

February 10, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: G. Paul Bollwerk, III */RA/*
Chief Administrative Judge

SUBJECT: ASLBP COMMENTS ON SECY-00-0017,
"PROPOSED RULE REVISING
10 CFR PART 2 -- RULES OF PRACTICE"

The Atomic Safety and Licensing Board Panel (ASLBP or the Panel) appreciates the opportunity to review and comment on SECY-00-0017, the January 21, 2000 Office of the General Counsel (OGC)-authored proposal to amend substantially the agency's 10 C.F.R. Part 2 rules of practice. The most significant aspect of this proposal is its endorsement of the use of "informal" procedures as the default process for agency licensing hearings.

We have focused our comments on three areas: (1) what proceedings should be "formal" rather than "informal"; (2) use of three-member Licensing Boards as the presiding officer in informal proceedings; and (3) concerns about particular proposed revisions relative to the expressed agency goal of providing a "full, fair, and efficient" hearing, particularly with regard to the proposed rule's Subpart C provisions concerning hearing initiation procedures and discovery, and the Subpart L provisions regarding cross-examination. In connection with the last subject, we have included as attachment A our views on the utility of party cross-examination. Finally, as attachment B, we provide a number of comments and questions on what we consider "technical" aspects of the rule that involve drafting clarification issues and the like.

I. Standards for Choosing Between Formal and Informal Procedures

Under section 2.310 of the proposed rule, the "formal" trial-type procedures in 10 C.F.R. Part 2, Subpart G, could be utilized in only three instances: (1) enforcement proceedings instituted under 10 C.F.R. Part 2, Subpart B; (2) uranium enrichment facilities licensed in accordance with Atomic Energy Act (AEA) section 193, 42 U.S.C. § 2243; and (3) reactor licensing proceedings with a large number of complex issues. See SECY-00-0017, attach. at 47-48 (draft proposed rule) [hereinafter Draft Proposed Rule].

We previously have expressed our agreement with items one and two.¹ Relative to item 3, however, we believe that the universe of possible proceedings in which the use of formal procedures would benefit both the parties and the presiding officer has been drawn too narrowly.

With its recent adoption of Subpart M of Part 2, the Commission began in earnest to retreat from the reactor/materials distinction that in the licensing context previously was the original basis for its choice to utilize formal as opposed to informal procedures in any particular instance. In crossing that threshold, however, it is not clear that the Commission wishes to abandon a related concept that it used to justify the adoption of informal procedures: the difference in the complexity and difficulty of the cases. See Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 262 (1982) (power reactor cases generally involve broader concerns), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Indeed, as the OGC analysis discussed below suggests, this is not the case.

By including the proposed “reactor licensing complex issues” criteria, OGC apparently recognizes that the formal hearing process is, indeed, a useful procedural construct for some types of licensing proceedings in which a hearing is provided by the AEA or other pertinent statutes. Indeed, noting that “[i]t 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,” SECY-00-0017, at 3, OGC declares that efficiency considerations warrant Commission consideration of whether those proceedings should be designated ab initio rather than requiring the resource expenditure that invariably will arise in case by case litigation. We agree. Moreover, based on our case experience over the past decade we suggest that the Commission consider expanding this category outside the reactor realm to include nuclear materials licensing cases involving complex issues.

In our estimation, at least two categories of materials cases deserve the type of ab initio formal hearing recognition OGC proposes for some reactor proceedings. The first is for a 10 C.F.R. Part 72 application to construct and operate an off-reactor-site independent spent fuel storage installation (ISFSI) or a monitored retrievable storage (MRS) installation. The pending Private Fuel Storage, L.L.C., ISFSI proceeding, in which the parties are litigating a host of complex issues, including financial qualifications, physical

¹ In December 17, 1998 comments to the General Counsel on a draft of what later became SECY-99-006 regarding the hearing process and January 19, 1999 comments to the Commission on SECY-99-006, we have indicated why we believe the better legal view is that AEA section 189a, 42 U.S.C. § 2239(a), as it currently exists, requires a formal hearing for power reactor licensing cases. The only additional observation we would make on this score is that the statements on page 11 of the proposed statement of considerations declaring the Commission’s view (1) that it “doubt[s] that a reviewing court would care greatly one way or the other” about the notwithstanding clauses; and (2) about what “any reviewing court interested in legislative intent would regard as the central question” relative to these clauses might have an impact on a reviewing court that is the opposite of what apparently is intended.

security, seismic qualification, credible accidents, and decommissioning planning and financing matters, provides abundant proof in this regard. Indeed, the proposed rule itself recognizes the unique nature of these facilities by withholding from the NRC staff the authority to grant an immediately effective license prior to the completion of an adjudication. See Draft Proposed Rule at 174 (§ 2.1202(a)).²

The second category is for materials licensing cases involving the initial licensing or decommissioning of major nuclear materials fabrication facilities, including fuel cycle and uranium extraction facilities. From the decommissioning proceeding for the West Chicago facility up through the current proceedings regarding the Hydro Resources, Sequoyah Fuels, and Atlas facilities, these cases inevitably involve a variety of complex issues that, as with reactor cases, would benefit by treatment in the formal hearing process.

Yet, whether or not the Commission is willing specifically to designate any additional particular types of proceedings under section 2.310, that provision's limitation to only reactor licensing proceedings should be eliminated. Experience has demonstrated amply that complex issues can arise in nuclear materials cases as well.³

² Along this same line, Commission consideration of specific Subpart G designation also would be merited for two other categories of reactor licensing proceedings: an application to construct and/or to operate a production or utilization facility and a license amendment application involving a significant hazards consideration under 10 C.F.R. § 50.92. See Draft Proposed Rule at 174 (§ 2.1202(a)(1), (4)).

³ If complexity is to be the benchmark for Subpart G proceedings, the high-level waste repository proceeding certainly seems to fall into this category as well. Our Licensing Support Network dealings with the potential participants in that proceeding suggest the Commission can anticipate this point will be made quite forcefully by the potential intervenors' representatives, much as was done by the representative of Nye County, Nevada, during the October 1999 OGC hearing process workshop. See Transcript of Public Meeting Regarding NRC Hearing Process at 346-49 (Oct. 27, 1999) [hereinafter Hearing Process Transcript].

Also on the matter of complexity, although section 2.310(c) of the proposed rule specifies that formal procedures can be used only in reactor licensing proceedings that include a "large number" of complex issues, past experience suggests that it is not necessary to have a "large number" of complex issues to have a complex case.

Finally, we would note that there are potential benchmarks other than complexity that could be used to determine when Subpart G would be invoked. For instance, specifying that Subpart G will be applied in instances in which an environmental impact statement is to be prepared in accordance with 10 C.F.R. § 51.20 seemingly would reach the types of cases appropriate for formal proceedings.

II. Use of Three-Member Licensing Boards as Presiding Officers

Although it is not explicit in this regard, at least as compared to the existing Subpart L, see 10 C.F.R. § 2.1207(a), the proposed rule seems to contemplate that the presiding officer for any Subpart L or N informal proceeding would be a single Panel Administrative Judge (AJ). Under present practice, this usually has been a Panel legal AJ, with a technical AJ acting as a special assistant to provide technical expertise as needed. Recognizing that the Commission will be requesting comments on the question of who should preside in informal proceedings, see Draft Proposed Rule at 35, we strongly recommend that the proposed rule provide that, absent a case-specific Commission directive, all non-Subpart M proceedings be conducted by three-member Atomic Safety and Licensing Boards.

The statement of considerations for the draft proposed rule notes that the Commission's original adoption of the Subpart L informal process was intended, among other things, "to 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." Draft Proposed Rule at 4. In our comments in section III.C below, we outline what we see are significant policy and practical concerns with the proposed rule's Subpart L provisions that would expand the use of presiding officer cross-examination into additional types of proceedings. Assuming, however, that this Subpart L process will provide the procedural model for the great majority of agency hearings, we believe this only emphasizes the need for the use of technical judges in substantive decisionmaking, rather than advisory, roles.

An attorney practicing law in a complex, technical area must develop an "expertise" so he or she can do the things necessary to act as an effective advocate or judicial officer. This should not, however, be mistaken for the expertise that comes with years of academic study and practical experience in a technical field. And while today's technical issues relating to nuclear regulation are perhaps not as often on the "frontiers of science" as they once were, they nonetheless are still technical issues that require careful consideration by someone with appropriate expertise.

As we noted in section I above, the existing Subpart L was developed with the view toward using it for cases that were less complex in terms of the issues and the potential health and safety impacts. As a consequence, there was more reason to experiment with utilizing a single legal AJ as a presiding officer.⁴ As we also have outlined in section I above, however, we anticipate that the proposed new line of demarcation will make Subpart L applicable to cases of increased technical complexity. Having technical AJ's available to develop and engage in presiding officer consideration of contentions admission (which is not involved in the current Subpart L) and the oral hearing

⁴ Although there is nothing in Subpart L that specifies this must be a legal AJ, this in fact has been the practice in almost all instances. While we believe a three-judge board that combines legal and technical expertise is preferable, if the Commission wishes to continue to use only a single presiding officer for Subpart L cases, it may wish to solicit public comments on whether and under what circumstances technical AJs might be used as presiding officers (presumably with legal AJs as special assistants).

questioning that is now to become the norm can only enhance the record development process.⁵

Besides hearing record completeness, there is another, equally important aspect to the adjudicatory process that would be enhanced by the use of three-judge boards in all Subpart L cases. In adding AEA section 191, 42 U.S.C. § 2241, in 1962 to authorize the use of the three-member Atomic Safety and Licensing Boards, the Joint Committee on Atomic Energy noted that “[i]t is finally the committee’s hope and expectation that with the decision being made by a semi-independent and technically qualified body, public confidence in the [agency’s] regulatory process will be further enhanced.” S. Rep. No. 1677, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 2207, 2214. We believe the committee’s expectation has largely been fulfilled. Time and again, during hearings and limited appearance sessions, Boards have heard the parties and the public comment favorably on the fact that there are judges with technical training and experience directly involved in the decisionmaking process. Indeed, if the hearing that is to be provided in almost all instances involves a process that, at least as compared to the formal hearing process, limits the ability of public interest participants to gain information about and probe the applicant and NRC staff positions on matters of concern, this credibility factor arguably becomes an even more important consideration.

In sum, we suggest that the Commission make three-judge licensing boards the default presiding officer for non-Subpart M hearings.⁶

⁵ As we discuss in more detail below, see section III.C.2, if the presiding officer oral questioning process is to be in any way effective, it may be a somewhat disjointed process. As we also note there, the appearance of inefficiency that is likely to adhere to this procedure will not be helped by a situation in which the legal AJ presiding is constantly having to stop and let the technical AJ acting as a special assistant provide “suggestions” about initial and followup questions. (This has not been a compelling problem under the existing Subpart L since, consistent with the Commission’s clearly stated preference for written hearings, see 54 Fed. Reg. 8269, 8274 (1989) (Commission contemplates that written presentations will be used in the “vast majority” of cases), written questions, which could be prepared by either the presiding officer or the technical member without specific attribution, have always been utilized in “merits” hearings.)

Of course, this problem could be avoided by having the legal presiding officer simply let the special assistant ask the questions directly. This, however, arguably undermines the Subpart L process as established, i.e., the presiding officer is to ask the questions absent an appropriate finding. Moreover, it does not account for the process credibility benefits that are discussed in the next paragraph of the text.

⁶ The apparent attempt to limit Subpart N to what are the least complex cases might make this the process in which use of a single presiding officer would be most appropriate. Nonetheless, the timing of the Subpart N designation, which is to occur after a hearing request is granted, see proposed section 2.310, may make this procedurally difficult if the Commission adopts our suggestion to use Licensing Boards

(continued...)

III. Comments on Particular Proposed Subpart C and Subpart L Revisions

Our other extended comments relate to certain pivotal provisions of the new Subpart C and Subpart L, specifically the procedures dealing with hearing initiation, discovery, and cross-examination. In analyzing these items, we have attempted to focus on the specific question of whether, as presented, they will provide a hearing that meets the three criteria of “full, fair, and efficient” that should be the hallmarks of any adjudicatory process.

A. Hearing Initiation Procedures

1. Notice of Hearing Opportunity. Proposed section 2.309(a)(2) provides that in non-antitrust cases, unless the notice of hearing/opportunity for hearing or the Commission/presiding officer establishes another date, a hearing request/intervention petition, which under section 2.309(c) must include the petitioner’s contentions, shall be filed no later than forty-five days from the date of publication of the hearing opportunity notice. In establishing this forty-five day time limit, as with the current Calvert Cliffs case in the United States Court of Appeals for the District of Columbia Circuit, it seems that some reliance is being placed on notification that is provided about the availability of the application and staff meetings for some considerable period prior to the actual hearing notice. See Draft Proposed Rule at 31, 33. Exactly how widespread the use of such prehearing notices is in reactor licensing proceedings is a matter the Commission may wish to consider relative to the adoption of this provision. Moreover, as the current Subpart L clearly recognizes, in many instances with materials license applications, notwithstanding the right of interested persons to a hearing under AEA section 189a, there is never any formal notice of the receipt of an application, the opportunity for a hearing, or later staff action on the application. See 10 C.F.R. § 2.1205(d)(2); see also 54 Fed. Reg. 8269, 8270-71 (1989). This agency practice, and the “fairness” problems it arguably creates, are not recognized or addressed in the revised rule.⁷

2. Filing of Contentions with Hearing Petition. As is noted above, proposed section 2.309(c) requires that contentions be filed with the hearing petition. As a

⁶(...continued)

as the default presiding officer from the outset of a proceeding. We would add, however, that we do not see that trying to preserve the option to use a single presiding officer for Subpart N proceedings provides a compelling reason for mandating the use of a single presiding officer in all non-Subpart G proceedings. Given its unanimous consent construct, it is not clear how often Subpart N will be invoked.

⁷ In the past, this practice usually has been justified on a cost basis, i.e., the cost of Federal Register notice for the numerous materials license applications the agency processes yearly. See 54 Fed. Reg. at 8271. Nonetheless, it may be that this cost issue needs another look with the advent of internet technology. Although we are unaware of any precedent holding that posting on an agency’s website is the legal equivalent of Federal Register publication, given the due process implications of the agency’s current notice practice, web publication certainly seems preferable to doing nothing, if the cost is not excessive.

historical matter, it should be noted that the requirement that contentions be included with the hearing petition has previously been tried by the Commission in Subpart G proceedings and abandoned as unworkable (albeit the earlier practice provided only 30 days from the date of the Federal Register notice, whereas the current proposal involves 45 days). In 1978, the Commission adopted the present practice, superseding a practice where petitions with contentions had to be filed 30 days after the notice of opportunity for hearing was published in the Federal Register. In adopting this change, the Commission explained, in pertinent part:

Experience has indicated that 30 days is often insufficient for potential petitioners to frame and support adequate contentions. It has become common practice for parties and petitioners in nuclear power plant licensing proceedings to discuss informally the framing of contentions until just before the special prehearing conference which is held some months or more after expiration of the 30 day period for timely petitions pursuant to § 2.751a. During this period the contentions are frequently revised based on the discussions among the parties and petitioners. Often the petitioners and parties will be able to present the presiding atomic safety and licensing board with an agreed upon set of contentions at the special prehearing conference. This practice reduces unnecessary controversy and litigation and should be encouraged. Accordingly, the rules are amended to permit the filing of contentions until shortly before the special prehearing conference.

43 Fed. Reg. 17,798, 17,799 (1978). We do not know whether the informal discussion practice referred to in the quote above continues today. In all likelihood it does not, given that current requirements for contention admission are much more complex and require far more support than they did in 1978, making the likelihood of contention dismissal (and the unwillingness of applicants to arrive at stipulated contentions) far greater. These enhanced requirements have resulted in a similar need for more time, however. Unlike applicants or the NRC staff that have experts routinely available, intervenors, who often have considerably fewer financial resources, now generally must locate and engage experts to support their contentions.⁸ Whether the additional fifteen days provided in the rule realistically addresses the very real resource difficulties these potential parties face is decidedly unclear.⁹

⁸ This one-time filing requirement also fails to acknowledge the practical benefit that the hearing petition supplement provisions of section 2.714(a)(3) and (b)(1) now provide, which is to allow the presiding officer to give intervenors unfamiliar with the NRC hearing process an opportunity to cure the “technical” defects in their petitions, such as missing affidavits on member residence distances from the facility and the like.

⁹ This is particularly true relative to those who participate in the current Subpart L
(continued...)

3. Late-Filed Contentions. Subpart C has two provisions dealing with late-filed contentions. The first is section 2.309(a)(3), which is an amalgam of the requirements of existing section 2.714(a)(1) and (d)(1).¹⁰ The second is section 2.309(c)(2), which deals with the subject of late-filing in the general context of environmental contentions. This section refers to both “new” and “amended” contentions and then seems to establish a separate standard for the admission of “amended” contentions, apparently not limited to environmental contentions. We suggest the Commission consider two things with regard to this provision.

First, as now worded, this provision appears to raise questions about the continuing efficacy of the Commission’s Catawba decision holding that contentions based on the staff draft or final environmental impact statement (EIS) must meet the section 2.714(a)(1) late-filing standards. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983). While noting that either new or amended environmental contentions may be filed, the proposed rule then provides a lateness standard only for amended contentions. Assuming the Commission wishes some late-filing criteria to apply to new contentions based on the draft or final EIS, it should clarify what those standards are.¹¹

⁹(...continued)

proceedings, which have a low threshold for issue admission. Indeed, by incorporating the Subpart G contentions requirement into the requirements for an informal hearing, the proposed rules magnify the procedural complexities of informal hearings and, in effect, remove one of the hallmarks of the informal process, making it more likely many who now can obtain a hearing will be unable to do so.

Also in this regard, the section 2.309(f) 25-day and 5-day time limits on hearing petition answers and answer replies seem unnecessarily stringent given the nature of the likely filings. We recommend both be extended by at least five days.

¹⁰ Existing late-filing factor three -- extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record -- that is now found in section 2.714(a)(1)(iii) has apparently been dropped. Given the existing caselaw on this late-filing element, the Commission may wish to provide some explanation in the statement of considerations as to why this factor is no longer considered relevant.

¹¹ Relative to the draft and final EIS, a reasonable argument can be made that applying late-filing criteria, especially the “good cause” standard, is superfluous because contentions based on those documents clearly could not have been submitted until those documents were issued. In this context, what the late-filing criteria really do is set some limit on the time within which the contention must be filed after those documents are issued. In fact, the process might be better served by specifying a time for filing contentions (e.g., forty-five days per proposed section 2.309(a)(2)) after those documents are issued, and then applying the late-filing criteria to any contentions that are not submitted within that time period.

Additionally, comparing the standards in section 2.309(a)(3) and 2.309(c)(2), there appears to be some attempt to treat “new” contentions differently from “amended” contentions. We suggest this be given serious consideration because, if one standard is more stringent, it may have the effect of shifting the argument from whether new material meets the late-filing criteria to a semantic debate over whether the information constitutes a “new” contention or is an “amendment.”¹²

4. Immediate Appeal of Contention Rulings. Although the new provisions of section 2.311(b) and (c) allowing immediate appeals of right of any presiding officer hearing petition rulings admitting or denying contentions involve a Commission judgment about the use of its resources, we nonetheless would offer two practical observations about these provisions. First, by affording such an opportunity the Commission should anticipate a significantly increased appellate workload and should be prepared to provide appropriate staffing to the Office of Commission Appellate Adjudication (OCAA) to handle that work.¹³ Second, bearing in mind that the natural tendency likely will be for the parties (citing resource/efficiency concerns) to seek to have the Commission delay further trial-level proceedings pending these appeals, unless the Commission is committed to taking a consistent, hard-line stand against stays pending these appeals, this provision has the potential to do serious harm to the efficient conduct of the adjudicatory process by presiding officers.¹⁴

¹² We also note that the current provisions in section 2.714(b)(2) and (b)(2)(i) that require a contention include “a specific statement of the issue of law or fact to be raised or controverted” and “a brief explanation of the bases of the contention” have been removed. Again, given the long-standing Commission case law about the need for contentions to have “specificity” and “basis,” the abandonment of these provisions probably needs some explanation in the statement of considerations. On the other hand, if the more stringent contention admission standard of existing section 2.714 is going to be applied in all cases, as a practical matter the overall efficiency of the process likely is improved by requiring contentions to meet these two elements.

¹³ In considering this workload increase, the Commission seemingly needs to make a judgment about whether contention admission issues have been a matter of major concern relative to the hearing process, i.e., have there been a significant number of appellate reversals of presiding officer actions on contentions. Moreover, by allowing immediate appeals, the Commission should be aware that it is undertaking work that in some instances it now does not have to tackle. For instance, in the ongoing Private Fuel Storage proceeding, a party that submitted some two dozen contentions, most of which could (and likely would) have been the subject of immediate appeal under this rule, reached a settlement with the applicant during the discovery process and dropped out of the proceeding, relieving the Commission of the need to consider any questions about the admissibility of its contentions.

¹⁴ The same would be true relative to appeals from presiding officer decisions on the appropriate hearing procedures under proposed section 2.311(d).

B. Discovery

Section 2.336, which will govern discovery in proceedings under the revised Subpart L, was modeled on Rule 26 of the Federal Rules of Civil Procedure. Under Rule 26(a), however, the parties' efforts in furnishing relevant documents and witness lists are only a preliminary discovery activity intended to provide a headstart, not the entire process. By requiring the parties to provide names and addresses of prospective witnesses and produce relevant documents, Rule 26 allows the parties an opportunity to gather information they can then use to plan further specific discovery, including interrogatories, document production requests, admission requests, and witness depositions. In contrast, for Subparts L, K and N, section 2.336 is the entire discovery process. With this recognition, we provide comments on several matters intended to make the section 2.336 discovery process more equitable for all those involved.

1. Disclosure Completeness Certification. In the normal discovery process now used in Subpart G, a party signing a response to a discovery request is certifying it is complete, true, and correct. See, e.g., 10 C.F.R. § 2.740b(b); see also proposed section 2.704(g). The general discovery provision of the proposed rule's section 2.336 does not have any explicit "completeness" provision for disclosing parties. To address a similar concern in the context of the Licensing Support Network (LSN) for the high level waste proceeding, 10 C.F.R. § 2.1009(b) requires that a responsible representative for each party in the proceeding certify that all required documents have been made available. Holding representatives directly responsible in this manner is expected to have a salutary effect in assuring compliance with document production. To encourage similar compliance by section 2.336 discovery participants, we recommend that responsible representatives for each party be required to certify (by sworn affidavit) that all relevant documents and witness lists have been furnished.¹⁵

2. Privileged Discovery Materials. Section 2.336 does not address the status of materials that, but for a claim of privileged or protected status (e.g., proprietary information), would be subject to disclosure. Fairness considerations suggest that the existence of such documents should be disclosed so that any contested privilege/protected status claims can be settled before the presiding officer. Accordingly, in line with the existing provisions of Subpart G and Subpart J, see 10 C.F.R. §§ 2.740(c), 2.790(b)(1), 2.1003(a)(4), 2.1006; see also proposed section 2.704(b)(4), there should be an explicit acknowledgment that the parties are required to provide a list of all discoverable documents for which a claim of privilege or protected status is being made.

¹⁵ Relative to the question of completeness, the Commission may also wish to consider giving the presiding officer the authority to permit the limited use of one of more of the Subpart G discovery procedures, such as depositions or admission requests, upon a party showing that it is necessary for the adequate development of the record for a specific issue or issues. Compare 10 C.F.R. § 2.1018(b)(2) (substantial need for materials sought and unable without undue hardship to obtain the substantial equivalent by other means).

3. Disclosure of Negative Information. Full and fair discovery procedures require the disclosure both of information that supports an application and information that does not. See, e.g., 10 C.F.R. § 2.1001 (definition of “documentary material”). Proposed section 2.336(b)(3) requires the staff to submit all documents supporting its review of the application, but it does not explicitly require the staff to submit documents that are contrary to or in opposition to the application’s acceptance/grant. Although section 2.336(b)(4) indicates that staff documents that “act on the application or proposal” should be disclosed, it is unclear exactly what this requires. We thus suggest that section 2.336(b)(3) or (4) should be amended to require the inclusion of such information. This change would be in keeping with the apparent intent of the discovery requirement placed on other parties to the proceeding in section 2.336(a)(4), which provides that parties other than the staff must furnish documents in “opposition to” the application.¹⁶

4. Equality in Imposing Sanctions. As with information disclosure, a party’s failure to disclose must be treated fairly. In section 2.336(e)(1), the proposed rule provides that sanctions may be imposed, including dismissal of specific contentions or dismissal of the adjudication, for a party’s failure to make disclosures required by section 2.336. We certainly agree that the presiding officer should be able to impose sanctions, but, depending that dismissal of the “adjudication” is not the same as dismissal of the application, the sanctions listed here seem to apply only to intervenors. For the perception of fairness, this section also should list sanctions that would apply to applicants, such as denial or dismissal of the application, or provide the presiding officer with the authority to permit Subpart G discovery against the offending party to the degree appropriate. Compare proposed section 2.704(g)(3).

Also in this regard, section 2.336(e)(2) states that if a party fails to provide documents or witness names, the presiding officer shall not admit the document into evidence or allow the testimony of that witness. However, this attempt to penalize a party’s negligence might have the opposite effect if the document or witness in question would have a negative impact upon that party’s case. (In fact, the party may have failed to list the document or witness for this reason.) The categorical exclusion of such documents or witnesses also might be inimical to protecting the public health and safety if the document is essential for the development of a full and complete record. To remedy potential problems, the presiding officer should be given discretion to decide whether these documents or witnesses should be excluded.

C. Cross-examination

In our December 17, 1998 memorandum to the General Counsel on a draft of what later became SECY-99-006, we provided some brief, general comments on the importance of party cross-examination to the adjudicatory process. The proposed rule quite obviously moves away from such examination as a vehicle of record development. Because of

¹⁶ Relative to section 2.336(a)(4), however, we would suggest for clarity sake that this provision read: “(4) all other documents that, to the party’s knowledge, provide direct support for, or **do not support**, the application or other proposed action that is the subject of the proceeding.” (Redline emphasis supplied.)

the critical importance of this change to the adjudicatory process, in Attachment A we have endeavored to outline in somewhat more detail what we continue to see as the very valuable role party cross-examination plays in the hearing process. Below, we provide comments on our concerns about the implementation of the proposed scheme for presiding officer cross-examination under the oral hearing process of the revised Subpart L.

1. Role of the Presiding Officer. Regarding the role in cross-examination assigned to the presiding officer by proposed section 2.1207(b)(7), the Panel's concerns are in several areas. To begin with, to maintain public confidence in the fairness and objectivity of the NRC adjudicatory process, it is imperative that its presiding officers be in appearance, as well as in reality, totally impartial. Yet, casting the presiding officer in the role of the sole questioner of the sponsor of direct or rebuttal testimony provides fertile ground for a suspicion that the adjudicator is aligned with one side or the other in the controversy. Both the participants and any interested members of the public in attendance at the hearing can be expected to pay very close attention to the questions that the presiding officer (or the special assistant, if also permitted to inquire) chooses to ask on his or her own initiative, as well as to the choice made among the questions submitted by participants. Perceptions regarding the level of solicitude or hostility inherent in a particular question or in the presiding officer's selection among the submitted questions might readily be translated into a conviction that the presiding officer lacks the required disinterest in the outcome of the proceeding. While that belief might lack merit, its very existence could be destructive.¹⁷

This is not to say that it is never appropriate for the presiding officer to ask a question of a witness sponsoring direct or rebuttal testimony. Of course, the presiding officer should pursue avenues of inquiry that have not been adequately explored by the participants yet have a seeming bearing on the issues that must be decided. That is scarcely the same, however, as being clothed with the responsibility of conducting the entire probing of the worth of the direct and rebuttal testimony adduced by the parties. In that connection, the burden of persuasion on the facts and issues in controversy has always been thought to be on one of the parties or another. Thus, the obligation to develop an adequate record should be regarded as that of the parties — not that of the presiding officer. Indeed, the failure of a party to meet its burden in establishing disputed facts or issues precludes that party from prevailing on those facts or issues. Hence, the party's examination of the opposing party's witnesses often plays a crucial role in a party's ability to meet its burden by unmasking the flaws, and hence refuting, parts of an opponent's testimonial evidence.

Finally, there is the matter of whether the presiding officer or the special assistant assigned to the particular case will be sufficiently equipped to serve informatively as the sole interrogator on issues falling outside of their particular areas of education and

¹⁷ In fact, the possible absence of the staff in many of these cases, see proposed section 2.1202, may serve to exacerbate this situation further, because the presiding officer, as the sole agency "representative" at the proceeding, may now be seen as there to fulfill what heretofore was the staff's role of evaluating an application in an attempt to address any outstanding problems.

experience. In preparing for the cross-examination of adverse witnesses, most parties have the advantage of consultation with persons who have considerable knowledge regarding the subjects to which the particular testimony is addressed. The presiding officer is likely not to enjoy that advantage. Moreover, even were the presiding officer and the special assistant to confine themselves to asking questions that had been submitted by the participants, in many instances it requires a substantial amount of subject matter knowledge to be able to follow up intelligently on the answers given to the submitted questions. In short, from an adequate record development standpoint, questioning by the presiding officer or the special assistant often may not be the equivalent of cross-examination by a participant who is armed with a thorough knowledge of the subject matter acquired in the course of trial preparation, if not already possessed. Accordingly, there is considerable danger that the evidentiary record might end up either incomplete or possessed of testimony that an informed cross-examination would have disclosed to have been unworthy of consideration in reaching a decision on the issues in dispute.

2. Procedure for Conducting Cross-examination. We also have concerns about practical problems that could keep the witness interrogation feature of the oral hearing provisions from achieving the stated goal of improving “the effectiveness and efficiency of the NRC’s hearing process.” Draft Proposed Rule at 39. As noted, proposed section 2.1207(b)(7) directs that “only” the presiding officer may question witnesses. Although the proposed rules nowhere explicitly provide that the presiding officer will be a single administrative judge, as we have noted in section II above, that is the clear import of the proposed regulations and what is required by the current Subpart L regulations. Thus, even though proposed section 2.322(a) permits presiding officers to appoint special assistants drawn from the technically trained administrative judges of the Atomic Safety and Licensing Board Panel to help them “in taking evidence and preparing a suitable record for review” and, where appropriate, in “function[ing] as . . . [t]echnical interrogators,” section 2.1207(b)(7), as written, seemingly bars such special assistants from directly questioning witnesses. If the proposed rule means what it says, the presiding officer must have the special assistant whisper any questions to him, only then to repeat them best as he can to the witness. The picture of an assistant whispering into the ear of a legislator while that official interrogates a witness is well known to the public from televised legislative hearings. That process (or the alternative of frequent recesses to consult with the special assistant) hardly seems either an effective or efficient method of questioning a witness when dealing with contested facts in an adjudicatory proceeding that must conclude with an initial decision required by section 2.1209(c)(1) to set forth “[f]indings [and] conclusions . . . on all material issues of fact or law.” Nor is it a process likely to instill respect for the presiding officer or confidence in the proceeding from the participants and the observing public.

There are a number of other practical problems associated with the proposed section 2.1207. The proposed rules are modeled after existing Subparts L and M that contain similar provisions for oral hearings. It must be remembered, however, that to the best of our knowledge there has never been an oral hearing conducted under either of these regulatory subparts. Further, the practical difficulties of implementing the proposed oral hearing provisions are likely to be highly magnified because, unlike Subparts L and M (which when promulgated were intended to apply only to a narrow class of proceedings thought to be relatively simple and straightforward), the proposed

rule applies to nearly all future NRC proceedings from the simplest to the extraordinarily complex such as the licensing proceeding for the high-level waste repository. Thus, although the oral hearing provisions will apply to the vast majority of NRC proceedings, there is no hearing history to provide guidance. Essentially, these untested provisions will be applied in a vacuum with respect to past hearing experience.

The first and most obvious problem under proposed section 2.1207 concerns the impact of the procedure for handling the participants' questions propounded for the presiding officer. The rule seems to lump these questions with the "[i]nitial written statements of position and written testimony with supporting affidavits" and the "[w]ritten responses and rebuttal testimony with supporting affidavits" in sections 2.1207(a)(1) and (a)(2)(i) that are to be filed and exchanged with other parties rather than being given only to the presiding officer, as with cross-examination plans under proposed section 2.710(b)(2). If proposed questions are to be provided to all the parties, however, this raises the immediate specter of a witness with advance knowledge of the questions proffering a well-rehearsed, "canned" answer to the question, essentially imparting to cross-examination some of the same problems that exist for prefiled direct testimony, see Attachment A, at 1.¹⁸

Further, the proposed rule does not clearly set out the standard the presiding officer is to apply for declining to ask a participant's proposed questions. Proposed section 2.319(d) states that in Subpart L proceedings "strict rules of evidence do not apply to written submissions" and that "on motion or on the presiding officer's own initiative" the presiding officer may strike "any portion of a written presentation or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable." To the extent they apply to spoken responses to an orally asked written question, these provisions suggest that the presiding officer should ask a participant's question regardless of its form (insofar as the rules of evidence are concerned) if the question is relevant or material and has not already been asked and answered (i.e., it is not repetitive or cumulative). Beyond this, however, the proposed rule is silent. Under the proposed rule, the oral hearing is the default hearing that, pursuant to proposed section 2.1206, can be avoided only with the unanimous consent of all the participants. Moreover, the only real substantive difference between a proposed section 2.1207 oral hearing and a proposed section 2.1208 written hearing is the oral questioning by the presiding officer. Thus, logic dictates that the presiding officer must ask the participants'

¹⁸ On the other hand, if the questions are only to be filed with the presiding officer because of a concern about the "canned" answer, then the rationale underlying subsection (b)(6) of the same section 2.1207 logically makes no sense. Section 2.1207(b)(6) allows the acceptance of written testimony and written answers to the presiding officer's written questions from a person not even appearing at the oral hearing and who, because discovery is not allowed, has never even been deposed by an opposing participant. Similarly, if proposed questions are filed only with the presiding officer, section 2.1207, unlike section 2.710(b)(2), leaves unanswered the question whether the written interrogatories a participant proposes to the presiding officer that the presiding officer declines to ask somehow become part of the hearing record or whether the participant must take some additional steps, such as orally proffering the unasked questions, in order to preserve its appeal rights.

timely proposed written questions if they are relevant, material, and not repetitive. This being so, it is not at all apparent how transferring the function of examining witnesses to the presiding officer from the most directly interested and more knowledgeable hearing participants acts to speed up a hearing or otherwise improve the efficiency and effectiveness of the agency's hearing process.¹⁹

In this regard, it should hardly be surprising that in many cases, if not most, it is likely to take a presiding officer considerably longer to question both a fact witness or an expert witness using the written questions proposed by a participant than it would take counsel for that participant to conduct the examination. Pursuant to section 2.325 of the proposed rules, the participants must meet their evidentiary burdens in order to establish a particular fact or prevail on an issue so a participant is not free to ignore an opponent's case. Thus, counsel for serious participants are necessarily obliged to propose questions for the presiding officer to ask that probe the validity of the testimony of opposing witnesses. Because section 2.1207 bars the participant's counsel from cross-examining the witnesses and directing the interrogation, it is most likely that participants will file many more written questions for the presiding officer to ask than counsel would ask if counsel were in control of the questioning of the witnesses. Moreover, it is almost a certainty that the participant's written questions will be much longer and contain considerably more detail than questions counsel would orally ask if counsel were conducting the cross-examination. A simple comparison of a set of written discovery interrogatories and a hearing transcript of counsel's cross-examination of a witness amply demonstrates this point. Because of these factors, it most likely will take a presiding officer much more time to read aloud the participant's written questions to the witnesses, inevitably stopping to repeat all or parts of the questions because they were not understood, than it would take the participants' counsel to conduct the examination. Additionally, even novice litigators know the critical importance of follow-up questions to the answers given by a witness. Again, because of the participants' need to meet their evidentiary burdens, serious participants will have little choice but to file written questions in the format of a fault tree in an attempt to meet the innumerable contingencies that might arise from the answers of a witness to an initial question. The potential for wasted time and disruption to the hearing process as the presiding officer attempts to plow through and read aloud such written questions should not be underestimated.²⁰

¹⁹ If, however, proposed section 2.312(d) does not define the standard governing whether to ask a proposed question, the question then becomes, what does?

²⁰ Because the effect of Subpart L is to shift to the presiding officer what are now party burdens, at least in Subpart G proceedings, for such matters as conducting cross-examination and the record review that is necessary for the preparation of proposed findings of fact and conclusion of law, see App. B to this memorandum at section E.3, at we would not expect any resource savings (and perhaps an increase in resources needs) for the Panel arising from the use of this procedural scheme. As a corollary to OGC's prior observation that "informal procedures are no guarantee of a speedy and uncomplicated proceeding," SECY-99-006, at 14, we likewise would suggest that they are no guarantee of resource savings for the Panel or others involved

(continued...)

Finally, a corollary to the question of the standard the presiding officer is to apply in declining to ask the participants' written questions is whether the participants may object to questions proffered by other participants and asked by the presiding officer, or may the participants object to the presiding officer's own questions. Again, the proposed rule is silent on the subject of evidentiary objections and the grounds and procedures for raising them. On the face of it, however, if the presiding officer pursuant to proposed section 2.319(d) may entertain motions to strike responses to written questions or strike responses on his own initiative, there appears to be no sound reason why the participants should be precluded from objecting to questions of the other participants and in that way aid the presiding officer by alerting him to the objectionable nature of a question.

Given the sweeping nature of the revisions being contemplated to Part 2, the Panel will continue to review this proposed rule and will bring any additional problems or concerns it perceives to the attention of OGC.

Attachments: As stated

cc: SECY
OGC
OCAA
OIG
OPA
OCA
EDO
CIO
CFO

ATTACHMENT A

UTILITY OF PARTY CROSS-EXAMINATION

Whether a particular NRC adjudicatory proceeding is conducted with the formality dictated by Subpart G, or instead utilizes the informal hearing procedures specified in Subpart L, the quality of the evidentiary record that is adduced during the course of that proceeding is obviously a matter of crucial importance. Without a record that fully explores in the requisite depth each and every one of the issues presented for consideration and disposition, it will not be possible for the presiding officer to reach an informed decision entitled to the respect, if not necessarily the agreement, of the litigants and interested members of the public at large.

In this connection, the experience of the members of the Licensing Board Panel garnered over a period of many years of involvement in the NRC adjudicatory process teaches the enormous potential value of the availability of party cross-examination. This is especially so with regard to expert testimony offered by one or another of the parties (including the NRC staff) on safety or environmental issues of a highly technical nature. That testimony might appear on its face to be very persuasive. Yet, a focused interrogation of its sponsor by one well versed in the subject matter respecting the underpinnings of the testimony might very well disclose assumptions made or inferences drawn that are sufficiently dubious to bring the probative value of all or a material part of the testimony into serious question. Or, conversely, the interrogation might have the ultimate effect of increasing the adjudicator's level of confidence in the reliability of the testimony. In either case, the interrogation will have served a most valuable purpose insofar as concerns the development of an evidentiary record that will inspire confidence in the judgments that are reached on the basis of it.*

The availability of cross-examination also serves another valuable purpose in NRC proceedings where the direct and rebuttal testimony is prefiled in written form. In many, if not most, proceedings, the prefiled direct and rebuttal testimony is written or at least partially drafted or heavily edited by the participant's attorneys and it is usually set out in a carefully scripted question and answer format presenting a highly polished piece of advocacy covering the disputed facts and issues. The testimony is then adopted and sworn to by the witness as his own testimony. There is absolutely nothing wrong with this practice. The knowledge that cross-examination is available to opposing counsel, however, helps to ensure that all parts of the witnesses' testimony is well thought out and fully supportable and that exaggeration and hyperbole are kept to a minimum because the sponsor of the testimony knows that it might have to be defended fully under vigorous cross-examination. Thus, the prefiled testimony, which makes up the vast majority of the testimonial evidence in the proceeding, is of far more use to the presiding officer in reaching a reasoned decision on the disputed facts and issues.

For these reasons, Panel members are especially interested in the provisions of the proposed rule revisions that concerned the availability of party cross-examination. It would appear that, for the proceedings conducted under Subpart G, proposed section 2.710 allows

* From time to time it has been asserted that cross-examination is not a useful fact-gathering tool in cases predominated by technical issues (as opposed to "factual" issues in which witness veracity is a critical element). As was pointed out very articulately by Nye County, Nevada counsel in the October 1999 hearing process workshop, cross-examination, albeit in the form of peer review, in fact is a vital part of the scientific method. See Transcript of Public Meeting Regarding NRC Hearing Process at 349-50 (Oct. 27, 1999).

cross-examination by the participants as a matter of entitlement subject to observance of certain procedural requirements. But the same is not true of the proceedings, which apparently will be in much greater number, that are subject to the informal hearing procedures outlined in Subpart L. Proposed section 2.1204(b) does permit the presiding officer, on motion of a party, to permit cross-examination on particular admitted contentions or issues on a determination that a failure to allow such interrogation will prevent the development of an adequate record for decision. Leaving aside, however, the substantial difficulties inherent in making such a reasoned determination in advance of the conduct of the sought cross-examination, it is clear from other provisions of the proposed rules revision that the contemplation is that the presiding officer will rarely resort to that authority.

Specifically, the process for presentations and submissions in a Subpart L oral hearing is set forth in proposed section 2.1207. After making provision in subsections (a)(2) and (3) for the presentation by a participant of questions that the participant would have the presiding officer consider propounding to the sponsor of direct written or rebuttal testimony, in subsection (b)(7) it is decreed that witnesses are to be questioned only by the presiding officer. In carrying out this function, the presiding officer may employ his or her own questions, those submitted by the participants, or a combination of both.

As we outline in section III.C. of the memorandum to which this analysis is attached, the Licensing Board Panel has considerable concern with the foregoing provisions of proposed section 2.1207. As we see it, there are potential procedural problems associated with the submission by the participants of questions to the presiding officer to be employed in the latter's interrogation of the witnesses sponsoring direct and rebuttal testimony. Of still greater importance, the Panel believes there may be serious difficulties attendant upon the role that section 2.1207(b)(7) would assign to the presiding officer -- difficulties that could threaten the integrity of the adjudicatory process that the Panel and its members are called upon to administer.

In addressing these concerns in section III.C of the memorandum to which this analysis is an attachment, the Panel would record its belief that, in Subpart L proceedings no less than in those conducted under Subpart G, party cross-examination can be sufficiently controlled by the presiding officer so as to avoid repetitive or aimless interrogation that serves no worthwhile purpose. For one thing, the presiding officer has inherent authority to control the course of the proceeding. For another, the use of such devices as required advance submission of cross-examination plans (a tool that proposed section 2.710 makes available to Licensing Boards in Subpart G proceedings) can be most helpful in ensuring that any undertaken cross-examination is both well focused and potentially productive.

ATTACHMENT B

ADDITIONAL COMMENTS ON DRAFT PROPOSED RULE

General Note: Because several of the Subparts are being wholly redone, it may be useful to skip a number between each section, leaving room for later insertions. See, e.g., existing Subpart L; see also NUREG/BR-0053, at 103 (rev. 4 Sept. 1997).

A. Subpart C

1. Section 2.301 -- Exceptions. We suggest deleting subsection (b) to this provision. It was intended to address the applicability of the military/foreign affairs exception at the time of its adoption, but is no longer necessary. In fact, it is now confusing since the term "rule," which in context is intended to mean only that section, might be misinterpreted as meaning Part 2 as a whole, suggesting incorrectly that it is the Commission's intent to apply the revised Part 2 to ongoing proceedings.

2. Section 2.302 -- Filing of Documents. The proposed rule's provision regarding filing by telegram should be deleted as outmoded. We thus suggest dropping the reference to telegraph filing in subsection (c).

3. Section 2.304 -- Formal Requirements for Document; Acceptance of Filing. In line with comment A.2 above, we suggest facsimile transmission be substituted for the mention of telegraph filing in subsection (f). Also, because of the common use of facsimile and e-mail, we suggest that in addition to name and mailing address, the initial filing under subsection (e) be required to include the individual's phone number, facsimile number, and e-mail address, if available. We also suggest that similar information be required from party representatives under proposed section 2.314(b).

4. Section 3.05 -- Service of Paper, Methods, Proof. As noted in comment A.2 above, we suggest dropping the reference to telegraph filing in subsections (c) and (e)(2).

Also, subsection (c) revises existing section 2.712 by adding language to the effect that the presiding officer shall require service by the most expeditious means available to all parties to 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." Because the proposed rule does not adopt the language from section 2.712 that states "upon some or all parties," the implication is that an undue burden on a single party is insufficient grounds to keep that party from having to use express mail, electronic e-mail, or facsimile transmission. If the language of the proposed rule intends that result, it raises a host of issues if it is applied to those who, because of financial resources, are without computers and internet access, facsimile machines, or express mail funds. If this result is not intended, the language should be clarified.

Finally, subsections (e)(4) and (e)(5) of this provision relating to facsimile and e-mail transmission require confirmation of message receipt. Our experience over the past several years has been that such transmissions are sufficiently reliable that receipt confirmation, which is not required for mail service, is unnecessary in this context as well. The provision dealing with an undeliverable e-mail message could be retained, however, with the understanding that not all e-mail systems provide such a message.

5. Section 2.306 -- Computation of Time. The portion of this provision dealing with electronic and e-mail transmission suggests that timeliness will be based on receipt by “close of business on the date of transmission.” The provision, however, does not indicate whose “close of business” is to be the deadline time: the sender, the recipient, or the Commission. Also, “close of business” can be an amorphous term. We suggest consideration be given to making the filing deadline midnight Eastern Time on the day a filing is due, unless the presiding officer specifies some other time. This has the advantage of being unambiguous and does not disadvantage those in the western time zones.

6. Section 2.308 -- Treatment of Requests for Hearing or Petitions for Leave to Intervene by Secretary. We are unsure if this provision is intended to codify the present practice under which hearing petitions are first reviewed by OGC before being sent to the Chief Administrative Judge (note the need for a title change in this section of the proposed rule). Because Subpart M proceedings are the only ones in which the Commission is designated as the presiding officer in the first instance, see 10 C.F.R. § 2.1319(a), this practice seems unnecessary and simply delays the start of the proceeding.

7. Section 2.313 -- Designation of Presiding Officer, Disqualification, Unavailability. As was noted in section II of the memorandum to which this analysis is an attachment, we recommend that Licensing Boards be used in all non-Subpart M proceedings. Accordingly, we also suggest this provision be redrafted as follows:

Absent a contrary direction from the Commission, in any proceeding referred to the Chief Administrative Judge by the Secretary pursuant to § 2.308, an Atomic Safety and Licensing Board shall preside; provided, however, that for any hearing conducted pursuant to § 2.310(b), if the Commission directs that the hearing not be conducted by an Atomic Safety and Licensing Board, the Chief Administrative Judge will issue an order designating as the presiding officer an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code.

This provision reflects the fact, as was recognized by OGC in SECY-99-006, attach. 5, at 1-2, that the agency’s position that only AEA section 193 uranium enrichment facility construction/operating license proceedings require formal, on-the-record hearings means that these are the only licensing or enforcement proceedings for which the Office of Personnel Management will “lend” the agency an administrative law judge as the presiding officer.

8. Section 2.315 -- Participation by a Person Not a Party. As currently worded, this section, which is based on the current section 2.715, appears to give interested governmental entities and Native American tribes an unqualified right to “interrogate witnesses,” a right not afforded to other parties under Subpart L absent presiding officer permission. This needs clarification.

9. Section 2.318 -- Commencement and Termination of Jurisdiction of Presiding Officer. In this provision, the references to “Chief Administrative Law Judge” should be changed to “Chief Administrative Judge.” Additionally, the first reference to “administrative law judge” in subsection (a) should read “administrative judge.”

Also relative to this section, consideration should be given to correcting an apparent disconnect between this provision giving the presiding officer jurisdiction over the proceeding

and existing section 2.107(a), which apparently is being read to preclude the presiding officer from dismissing a proceeding in which a license application has been withdrawn absent the issuance of a "notice of hearing." This simply creates unnecessary confusion. A presiding officer with jurisdiction over the proceeding should have the authority to dismiss the proceeding if the application is withdrawn, regardless of whether a notice of hearing has been issued.

10. Section 2.323 -- Motions. Subsection (e) of this proposed provision allows motions for reconsideration to be filed with leave of the presiding officer "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." This standard appears to join one of the old standards for a petition for review with the notion that a party can anticipate a presiding officer making a clear and material error and then adds the concept that such a circumstance renders the decision "invalid," as opposed to reversible. We would suggest leaving the standard at "compelling circumstances" without further explanation. We also would suggest putting a time limit of no more than ten days on such motions. See proposed section 2.340(d).

11. Section 2.327 -- Official Reporter; Transcript. In a January 6, 1997 memorandum, we provided OGC suggested revisions to the existing version of this provision (10 C.F.R. § 2.750) to incorporate the use of the videotape recording system in the Panel's hearing room. Although the feedback we received was positive, any rule revision apparently was overshadowed by the larger issue of changes to the general parameters of the hearing process. Nonetheless, we would suggest that our previous rule change proposal be adopted now. Taking into account that digital recording media (e.g., DVD, CD-R) may soon be with us as well, it would provide:

§ 2.327 Official recording; transcript.

(a) Recording hearings. A hearing will be recorded stenographically or by other means, under the supervision of the presiding officer. If the hearing is recorded on videotape or some other video medium, prior to the time an official transcript is prepared in accordance with paragraph (b), that video recording will be considered to constitute the record of events at the hearing.

(b) Official transcript. For each hearing, a transcript will be prepared from the recording made in accordance with paragraph (a) that will be the sole official record of the hearing. Except as limited pursuant to Section 181 of the Act or order of the Commission, the transcript will be available for inspection in the agency's public records system.

(c) Availability of Copies. Copies of transcripts prepared in accordance with paragraph (b) are available to the parties and to the public from the official reporter or transcriber on payment of the charges fixed therefor. If a hearing is recorded on videotape or some other video medium, copies of the recording of each daily session of the hearing may be made available to the parties and to the public from the presiding officer upon the payment of a charge fixed by the Chief Administrative Judge.

(d) Transcript corrections. [Same as proposed section 2.327(b).]

This also would require that proposed section 2.329(c) be revised to provide that:

(c) Prehearing conferences may be reported stenographically or by other means.

Finally, in this same vein, we would suggest that the second sentence of proposed section 2.303 be revised to state:

The Secretary shall maintain all files and records of proceedings, including transcripts and video recordings of testimony, exhibits, and all papers, correspondence, decisions and orders filed or issued.

12. Section 2.338 -- Expedited Decisional Procedure. In addition to suggesting that the title of this section be changed to "Expedited Decisionmaking Procedure" we note that subsection (a)(2) probably intends to refer to "unresolved" substantial issues.

13. Section 2.339 -- Initial Decision, etc. In subsection (a), as compared to the former section 2.760a, the second sentence appears to be missing a clause, which would make it read:

Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Materials Safety and Safeguards **as appropriate, after making the requisite findings, will issue, deny, or** appropriately condition the license.

(Redline emphasis supplied.)

14. Section 2.340 -- Review of Decisions and Actions of a Presiding Officer. Although this proposed section contains no subsection (g), there are various references to such a provision in the proposed statement of considerations. See Draft Proposed Rule at 54, 59. Also, the language of proposed section 2.340(f)(2) refers to this subsection. The apparent reference is to section 2.340(f).

15. Section 2.347 -- Separation of Functions. In subsection (b)(2) of this provision, which is based on existing section 2.781, a comma has been added between the words "Commission" and "adjudicatory" so that it now reads "Commission, adjudicatory employees". This comma should be deleted.

B. Subpart G

1. Section 2.704 -- General Provisions Governing Discovery. In line with a requirement that has been implemented by order by presiding officers in several recent cases, proposed section 2.704(c) requires that when filing a protective order motion, the moving party must certify that it has attempted to resolve the dispute informally with opposing counsel. A similar requirement should be added to proposed section 2.704(h) regarding motions to compel discovery.

2. Section 2.709 -- Authority of Presiding Officer to Dispose of Certain Issues on the Pleadings. This proposed provision, modeled on existing section 2.749, has a sentence requiring that a summary disposition motion can be considered only if it "will likely substantially reduce the number of issues to be decided or otherwise expedite the proceeding." Recognizing this reflects a similar sentiment expressed in the Commission's 1998 policy statement, see CLI-98-12, 48 NRC 18, 20-21 (1998), we respectfully suggest that this statement places an unnecessary burden on utilization of what can be an extremely valuable case management tool. To be sure, summary disposition can be abused by the parties to "fish" for hints at the presiding officer's leanings on particular issues and has the potential to delay a proceeding if it is not managed so as to provide sufficient time for briefing and decision before a hearing is to commence. Given that this latter point is fully recognized in the last sentence of proposed section 2.709, we would suggest imposition of the "substantially reduce" standard should only apply if the presiding officer wishes to entertain a dispositive motion less than 60 days before the scheduled start of an evidentiary hearing.

We also question the deletion of subsections (b), (c), and (d) to the former section 2.749, which in our view provide valuable instructions/directions regarding the summary disposition process.

C. Subpart J

1. Section 2.1013 -- Use of the Electronic Docket During the Proceeding. In line with our comments in section A.11 above, we suggest that subsection (b) of this section be revised as follows:

(b) Absent good cause, all exhibits tendered during the hearing must have been made available to the parties in electronic form before the commencement of that portion of the hearing in which the exhibit will be offered. The electronic docket will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. For any hearing sessions recorded stenographically or by other means, transcripts will be entered into the electronic docket on a daily basis in order to afford next-day availability at the hearing; provided, however, that for any hearing sessions recorded on videotape or some other video medium, if a copy of the video recording is be made available to all parties on a daily basis that affords next-day availability at the hearing, a transcript of the session prepared from the video recording will be entered into the electronic docket within twenty-four (24) hours of the time the transcript is tendered to the electronic docket by the transcription service.

D. Subpart K

1. Section 2.1111 -- Discovery. The proposed statement of considerations indicates that the existing section 2.1111 on discovery is being eliminated; however, the proposed rule language does not indicate this is being done. Compare Draft Proposed Rule at 63 with id. at 172-73. This is important because, there being no access to a Subpart G hearing under the revised Subpart K, about the only reason a participant would invoke Subpart K would be to get Subpart G discovery, which it also cannot have. Recognizing that there is a statutory basis for Subpart K, see 42 U.S.C. § 10154, as configured in the draft proposed rule it seems

the congressional concerns that prompted its adoption would no longer be extant. We thus suggest that there be a specific request for comments on whether it should be removed.

2. Section 2.1109 -- Requests for Oral Argument. Under the current terms of section 2.1109(a)(1), any party may invoke the Subpart K oral argument procedure within ten days after the presiding officer has entered an order granting a hearing request. This revision seems to assume that only an intervenor now will invoke Subpart K because it states that Subpart K must be invoked in the hearing petition. Assuming Subpart K will be retained, we suggest that the provision not be changed, leaving it to any party to invoke the Subpart K procedure after the order granting a hearing.

E. Subpart L

1. Section 2.1205 -- Summary Disposition. Consistent with our comments in section B.2 above, we would suggest that the limit on summary disposition motions be placed at sixty days, absent a finding on the “substantially reduce” standard. Also, while subsection (c) of this provision makes the “standards” of section 2.709 applicable, this is an apparent reference to the substantive standard rather than the procedural requirements for lists of material facts not at issue, etc. Summary disposition is the same whether the proceeding is formal or informal, so that the procedural items applicable to Subpart G should apply to Subpart L.

2. Section 2.1207 -- Process and Schedule for Submissions and Presentations in an Oral Hearing. Section 2.1207(b)(2) provides that “[w]ritten testimony will be received into evidence in exhibit form.” Further, section 2.1207(b)(3) states that participants may designate and present their own witnesses to the presiding officer, but section 2.1207(b)(5) provides that no subpoenas will be granted at the request of the participants for the testimony of participants or witnesses or for the production of evidence. By referring to “exhibits” in section 1207(b)(2), the rule clearly recognizes that there will be exhibits in Subpart L proceedings. The rule is silent, however, as to how exhibits are to be admitted.

This is important because exhibits, unless admitted pursuant to a stipulation, presumably must be authenticated and admitted through a witness, yet section 1207(b)(5) precludes the grant of subpoenas at the request of participants. In practice, therefore, documents or other matters that a participant obtains through an opponent’s general discovery disclosures under section 2.336(a)(1) and (3) and which the participant wishes to introduce as exhibits seemly will not be able to be authenticated and admitted at a section 2.1207 oral hearing unless the participant’s opponent happens to present a witness who can authenticate the exhibit. Further, because there is no discovery by way of interrogatories or depositions, the participant who wishes to introduce these materials as exhibits has no way of even determining what individuals in the opponent’s camp could authenticate the documents. Unless this situation is remedied, this whole category of potential evidentiary exhibits will not be able to be used by hearing participants. If, on the other hand, it is intended that exhibits in Subpart L proceedings may be entered into the record without authentication and a sponsoring witness, the rules should make this intent clear. Such a situation, however, is likely to lead to Subpart L records that have documentary or other exhibits that in one or more respects may be unreliable, yet that fact might not be known.

3. Section 2.1209 -- Initial Decision and Its Effect. Section 2.1209(c) provides that in a Subpart L proceeding the presiding officer must issue an initial decision that “must be in

writing and must be based only upon information in the record or facts officially noticed.” Further, section 1209(c)(1) provides that “[t]he initial decision must include- -(1) [f]indings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact or law admitted in the proceeding.” So there is no confusion in this regard, we suggest that the provision be revised to read “on all material issues of fact or law admitted as part of the contentions in the proceeding.” That would be in accord with the meaning of the current section 2.1251(c)(1) that refers to material issues of fact or law “presented on the record.”

The more important matter regarding proposed section 2.1209, however, is its failure to recognize the need for proposed findings of fact and conclusions of law from the participants. Section 2.1207(c) provides only that participants may file “[w]ritten post-hearing statements of position on the contentions.” The post-hearing statements of position, like the “[i]nitial written statements of position” filed with the written pre-filed direct testimony pursuant to proposed section 1207(a)(1), are markedly different from Subpart G proposed findings of fact and conclusions of law provided for in proposed section 2.711 that are to be filed along with the party’s briefs. Pursuant to section 2.711(c) “[p]roposed 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.” Similarly, proposed conclusions of law “must be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record.”

By requiring that in his or her initial decision the presiding officer make and justify findings and conclusions, but permitting the participants to file only a post-hearing statement of position, a significant additional work burden is shifted onto the presiding officer. Although there is nothing in the proposed rules that explicitly prohibits the presiding officer from ordering the participants to file proposed findings and conclusions with record citations, the structure of the proposed Subpart L regulations appears not to contemplate such filings. The value of a post-hearing statement of position that does not contain the detail normally required of proposed findings and conclusion is, at best, questionable as an aid to the presiding officer in preparing an initial decision.

F. Subpart N

1. Section 2.1405 -- Hearing. In line with our comments in section A.11 above, we suggest that subsection (b) of this section be revised as follows:

(b) A hearing will be recorded stenographically or by other means, under the supervision of the presiding officer, and a verbatim transcript of the hearing will be prepared. Parties may purchase copies of the transcript from the reporter.

G. Appendices A and D to Part 2

The proposed rule says nothing about appendices A and D to Part 2. The former is a “handbook” that provides many details about how Subpart G proceedings are intended to operate in the context of reactor construction permit and operating license proceedings. The latter contains the proposed schedule for the high-level waste repository licensing proceeding under Subpart J.

While the easy approach would be simply to delete these from the rules, we do not believe that should be done without a careful analysis of their contents to ensure that nothing useful is being removed. For instance, Appendix A contains the statement of Commission policy that presiding officers should attempt to conduct hearings near the site of the facility at issue. See 10 C.F.R. Part 2, App. A, § I(a). Further, the Appendix D schedule provides an outline of how the high-level waste repository proceeding should unfold that has been a useful planning tool for budgetary and other purposes.