1073

WINSTON & STRAWN

Electronic Letterhead

1400 L STREET, N.W., WASHINGTON, DC 20005-3502
202-371-5700

35 W. WACKER DRIVE
CHICAGO, IL 60601-9703
312-558-5600

200 PARK AVENUE
NEW YORK, NY 10166-4193
212-294-6700

444 FLOWER STREET
LOS ANGELES, CA 90071-2911
213-615-1700

43 RUE DU RHONE
1204 GENEVA, SWITZERLAND
41-22-317-75-75

21 AVENUE VICTOR HUGO
75116 PARIS, FRANCE
33-1-53-64-82-82

WRITER'S DIRECT DIAL
202-371-5726

September 14, 2001

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Rulemakings and Adjudications Staff

Re: Changes to Adjudicatory Process
66 Fed. Reg. 19,610

Dear Ms. Vietti-Cook:

On April 16, 2001, the Nuclear Regulatory Commission ("NRC" or "Commission") published a proposed rule intended to improve the NRC's hearing process. Specifically, the proposed rule would amend portions of the NRC's Rules of Practice (10 C.F.R. Part 2) to adopt "informal" hearing procedures in connection with a broader category of NRC licensing actions, to tailor hearing procedures to the differing types of licensing activities the NRC conducts, and to better focus the limited resources of the NRC and the parties involved in the hearing process. See 66 Fed. Reg. 19,610 (2001). On behalf of Exelon Generation Company, Entergy Operations, Inc., and other power reactor licensee clients of Winston & Strawn, we submit the following comments on the proposed changes to the adjudicatory process.

I. General Comments

As a general matter, we applaud the Commission's efforts to foster public participation in its adjudicatory process by, among other things, moving away from trial-type, adversarial proceedings, toward more accessible, informal procedures — at least in some cases. We believe the NRC should continue to implement, and indeed expand, its strategy to utilize informal hearing approaches.

As the Commission noted in the preamble to the proposed rule, the use of formal adjudicatory procedures is not necessary to develop a complete hearing record. On the contrary, the use of formal procedures frequently results in protracted, costly proceedings with little value

added. Streamlined, informal hearing procedures, on the other hand, promote efficiency and openness in the hearing process. Not only are informal proceedings less expensive, thus promoting participation by diverse members of the public, but simpler procedures allow for speedier, more efficient issue resolution.

We welcome the opportunity to provide the following specific comments on the Commission's proposals. While we agree with the Commission's objectives and support many of the proposals "as is," we believe further refinements remain necessary in order to effectively streamline the NRC's hearing process and to enable efficient resolution of these proceedings.

II. Hearing Tracks/Informal Hearings

In the proposed rule, the Commission retains the existing formal hearing track, 10 C.F.R. Part 2, Subpart G, for, among others, hearings which are statutorily required to be "on the record" (i.e., hearings on uranium enrichment facility construction and operation).[1] The Commission would also retain the existing Subpart K, which is required by the Nuclear Waste Policy Act of 1982, as well as the existing Subpart M for license transfers. For other NRC licensing and regulatory matters the Commission would adopt two "informal" hearing tracks: a revised Subpart L for other informal hearings, and a new Subpart N for expedited informal hearings. 66 Fed. Reg. at 19,619. The proposed rule provides for the use of Subpart N procedures in any proceeding, other than those requiring formal hearings, in which the oral hearing is estimated to take no more than two days to complete, or where all parties agree to use the procedures.

The Commission is seeking comment on the proposed informal procedures and is also seeking comment on whether the informal hearing processes contained in proposed Subparts L and N should be augmented, or supplanted, by more informal, legislative-style proceedings. 66 Fed. Reg. at 19,618-619. On this threshold issue, we believe that the Commission should supplant both the existing hearing procedures (Subpart G), to the maximum extent allowed by law, and the proposed informal hearing procedures (Subparts L and N), with legislative-style hearings. The use of legislative-style hearings will best serve the Commission's objectives of opening access to the hearing process, applying resources wisely and efficiently, and assuring timely resolution of these matters. This approach is not without precedent; for example, the Federal Communications Commission mandates legislative hearings in certain proceedings.

---

[1] The proposed rule would also utilize formal hearing procedures in proceedings under Subpart J for the initial licensing proceeding to authorize the construction of a high-level waste geological repository and initial licensing proceeding to authorize the repository to receive and possess high-level waste. We make no comment on this proposal.

Apart from this general threshold comment, however, we also believe that the NRC's proposal would apply the proposed informal procedures (Subparts L and N) too sparingly. The proposals would lead to more Subpart G formal hearings than are necessary or desirable. In addition, the expedited Subpart N procedures would be likely to be applied far too infrequently, if at all.

First, with respect to the informal/formal determination, proposed Section 2.310(c) includes a criterion that would call for the use of formal, Subpart G hearing procedures in those reactor licensing proceedings "involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures." The Commission requests comment on the appropriateness of this criterion. 66 Fed. Reg. at 19,624. We believe this criterion constitutes a subjective, discretionary standard that would be extremely difficult to consistently interpret. Moreover, we are concerned that in practice it would be ineffective in reducing the number of formal hearings held by the Commission. Almost any NRC licensing action involves technical matters that might be considered, at least by some, to be "complex." As a result, the use of this criterion could thwart the very purpose of these proposed revisions. The Commission, in our view, would be better served by simply deciding that informal hearings (be they legislative, Subpart L, or Subpart N hearings) are appropriate except in the limited, defined cases where a formal hearing is statutorily required.

The Commission has determined that the Atomic Energy Act requires formal hearings only on the construction and operation of a uranium enrichment facility. These are the only hearings statutorily required to be formal, "on the record" proceedings. See 66 Fed. Reg. at 19,623. Consequently, we advocate that the Commission eliminate the "complex issues" criterion provision entirely and apply the discretion allowed by the Atomic Energy Act ("AEA") and the Administrative Procedure Act ("APA") to utilize informal procedures. In this way, informal hearing procedures would be consistently applied in power reactor licensing cases.

Second, in the spirit of seeking greater informality in the process, the Subpart N expedited process seems the most effective at achieving the goal. However, Subpart N would only be applied if an oral hearing is estimated to take no more than two days to complete or if all parties agree to use Subpart N procedures. We believe that, in far too many contested cases, the parties will <u>not</u> agree and it will at least be argued that the 2-day criterion will not be met. This, therefore, is not an effective criterion. The Commission should have one informal track (other than Subparts K and M). Moreover, the NRC should simply state that an informal hearing should not take more than two days (or three days, or even five days). (As is discussed below, the rules should mandate the schedule for not only the actual hearing, but also for pleadings and other matters associated with the hearing process.) The proposal, which mandates the procedure based on an expectation of time, is backwards. The procedure should apply, unless other specific procedures apply (Subparts G, K, and M), and should dictate the time that will be allowed.

Finally, the Commission has determined that formal hearing procedures are appropriate for hearings on enforcement actions. See 66 Fed. Reg. at 19,623. Proposed Section 2.310(a) requires the use of formal procedures in hearings on enforcement actions unless all parties agree to the use of informal procedures. We support the idea that formal hearings be available in enforcement cases, in actions against both individuals and facility licensees. However, we believe that the Commission should make an option available, only to the recipient of the enforcement action, to invoke informal procedures. In some cases the recipient of an enforcement action may wish to use informal procedures to allow for expedited, less costly review of the issues. The Commission should welcome easy access to the enforcement action appeal process as a means to afford due process to the regulated community and to serve as a check on the NRC Staff enforcement process.

III. Case Management

The NRC has also correctly noted that strong case management is an integral part of an efficient and effective hearing process. 66 Fed. Reg. at 19,617. In many arenas, including scheduling, discovery, and cross-examination, poor case management can and often does result in needlessly protracted proceedings, with little value added. Accordingly, we strongly support the Commission's ongoing initiatives to improve case management. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). However, we believe the Commission must also set strong and effective schedule mileposts in the rules to assure appropriate case management. We believe the rules (including Subparts G, L, and N) should specify clear and appropriate schedules similar to existing Subpart M.

The proposed rule does present several potentially effective tools to encourage licensing boards and presiding officers to conduct efficient and effective hearings. See, e.g., proposed §§ 2.332-2.334. However, to buttress these provisions we support imposition in all hearing tracks of specific schedular milestones governing the time limits of particular aspects of proceedings similar to those found in proposed Subpart N, at Sections 2.1404-2.1406, 2.1407. Such mileposts should govern completion of major aspects of the hearing process. This step will achieve significant progress toward meeting the Commission's objectives of efficiency and timeliness in the hearing process — almost as much as amending the procedures themselves.

IV. Cross-Examination and Discovery

A key to achieving a more efficient hearing process, regardless of "hearing track" or approach, is reforming the NRC's current expansive approach to cross-examination and discovery. We believe that these are the areas in which changes will most effectively increase efficiency and promote timely decisionmaking, without impacting due process and accurate fact-finding.

A. Cross-Examination

The proposed rule provides for cross-examination by the parties in enforcement proceedings, in proceedings involving complex reactor licensing issues, and in other cases that will be adjudicated under formal Subpart G hearing procedures. NRC proceedings under the less formal procedures of Subpart L or N do not include cross-examination by the parties unless ordered by the presiding officer or the Commission, as determined on a case-by-case basis.

We support an approach in which the presiding officer or the licensing board conducts the examination of the witnesses. NRC proceedings usually involve technical issues that are most effectively addressed in writing (e.g., written direct testimony and rebuttal), with any necessary additional follow-up questions by the presiding officer to assure an understanding of the testimony. We believe that this approach should be adopted and even extended, to the maximum extent possible, to Subpart G. Provisions such as those in proposed Sections 2.1207(a)(3)(i) and (ii), which would permit parties to propose questions for the Presiding Officer to consider, should assure that all parties' concerns are ventilated during the questioning.

We understand fully that the representatives of some interested stakeholders will vehemently oppose elimination of cross-examination in NRC cases, arguing that cross-examination is the "engine of truth" or citing some other similar platitude. However, we disagree with the "engine of truth" notion. Ample experience has demonstrated that witnesses in NRC proceedings are most often expert witnesses, whose testimony is unlikely to be illuminated by standard interrogation techniques. Cross-examination has, in fact, been a significant source of delay and inefficiency.

The assertion of a need for cross-examination to find "truth" has also been repudiated by legal scholars. In technical matters, the counsel undertaking a cross-examination of experts usually will not have the same command of the material as the witness. See Isaac D. Benkin, "Is it Bigger than a Breadbox? – An Administrative Law Judge Looks at Cross-Examination of Experts," 21 A.F.L. Rev. 364, 365 (1979). This fact alone makes the cross-examination largely pointless. Even when this is not the case, success by opposing counsel in challenging an expert's conclusions is rare. As one administrative practitioner explained, "[the issues involved] are not susceptible to useful exploration in the strict ritual of trial cross-examination. They are in the realm of opinion, albeit expert opinion, which experience shows usually cannot be illuminated by formal question-and-answer interrogation." William Warfield Ross, "The Big Administrative Proceeding: A Response to Mr. Westwood," 51 A.B.A.J. 239, 241 (1965). Completely consistent with this assessment, in practice in NRC cases cross-examination on technical issues frequently has been unfocused, ineffective, and unproductive of information helpful to the presiding officer or licensing board for its decision on the merits.

Lengthy, unfocused, and unproductive cross-examination will certainly increase delay, discourage witnesses, and increase the adversarial nature of administrative hearings.

William D. Dixon, "Rulemaking and the Myth of Cross-examination," 34 Admin. L. Rev. 389, 435-7 (1982). The formality and time involved in the procedure also increase the cost of administrative proceedings. Judge Friendly correctly observed that in such hearings, "the main effect of cross-examination is delay." Henry J. Friendly, "Some Kind of Hearing," 123 U. Penn. L. Rev. 1267, 1285, 1306 n.199 (1975). Other scholars, considering the experience of federal agencies, have also noted the additional time that "permissive" rules of cross-examination add to hearing processes, with potentially negative effects on the health and well-being of those populations that administrative regulation is intended to protect. Paul R. Verkuil, "The Emerging Concept of Administrative Procedure," 78 Colum. L. Rev. 258, 308-09 (1978).

Limitations on cross-examination do not deprive any party of its right to a full and fair hearing. The APA requires, in formal cases, "such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C.A. § 556(d). This does not create an absolute right to cross-examination; consequently, the NRC may properly limit cross-examination to formal hearings, and in those matters to only cases in which cross-examination is required for a "full and true disclosure" of the facts.[2] See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 120 (1995). In short, we concur with the Commission's determination, reflected in the proposed rule, that full cross-examination is not the most effective means for ensuring the development of a full administrative record. There is no reason this conclusion should not be extended to Subpart G proceedings — qualified in those formal matters only as necessary to meet the APA requirement.

B. Discovery and Disclosure

Discovery and disclosure under the proposed rule take three forms. First, the proposed rule would impose a general disclosure requirement on all parties (including the NRC Staff) in all Part 2 proceedings, save those conducted pursuant to Subparts G and J. See proposed Section 2.336. The discovery provided for in this general provision constitutes all of the discovery that would be available, although the duty of disclosure remains throughout the pendency of the proceeding. Second, for informal Subpart L proceedings, proposed Section 2.1203 requires the NRC Staff to prepare and provide a hearing file and keep it "up to date." 66 Fed. Reg. at 19,628. Pursuant to proposed Section 2.1203, no other discovery (beyond the hearing file and general disclosures provided pursuant to proposed Section 2.336) is permitted in

---

2 Other agencies explicitly leave cross-examination to the discretion of the presiding officer. See, e.g., 47 C.F.R. § 1.248 (Cross-examination only permitted in certain Federal Communications Commission proceedings, and then only when the presiding judge determines that it is necessary to ascertain material issues of fact, or when the public interest requires oral proceedings); Securities and Exchange Commission ("SEC") Rule 326 (no requirement that live evidence or cross-examination be permitted in informal hearings; their provision is at the discretion of the SEC).

a Subpart L proceeding. Finally, in Subpart G and J proceedings, specific, traditional discovery provisions will apply.

First, we strongly support the use of a hearing file as a discovery tool in NRC proceedings. Indeed, we encourage the Commission to use the hearing file as the sole discovery tool for informal proceedings. The key documents relevant to licensing proceedings are available to all parties via the NRC's public release process. As a result, there is little need for additional discovery to develop an adequate record in an informal adjudicatory proceeding. Employing the hearing file concept in conjunction with informal procedures (preferably legislative hearing procedures or streamlined informal procedures such as Subpart N, as discussed above) would eliminate the traditional cumbersome, costly, and time-consuming discovery process. The regulations should provide for a hearing file to be made available for proceedings conducted pursuant to Subparts K, M, and N, as well as Subpart L.[3]

Second, we have significant concerns with the proposed general disclosure provision, and believe that it may not be effective in reducing the time and burden of the discovery/disclosure process. While we do not oppose general disclosure per se, the amount and type of additional information required by the proposed general disclosure provisions is not consistent with the information needed to resolve a matter that is the subject of an informal proceeding. Proposed Section 2.336, as currently drafted, is overbroad and will result in an undue burden on parties, without a corresponding benefit. At a minimum, the disclosure rule should be eliminated from Subpart N proceedings and significantly clarified for other proceedings in which it would apply.

For example, proposed Section 2.336(a)(1), requiring production of the name, address, and telephone number of any person (including any expert) upon whose opinion the party bases its claims and contentions, as well as a copy of the analysis or other authority upon which the person bases his or her opinion, is overbroad. This provision could encompass numerous individuals in a licensee's organization. This provision should require only production of information relative to those persons a party intends to use as witnesses in a proceeding, and the basis for that person's testimony. The Commodity Futures Trading Commission ("CFTC") requires mandatory prehearing discovery in its proceedings. With respect to witnesses, the CFTC requires:

> The identity, and the city and state of residence, of each witness, other than an expert witness, who is expected to testify on its

---

[3] The current proposed rule appears to call for a hearing file for Subpart L proceedings, but not Subpart N proceedings. At a minimum, the NRC should eliminate the general disclosure provisions from Subpart N and replace them with the hearing file requirement.

> behalf, along with a brief summary of the matters to be covered by the witness's expected testimony; . . . .
>
> [A]ny party who intends to call an expert witness shall also furnish to all other parties to the proceeding . . . (i) a statement identifying the witness and setting forth his or her qualifications; (ii) a list of any publications authored by the witness within the preceding ten years; (iii) a list of all cases in which the witness has testified as an expert, at trial or in deposition, within the preceding four years; (iv) a complete statement of all opinions to be expressed by the witness and the basis or reasons for these opinions; and (v) a list of any documents, data, or other written information which were considered by the witness in forming his or her opinions, along with copies of any such documents, data or information which the other parties do not already have in their possession and to which they do not have reasonably ready access.

17 C.F.R. § 10.42(a)(1)(iii); (a)(2) (2001). If the Commission chooses to retain a general disclosure provision, a similar standard, requiring only production of information with respect to witnesses to be called would be more appropriate. Moreover, any standard should require only general information with respect to the individual's location; that is, city and state. Requiring production of an address and/or telephone number could implicate privacy concerns.

Proposed Section 2.336(a)(2) would require disclosure of the name, address and telephone number of each person that the party believes is likely to have discoverable information relevant to the admitted contentions. This provision is, again, entirely overbroad. Any number of individuals could have discoverable information, but be in no way connected with the proceeding. Moreover, the provision is somewhat duplicative, as parties are already obliged to produce a witness list pursuant to subsection (a)(1). In order to assemble a complete administrative record, the Commission need only require a witness list; proposed Section 2.336(a)(2) will likely produce only detours without adding significant value to the proceeding. In addition, as noted above, if the Commission decides to retain this provision, it should not require production of addresses and/or telephone numbers, in light of privacy considerations.

Perhaps most significantly, proposed Section 2.336(a)(3) would require disclosure of:

> A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party

> shall have the right to request copies of that document and/or data compilation . . .

As written, this provision would present an exceptionally difficult standard for applicants to meet.

First, this proposed standard places a burden on the applicant to understand what might be relevant to an intervenor's contention. Depending upon the specificity of the contention, this may prove very difficult. Second, data may be available in numerous sources — both written and electronic. For example, there may be files and databases related to maintenance requests, corrective actions, operating experience, equipment qualification, fitness for duty, and performance indicators, all of which, by somebody's lights, may have something to do with a contention. The formats of these databases will vary, and, while all may be searchable to some extent, the degree and ease of searchability may vary widely. Moreover, the vast majority of "data compilations" contained in these databases will not be relevant to a given licensing proceeding. As drafted, the provision could require the applicant to search numerous potential sources, search databases, and provide descriptions or copies of entire databases that could contain relevant information. For electronic data, a choice of search terms may be a matter of discretion. In total, this approach clearly places an undue burden on the applicant and creates the potential for unwarranted suspicion and controversy regarding the scope and thoroughness of the search.

Accordingly, if this disclosure approach is to be employed, the scope of the obligation needs much better focus. For example, the obligation should primarily run to those documents and other information that the party itself will rely upon to make its own case. Otherwise, the Commission must provide clear limits defining the extent to which a party is required to search its internal databases to produce potentially relevant information. We do not believe that a party should be required to craft and perform word searches for other parties, and then be subjected to accusations regarding the thoroughness of the search and screening. The provision should also direct that documents and data compilations related to industry organizations, such as the Nuclear Energy Institute, the Institute for Nuclear Power Operations, and vendors, are beyond the scope of the disclosure obligation.

Finally, if the Commission adopts either a hearing file or disclosure provision, there is no need to require traditional discovery, as acknowledged by the proposed rule. To the extent traditional discovery mechanisms remain available (e.g., in Subpart G), we strongly support the addition of time limits on the discovery period. As such, the Commission should incorporate into proposed Section 2.705 a provision similar to that contained in current Section

2.1111.[4] That section, which is part of the "hybrid" Subpart K hearing process, has codified the expectation that all discovery be completed within 90 days. In incorporating this provision, however, the Commission must clarify that discovery requests must be timely filed with due allowance, within the 90-day period, for responses as well as for resolution of challenges to discovery by the licensing board or presiding officer.[5]

V. Other Specific Proposals

A. Submission of Contentions

Proposed Section 2.309 establishes, among other things, that all proposed contentions must be filed as part of the initial request for hearing/petition to intervene. See 66 Fed. Reg. 19,617, 19,620. The Commission proposed to provide a minimum of 45 days from the date of publication of the notice of opportunity to request a hearing for the filing of petitions and contentions. The Commission also requests public comment and suggestions on whether it should allow 75 days from the notice of opportunity for hearing for filing contentions, or whether some other time frame should be established.

We support the consolidation of petitions to intervene/requests for hearing with proposed contentions. This change should improve the efficiency of proceedings, and eliminate ambiguities currently surrounding the timing of submission of contentions. Moreover, we encourage the NRC to retain the 45-day period for the filing of contentions as proposed. A longer period would unduly delay proceedings, and in most cases would be unnecessary. For situations in which the Commission deems a longer period to be appropriate, it may implement such on a case-by-case basis.

In addition, we strongly support the Commission's proposal to extend to informal proceedings under Subpart L the requirement to proffer specific, adequately supported contentions rather than simply to state "issues." This requirement will assist in streamlining hearings by focusing the issues for resolution.

---

4 The proposed rule would remove section 2.1111. See 66 Fed. Reg. at 19,627. The 90-day time limit for discovery is an invaluable tool in attaining the Commission's stated objective of increased efficiency in adjudicatory proceedings. This portion of the provision should be, at a minimum, retained, and, as discussed above, incorporated throughout Part 2.

5 We have experienced a situation where an intervenor has filed discovery requests during the last week of the 90-day period of a Subpart K proceeding, claiming that responses were due on day 90. The licensing board allowed the untimely discovery and set a response schedule beyond day 90, thus subverting the regulatory time limit.

B. Interlocutory Appeals

The proposed rule replaces existing Section 2.730(f) with a proposed Section 2.323(f). Under current Section 2.730(f), interlocutory review is disfavored, and generally not allowed as of right. The provision provides for referral of a ruling to the Commission when, in the judgment of the presiding officer, "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense." Proposed Section 2.323(f)(1) expands this section to also permit referral to the Commission where the decision or ruling involves "a novel issue that merits Commission review at the earliest opportunity." Moreover, a new Section (f)(2) permits a party to petition the presiding officer to certify an issue to the Commission for early review.

We strongly support this proposal and encourage that it be expanded. The immediate correction on appeal of a decision or ruling —either procedural or substantive — can save both cost and time by streamlining or even shortening a proceeding. Opponents of interlocutory review often cite to increased Commission workload as a downside to permitting interlocutory appeals. However, a slight increase in interlocutory appeals could decrease the NRC's overall caseload by expediting or shortening the resolution of cases before a presiding officer or licensing board. It could also result in streamlined — and fewer — appeals of final orders to the Commission.

Interlocutory review would also facilitate the Commission in promptly exercising its inherent supervisory authority over presiding officers and licensing boards. We believe such review should be expanded to include procedural rulings with significant case management implications, as well as appeals to settle substantive legal issues important to other cases or to the public interest. For all of these reasons, we would encourage the Commission to not only adopt the proposed rule, but extend interlocutory appeal.

C. Alternative Dispute Resolution

The Commission has long encouraged the use of settlement and alternative dispute resolution ("ADR"). The proposed rule contains a new provision, Section 2.337, on settlement, and consolidates and elaborates on existing rules pertaining to settlement. See 10 C.F.R. §§ 2.203, 2.759, 2.1241. The Commission requested public comment on the text of the proposed rule, and on the general use of ADR in NRC proceedings. 66 Fed. Reg. at 19,626.

We support the availability and use of ADR in a wide variety of cases, including hearings on NRC enforcement actions.

D. Discretionary Standing

Under proposed Section 2.309(b)(2), the Commission proposes to codify the discretionary intervention factors that were established in Portland General Electric Co. (Pebble

Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976). The Presiding Officer or licensing board will be required to apply those factors in all cases where a petitioner is found to lack standing to intervene as of right, and the petitioner, in its initial intervention petition, has asked for discretionary standing and addressed the six Pebble Springs factors. The Commission solicited comment on several specific matters related to this standard. See 66 Fed. Reg. at 19,622.

We oppose codification of the discretionary intervention standard. Wrangling and subjectivity over how to apply these standards will likely delay presiding officers and licensing boards in making determinations on the threshold issue of standing. In terms of simplifying hearing procedures, codification of this standard is a step in the wrong direction. Meaningful public participation will not be hampered by continuing to apply the Pebble Springs factors, as needed, without codification.

E. Computation of Time

Proposed Section 2.306 provides, among other things, that if a document is served by electronic transmission or facsimile and is not received by a party before 5 p.m. in the recipient's time zone on the date of transmission, the recipient's response date is extended by one business day.

We certainly support this proposal, which is eminently fair. However, there is an additional issue created by simultaneous (same day) electronic filings. In order to avoid the unfair advantage that could result if a party receives an electronic filing or facsimile, but does not transmit its own filing in a timely fashion, the rule should be amplified to specify that, where simultaneous (same day) electronic filings are required, all parties must serve the filing by 5 p.m. Eastern time. Violations of this provision should result in sanctions.

F. Proof of Service by Electronic Mail

Proposed Section 2.305(e)(3) provides that service on a party by electronic mail is complete on transmission and receipt of electronic confirmation that one or more addressees for a party has successfully received the transmission.

This provision removes the responsibility for completing service from the party serving the filing. To return responsibility to the serving party, and avoid disputes over timeliness, this section should require deposit of the filing in the U.S. mail in addition to the electronic filing. Service would be complete once (1) the electronic filing is transmitted, and (2) a hard copy of the filing is deposited in the U.S. mail.

G. Burden of Proof

Proposed Section 2.325 restates without modification current Section 2.732. That section provides that, unless the Presiding Officer otherwise orders, the applicant or the proponent of an order has the burden of proof in NRC adjudications.

The provision should be amended to read: "Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof by a preponderance of the evidence." This change would codify the standard that the NRC has traditionally applied. See, e.g., Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), aff'd, Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995)(Table).

H. Oral Argument

Proposed Section 2.342 restates the current section 2.763, and provides that the Commission may allow oral argument upon the request of a party made in a petition or brief on review, or upon its own motion.

This provision is extraneous and should be deleted. If new information is proffered, the appropriate procedural mechanism is the motion to reopen, currently at § 2.734 (proposed § 2.326). Otherwise, the Commission is empowered by current § 2.786(d) (proposed § 2.340(c)(1)) to hold oral argument at its discretion.

I. Limited Appearances

Proposed Section 2.315(a) restates, without substantive change, the provisions, currently contained in § 2.715(a), governing limited appearances by persons who are not parties to a proceeding. This provision applies to all proceedings, both formal and informal.

We propose that the Commission amend this regulation to provide for, at most, one session per proceeding during which the presiding officer or licensing board entertains limited appearances. Holding several sessions on one action results in repetitive presentations that add little value to either public understanding or the administrative record.

J. Post-Hearing Proposed Findings of Fact and Conclusion of Law in Subpart L Proceedings

Proposed Section 2.1209 would require the filing of proposed findings of fact and conclusions of law within 30 days of the close of the hearing (unless the presiding officer specifies another time period).

This provision is unnecessary and should be deleted in all informal cases. Proposed Section 2.1208(a)(4) provides for written concluding statements of position on the contentions, to be filed following service of written responses to the presiding officer's questions, or, if there are no questions, following service of written responses and rebuttal testimony. These concluding statements of position, together with the other filings and the transcript of the oral hearing, should suffice for the presiding officer to issue an initial decision.

Indeed, this record should suffice for the presiding officer to issue a decision from the bench in many informal proceedings. To this end, the Commission should add a provision, similar to that in proposed § 2.1406(a), allowing a presiding officer in a Subpart L proceeding to issue a bench decision where practicable.

K. Jurisdiction of the Presiding Officer/Licensing Board Over the NRC Staff

Proposed § 2.335(a) restates current § 2.758(a) and provides, as a general matter, that a Part 2 adjudication is not a proper forum in which to challenge an NRC rule or regulation. Proposed Sections 2.335(b)-(d) lay out the process by which a party may request a waiver of application of an NRC rule or regulation.

We support the proposed language as consistent with agency precedent and practice. However, we believe this provision is an appropriate place for the Commission to also codify its standard relating to the scope of an NRC hearing.

It is well established by NRC case law that the scope of an NRC hearing is limited to matters specified in the notice of hearing. See, e.g., Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 AEC 689, 690 (1971); accord, Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983)(the scope of a license amendment proceeding is limited to the matters outlined in the Commission's notice of hearing on the licensing action). Greater specificity, beyond that provided in the case law, is necessary.

Specifically, the Commission should clarify that the licensing board/presiding officer does not have jurisdiction over ongoing NRC inspection, enforcement, and investigation matters in license amendment cases. NRC proceedings — particularly those involving matters of narrow scope, such as routine reactor operating license amendments — should not be a forum to address ongoing regulatory matters. For example, while recent inspection findings may have some relevance in a particular case to a specific contention, the Commission needs to establish clear parameters to ensure that licensing boards/presiding officers do not permit a proceeding on a routine amendment (and a specific contention) to evolve into a referendum on ongoing operational matters unaffected by the amendment, such as general management character or competence or overall licensee and plant performance. These issues are appropriately handled by NRC Staff as ongoing operational issues. Where a general issue will exist regardless of the

amendment, it should clearly be an ongoing inspection and enforcement — not licensing — matter.

IV. Conclusion

We appreciate this opportunity to provide our comments on the Commission's proposed changes to its Rules of Practice. Greater informality in Commission proceedings will foster both more effective public involvement in NRC matters and the efficient allocation of limited resources for hearings. To accomplish this goal, we encourage the Commission to consider even greater informality, such as legislative and expedited hearings, in a greater range of cases as discussed in our comments above.

Respectfully submitted,

David A. Repka

David A. Repka