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DOCKETED NUMBER
PROPOSED RULE: PR-1,2,50,51,52,54,60,70,73,76&110
(66 FR 19610)

1075

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C O U N S E L O R S A T L A W

September 14, 2001

**DOCKETED
USNRC**

September 17, 2001 (12:26PM)

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

ATTN: Rulemaking and Adjudications Staff

Subject: Comments on Changes to the Adjudicatory Process, 10 CFR Parts 1, 2, 50,
51, 52, 54, 60, 70, 73, 76, and 110.

Reference: *Federal Register* notices dated April 16, 2001 (66 *Fed. Reg.* 19610) and
May 16, 2001 (66 *Fed. Reg.* 27045).

These comments are submitted on behalf of First Energy Nuclear Operating Company, Nuclear Management Company, LLC, South Texas Nuclear Operating Company, and TXU, Inc.

The proposed changes to the NRC's adjudicatory processes are an important step toward making those processes more efficient, stable, and predictable. In the past, these processes have sometimes proven cumbersome and unmanageable, with the result that some proceedings have consumed an inordinate amount of time and resources. We strongly support the Commission's initiative to reform these processes.

In recent years, the Commission has taken measures to improve the conduct of adjudicatory proceedings. The Commission's 1998 policy statement on the conduct of proceedings (63 *Fed. Reg.* 41872) and recent Commission orders establishing milestones and schedules for the conduct of proceedings have been significant positive changes that demonstrate the Commission's resolve in assuring that its adjudicatory processes are managed effectively. In particular, the Commission's management of license transfer proceedings under Subpart M and license renewal proceedings has generally facilitated timely, efficient, and predictable licensing decisions. These improvements are vital to the continued availability of nuclear power as a safe, clean, economic energy source, and should be preserved.

A systematic reexamination of Commission adjudicatory processes and improvement of the regulations that govern those processes are the next logical steps. As the electric utility industry restructures and demands for electrical energy increase, it is particularly important that the NRC's adjudicatory processes be efficient and predictable.

TEMPLATE = SECY- 067

SECY-02

As a threshold matter, we agree that the Commission has the legal authority to employ a full range of hearing procedures and to apply different procedures depending upon the nature of the case at hand. In particular, there is no legal requirement that would prohibit much broader use of informal hearing procedures as opposed to formal trial-type procedures.

Our comments cover a number of specific features of the proposed rulemaking, but are based upon several key principles. These include:

Principle 1 Adjudication should be used to resolve specific factual or legal disputes, on matters that must be decided, between parties having a direct interest in the outcome of the proceeding.

In changing its adjudicatory processes, the NRC should consider the proper role of adjudication and its relationship to other opportunities for public participation and involvement in Commission activities. Adjudication is only one part of broader Commission rulemaking, licensing, and enforcement processes. Members of the public have multiple avenues for expressing their views and participating in Commission activities. These avenues include participation in rulemaking, participation in public meetings, filing of petitions, making limited appearance statements in writing or orally at hearing, and communication of views directly to the Commission or the NRC Staff via letter or otherwise. These communications may address general policy issues or may be specific to a particular NRC activity or licensing action. The Commission has consistently encouraged the use of all these avenues. They have been widely publicized and may be used by any person without any demonstration of a concrete interest or specific factual or legal dispute.

By contrast, adjudication in a particular proceeding is designed to address specific factual and legal disputes, on matters that must be resolved in the proceeding, between interested parties who are likely to be directly affected by the results. Adjudication is not an appropriate or useful forum for generally addressing policy issues or solicitation of public comment on issues which are not germane to the findings the Commission must make in the proceeding. As noted above, multiple alternative methods are widely available for those purposes. Accordingly, the Commission's adjudicatory processes should be dedicated exclusively toward resolving specific factual and legal disputes between parties who have standing to participate in the proceeding.

Principle 2 The type of adjudicatory process applied should be the one best suited to the nature of the proceeding at hand.

As noted above, the Commission has broad authority to employ a range of adjudicatory procedures. In doing so, the Commission should consider the nature and types of issues that arise in different kinds of proceedings and should apply the adjudicatory process best suited to resolving the kinds of disputes that arise in each type of proceeding. For

example, a traditional trial-type process may be appropriate for enforcement proceedings, which are often focused on determining the intent of individuals and establishing facts associated with a specific event. By contrast, a process based upon written submittals may be more appropriate for resolution of the types of technical issues associated with reactor licensing proceedings. For good reason, scientific and technical organizations do not rely upon trial-type procedures as a means for resolving scientific or technical questions or differences in expert opinion. The use of procedures appropriate to the nature of the matters to be adjudicated will ensure that these proceedings are fair, efficient, and predictable.

Principle 3 Commission adjudicatory proceedings should be predictable and efficient.

NRC adjudicatory processes are relied upon by applicants and other parties for timely determinations, and the principle that “justice delayed is justice denied” well applies. While NRC adjudicatory processes must fairly address issues in litigation, those seeking NRC action should be able to predict with reasonable certainty the scope of proceedings, the types of issues likely to be litigated, and the amount of time and resources those proceedings will require. Furthermore, all parties should be able to expect that the Commission will manage its proceedings in an efficient and effective manner, and that all parties will be required to adhere to the Commission’s rules for participation in proceedings, including adherence to milestones and schedules. Without this confidence, delays and burdens associated with Commission adjudicatory proceedings present a significant risk and deterrent to the transfer, modification, or construction of NRC-licensed facilities. Although recent NRC policy statements and orders have helped improve the management of some NRC proceedings, similar improvements should be embedded in the regulations governing all proceedings.

Principle 4 The purpose of discovery is to enable full and fair litigation of specific identified contentions.

Both in the context of NRC proceedings and in other adjudicatory settings, the purpose of discovery is to provide the parties with the ability to fully and fairly litigate the matters in dispute between them. Discovery should be available so that a party to a proceeding can learn the facts in the opposing party’s possession that are relevant and material to the matters to be litigated. This ensures that both sides have a full opportunity to present their best case on these matters, and that the trier of fact has a full basis for decision. It also ensures that there is no “surprise evidence” at hearing that the opposing party has not had the chance to evaluate and rebut.

At the same time, discovery should be limited to the specific contentions that have been identified and admitted for litigation and should be conducted efficiently and expeditiously. Open-ended discovery, not limited by schedule or subject matter, invites abuse of the discovery process, imposes burdens disproportionate to the scope of the

matters actually to be litigated, and renders the duration and cost of adjudicatory proceedings unpredictable. Without reasonable limits, discovery can significantly delay proceedings and provoke unnecessary litigation over collateral matters not related to the substance of the issues that must be decided in the proceeding. Accordingly, discovery should be directed at those matters actually in dispute in the adjudication.

We strongly urge the Commission to modify its adjudicatory processes using the four principles described above. We believe that application of these principles will result in proceedings that are predictable and efficient, are fair to all parties, and that will facilitate participation by both licensees and the public. Our major comments on the proposals set out in the Commission's proposed rulemaking are based upon these principles and are set forth below. Other comments on specific matters upon which the Commission has requested comment are appended in Attachments A and B.

COMMENT 1 – STANDARDS FOR PARTICIPATION IN PROCEEDINGS

Under the proposed Subpart C, persons seeking to participate in NRC adjudicatory proceedings must demonstrate a sufficient interest in the proceeding and advance specific litigable contentions (*see* proposed §2.309). These requirements are consistent with the purpose of adjudicatory hearings (*see* Principle 1 above). We strongly support these provisions. They prevent proceedings from being expanded or delayed by persons who have no direct tangible interest in its outcome, or who have not identified any specific litigable issue that would affect the Commission's ultimate determination in the proceeding. Without these requirements, NRC hearings would become entirely unpredictable as to their scope, timing, and financial burden.

Accordingly, the Statement of Considerations for the revised rules, as well as the revised Part 2 itself, should expressly state that the purpose of adjudicatory proceedings is to resolve specific contentions on matters necessary for a Commission decision in the proceeding, between parties who have standing. The Statement of Considerations and the revised rules also should note the other avenues for expressing views and communicating with the Commission that are available for those who do not have a direct interest in the proceeding or cannot identify a specific factual or legal matter that must be resolved through adjudication.

The Commission proposes (*see* §2.309(e)) to permit a presiding officer to allow "discretionary intervention" into proceedings by persons who do not demonstrate a sufficient interest to have standing. This provision should be eliminated. It is not consistent with the purpose of adjudicatory proceedings and would permit parties who cannot demonstrate a direct interest in the outcome of the proceeding to extend and broaden the scope of the proceeding. The potential for discretionary intervention also provides a further matter for argument and litigation unrelated to the substance of the proceeding, and renders the burdens of proceedings less predictable. As a practical matter, an outside group that wishes to demonstrate standing normally does so through a

local member or representative. A group that cannot convince a single individual who can demonstrate standing to participate is unlikely to serve well the interests of those who will actually be affected by the Commission's decision in a proceeding. Accordingly, provisions permitting discretionary standing should be eliminated. The Commission's regulations already provide means for persons who are not parties to proceedings to express their views through limited appearance statements (see, e.g., 10 C.F.R. §§2.715 (a) and 2.1211(a)) or the filing of comments (10 C.F.R. §2.1305).

COMMENT 2 -- SELECTION OF ADJUDICATORY PROCEDURES APPROPRIATE TO EACH TYPE OF PROCEEDING

The proposed revisions include a new Subpart C to 10 C.F.R. Part 2. Subpart C contains procedures common to all NRC adjudications, as well as directions for selection of specific adjudicatory procedures (contained in other subparts) to be applied to different types of proceedings.

We support the general approach contained in Subpart C. Although it might appear to add complexity to Part 2, this approach actually simplifies and clarifies the requirements applicable to each particular type of proceeding by providing clear instructions on the requirements parties are expected to meet in each case. In addition, this approach ensures that adjudicatory processes most suited to the nature of the proceeding (see Principle 2 above) will be applied. For example, the proposed §2.310(a) of Subpart C directs that enforcement proceedings be conducted pursuant to the trial-type procedures in Subpart G. This is appropriate because enforcement actions typically involve making determinations of intent and credibility, and establishing facts and circumstances regarding particular past occurrences, which are purposes for which trial-type procedures are well suited. See Carolina Power & Light Company (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 fn 6 (2001). For proceedings more likely to involve technical issues, the proposed §2.310 generally provides for less formal hearing procedures more suited to the resolution of those issues. Overall, this approach helps ensure that processes appropriate to the nature of the issues to be decided are used.

But there are certain features of the procedures for selecting hearing tracks in the proposed Subpart C that are likely to undercut these advantages. For example, the proposed §2.310 (g) and (h) of Subpart C generally provides that reactor licensing proceedings may be conducted under the less formal hearing procedures specified in Subparts L or N. However, the proposed §2.310(c) of Subpart C permits reactor licensing proceedings to be conducted under trial-type hearing procedures when a "large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures" is present. This exception undermines the advantages to be derived from less formal procedures, and could result in the application of formal hearing procedures, which are not well-suited to the resolution of numerous and complex technical issues, to reactor licensing proceedings in which such issues predominate. Furthermore, proceedings in which there are a large number of complex technical issues

are the very proceedings likely to involve evaluation of expert opinion and to most benefit from presentation of evidence through written submittals and responses rather than oral testimony and cross-examination. In addition, the availability of the exception creates additional opportunities for argument and litigation over procedural matters not related to the substance of the licensing action, and contributes to uncertainty regarding the schedule and costs of proceedings. Accordingly, we urge that the Commission abandon the “large number of complex issues” test and provide that all reactor licensing proceedings be conducted under Subparts L or N.

The regulations should clearly state which procedures should apply to each type of proceeding, without exceptions. As described below, within each hearing “track,” sufficient flexibility can be preserved to account for differences in particular cases.

COMMENT 3 – ORAL VS. WRITTEN HEARINGS

Related to the question of which adjudicatory process should be applied is the type of hearing conducted under each process. The proposed revisions contemplate a variety of types of hearings under Subparts G, K, L, M, and N. In some cases, such as subpart G, a formal, trial-type hearing is specified. In others, such as proposed subparts L, M, and N, informal hearings are prescribed. In proposed subparts L and M, oral hearings are to be conducted unless the parties agree upon a hearing consisting of written submittals.

For proceedings involving NRC consideration of applications or permits for transfer, amendment, or renewal of licenses, the presumption should be that a hearing on written submittals shall be conducted unless a specific need for oral testimony is shown. As recently noted by the Commission,

Many issues . . . particularly those involving competing technical or expert presentations, frequently are amenable to resolution by a licensing board based on its evaluation of the thoroughness, sophistication, accuracy, and persuasiveness of the parties’ submissions.

Carolina Power & Light Company, CLI-01-11, 53 NRC at 386.

Oral hearings entail substantial burdens on parties and the NRC Staff, including need to provide a hearing location, travel to and from often distant locations, and the need to devote witnesses (often personnel who have other primary duties) for long periods of time. These burdens can be substantially reduced or eliminated through the use of hearings based upon written submittals.

Oral hearings should be reserved for situations in which written submittals will not suffice or would be more efficient than hearings based upon written submittals. Specifically, oral hearings should be used only in cases where the presiding officer determines that the nature of the issues to be adjudicated are such that an oral hearing is

necessary to resolve the contention(s) at issue (such as where conflicting factual testimony has been submitted and the credibility of individual fact witnesses is in dispute), or that an oral hearing is the most efficient way of obtaining the evidence necessary to resolve the contention.

This approach would provide the most direct and efficient means for achieving resolution of issues under adjudication, while preserving the option of oral hearings in cases where such hearings are necessary.

COMMENT 4 – SCHEDULES AND CASE MANAGEMENT

We strongly support the fixed time limits for filing of petitions to intervene and contentions that are proposed in §2.309(b). Absence of firm time limits in the past has led to undue delays between the time intervention was initially sought and the time of determinations on standing and the admissibility of contentions. The proposed 45-day period provides ample time for potential intervenors to evaluate a proposed NRC action and formulate contentions, while permitting a timely determination on whether an adjudicatory proceeding is required.

In addition, once an adjudicatory proceeding is commenced, firm schedules should be established for its conduct. This approach has been successful in recent Commission proceedings and should be institutionalized in the regulations. These schedules should provide sufficient time for parties to prepare for and participate in the proceeding, but limits should be set to prevent proceedings from becoming unduly delayed and unpredictable in duration (see Principle 3 above). Schedules and actions required of the parties should be set forth either in the Commission's regulations, or in case management orders issued by the Commission or the presiding officer, and should be enforced through sanctions. Departures from these schedules and orders should not be permitted except upon an affirmative showing that specific criteria for departure from the schedule or order have been met.

As an example, the regulations in Subpart C (proposed §2.332) should provide that the presiding officer issue a decision on standing and admissibility of contentions within 45 days of the completion of the parties' filings on those issues. Similarly, the regulations should provide that the time from acceptance of contentions until the commencement of a hearing (or filing of testimony in the case of a proceeding involving only written submittals) shall be prescribed, following a prehearing conference, in a scheduling order to be issued within 30 days after the parties and contentions for hearing have been identified. All pre-hearing activities, such as discovery, motions, etc., would be required to be completed within the times specified in that scheduling order. The regulation should provide that the schedule contained in the order may only be extended upon an affirmative showing that all of the following conditions are met: (1) the requesting party has exercised due diligence to adhere to the schedule; (2) the requested change is the result of unavoidable circumstances; (3) failure to grant the extension will cause

substantial and irreversible prejudice to the requesting party; and (4) the extension will not cause substantial prejudice or harm to other parties. In the event that parties do not comply with their obligations under these schedules and orders, the regulations should authorize the presiding officer to impose appropriate sanctions, such as dismissal of the offending party from the proceeding or loss of the right to litigate a particular contention affected by the noncompliance. Such provisions will ensure that parties take seriously their obligations for participation in NRC proceedings and that proceedings are concluded efficiently and in a timely manner.

COMMENT 5 -- DISCOVERY

Discovery is intended to allow the parties sufficient access to information to permit full and fair litigation of matters to be adjudicated. This access should enable the basis for each party's position on a contention to be understood, and permit parties to learn the facts that bear upon the validity of the contention prior to hearing (see Principle 4 above).

At the same time, if not properly regulated, discovery has the potential to consume large amounts of resources, provoke litigation on ancillary matters, and extend into areas unrelated to those actually at issue in the adjudication. Unregulated discovery can also be abused by parties seeking to delay or impose burdens on their opponents. In sum, it can render the cost and schedule of NRC proceedings unpredictable, and deter parties from availing themselves of the Commission's licensing processes.

In our view, some of the discovery requirements set forth in the proposed Subpart C are unclear, are likely to lead to substantial disputes, and create burdens beyond those necessary to accomplish the purposes for which discovery is designed. Most importantly, proposed §2.336 (a)(4) requires parties to supply "all other documents . . . that, to the party's knowledge, provide direct support for, or opposition to, the application or other proposed action that is the subject of the proceeding." This requirement is not capable of objective interpretation, and would appear to apply without limit as to whether the documents are actually in the party's possession, custody or control and without respect to the burden, expense, and impact on schedule of producing such documents. More fundamentally, this provision would require applicants to produce (and the NRC Staff and Public Document Rooms to accommodate) huge volumes of material related to the application but unrelated to any contention that has been admitted for litigation, and is likely to invite discovery disputes on matters irrelevant to the contentions being litigated in the proceeding. This provision is inconsistent with the fundamental purpose of adjudication, which is to resolve specific disputes. It is also redundant of, and/or inconsistent with, other provisions requiring production of other categories of documents or listings of certain categories of documents, such as the proposed §2.336(a)(3).

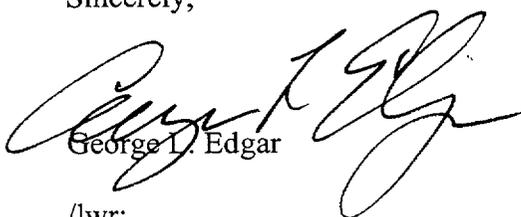
We suggest that §2.336(a)(4) be eliminated. For all proceedings involving NRC approval of an application or permit, transfer of an application or amendment, extension, or renewal of an application, the NRC should use the procedure currently included in 10

C.F.R. Part 2, Subpart L, under which a hearing file is made available by the NRC Staff to all parties. Because it contains the application and all related correspondence between the licensee and the NRC Staff, the hearing file contains the entire basis for NRC Staff approval, and therefore provides all information necessary for a general determination whether the application meets the Commission's requirements. Aside from the hearing file, discovery should be limited to matters relevant to specific admitted contentions, and §2.336 should specifically state that, aside from the hearing file provided by the NRC Staff, materials not relevant to a specific contention are not discoverable. With respect to admitted contentions, parties should have the ability to discover information through the means described in the proposed §2.336(a)(1), (2), (3), and (5). This approach will both ensure that parties are provided with information to allow full and fair litigation of their contentions, and prevent abuses of discovery and the imposition of unwarranted burdens, costs, and delays.

* * * * *

Thank you for consideration of these comments. Additional comments in response to a number of the Commission's specific requests for comment are appended as Attachment A. Please call me or Bill Baer at (202) 467-7454 should you have any questions or require further information.

Sincerely,


George L. Edgar

/lwr:

Attachment

COMMENTS ON SPECIFIC ISSUES IN CONNECTION WITH REVISIONS TO ADJUDICATORY PROCESS

Issues	Proposed Comment
<p>1. The Commission seeks comments on whether the informal hearing processes embodied in subpart L and subpart N should be augmented or even supplanted by more informal, legislative-style hearing procedures.</p>	<p>The informal hearing procedures embodied in Subparts L and N, if managed properly, would appear to be sufficiently flexible and informal. Moving to an even more informal “legislative style” hearing may also be acceptable, so long as requirements are imposed to ensure that hearings will be clearly focused on matters in dispute that must be adjudicated, and that parties will have sufficient opportunity to challenge factual claims or expert opinions advanced by their opponents. As described in the cover letter (Comments 2 and 3), Subparts L and N (and other subparts) could be modified so that the presumption is that hearings will be conducted on the basis of written submittals, with oral hearings reserved for situations in which particular criteria are met. This approach would eliminate much of the burden of the current hearing process while keeping hearings focused on specific matters actually in dispute and providing parties with the opportunity to respond to other parties’ factual claims and expert opinions.</p>
<p>2. The Commission requests public comment on the feasibility and desirability of using legislative-style hearing procedures for matters that would otherwise be subject to subpart L and subpart N procedures.</p>	<p>See response to item 1 above.</p>
<p>3. The Commission requests public comments on (i) The proposed rule’s approach of multiple, specialized tracks tailored to certain types of issues, (ii) whether additional specialized tracks should be considered, (iii) the desirability of adopting an alternative approach of a single formal and two informal hearing processes, with the presiding officer given the discretion to tailor the procedures to suit the circumstances of each case.</p>	<p>(i) As noted in the cover letter, we support the use of multiple hearing tracks tailored to certain types of issues. In general, hearings on license applications, amendments, and transfer requests should be informal and normally conducted by means of written submittals. Formal trial-type hearings should be reserved for enforcement actions. We disagree with the “complex issues” test for the application of Subpart G procedures. See Principle 2 and Comment 2 in the cover letter.</p> <p>(ii) Additional specialized hearing tracks are not necessary. The proposed tracks, with some modifications, should be sufficient to address the various types of matters coming before the Commission for adjudication. See Comments 2 and 3 in the cover letter.</p>

Issues	Proposed Comment
	(iii) We do not support the adoption of a single formal and two informal hearing tracks, with presiding officer discretion to tailor procedures for each case. Although somewhat complex, the multiple-track approach currently proposed would (if modified as suggested in cover letter Comments 2 and 3) provide clear directions and certainty for each type of proceeding. Providing hearing officers with wide discretion as to hearing processes to be applied in each case would likely cause additional disputes and litigation over procedural matters, would reduce the predictability of likely burdens on participants in proceedings, and would risk application of inconsistent processes in similar cases.
4. The Commission seeks public comment as to whether there are better alternatives to the proposed rule's approach for defining what type of proceedings are appropriate for formal and informal hearing procedures. Is the proposed category of cases to which formal hearing procedures would apply too narrow?	The proposed category of cases to which formal hearing processes would apply is not too narrow. We disagree with the assumption that formal trial-type procedures such as those in Subpart G will be helpful in resolving numerous and complex issues. Instead, informal processes (such as those in proposed Subparts L and N) should be used for nearly all types of proceedings. See cover letter Comments 2 and 3.
5. The Commission welcomes comments on whether discovery should be eliminated or limited to requests from the presiding officer. Would a general disclosure obligation of the sort that would be required in the proposals that follow be sufficient discovery for all NRC adjudicatory proceedings?	Discovery should be available to parties who have demonstrated standing and have advanced litigable contentions, and should be limited in scope to matters relevant to specific contentions admitted for litigation. As noted in the cover letter, the general disclosure requirements contained in the proposed regulations are very broad, vague, and would likely impose burdens and foster litigation unrelated to the merits of the matters to be litigated. In particular, the test should be whether the material is relevant to an admitted contention, not the application as a whole. See cover letter Principle 4 and Comment 5.
6. The Commission seeks public comment on the degree to which oral testimony and questioning of witnesses should be used in each of the proposed hearing tracks.	With the exception of trial-type hearings under Subpart G, the presumption should be that hearings would be conducted based upon written submittals unless specific criteria are met. See cover letter Comment 3.
7. With respect to cross-examination and questioning by the presiding officer, the Commission requests public comment on: (i) The relative value and drawbacks of cross-examination; (ii) whether the proposed approach that would limit cross-examination in favor of questioning by the presiding officer is	(i) In some circumstances, cross-examination can assist a presiding officer by requiring witnesses to answer questions which would otherwise not be asked. It is particularly useful in cases where the credibility or motivations of a witness or his or her recollection of events is at issue. However, cross-examination also has several drawbacks. For example,

Issues	Proposed Comment
<p>appropriate; (iii), whether subpart L should retain traditional cross-examination as a fundamental element of any oral hearing; and (iv) assuming that cross-examination is necessary or more effective in certain circumstances to afford parties fundamental fairness, timely and effective identification of relevant and material information, or to provide public confidence in the hearing process, the appropriate criteria for identifying and distinguishing between proceedings where cross-examination should be used, versus those where cross-examination is not necessary.</p>	<p>when questions involve complex technical issues or analysis of substantial amounts of information, the cross-examination format does not permit the witness to go back and study or analyze the applicable data. Cross-examination may take substantial amounts of time and, particularly when the persons conducting the cross-examination do not have a strong technical understanding, questions may range far from the issues that must be adjudicated. In addition, cross-examination requires significant resources because it requires the attendance of the presiding officer, NRC staff personnel, witnesses, and attorneys for the parties. Accordingly, cross-examination should be reserved for those matters (such as disputes about intent, credibility, and claims regarding specific past occurrences) in which it is likely to add appreciable value. See Principle 2 and Comments 2 and 3.</p> <p>(ii) For those cases in which oral hearings are appropriate (see cover letter Comment 3), we support limiting cross-examination to questions propounded by the presiding officer. In such cases, the parties would be able to suggest questions to the presiding officer; however, the presiding officer would be able to exercise discretion to eliminate questions not material to the decision of the issues in litigation. Also, in many cases, it may be appropriate for questions put by the presiding officer to be provided and responded to in writing. Especially in cases where questions involve complex data or require study and analysis, this would ensure complete and accurate answers. So conducted, questions by the presiding officer would be likely to contribute to a full, fair, and accurate decision.</p> <p>(iii) Cross-examination need not be retained as a part of Subpart L; as noted above, a fairer and more efficient process would be to permit the presiding officer to ask questions (including questions suggested by the parties), preferably in writing.</p> <p>(iv) As noted above, cross-examination should be preserved in cases (such as most enforcement proceedings) in which the witness's recollection of specific past facts or events, or the witness's credibility or intent, is at issue. Cross-examination does not necessarily serve a useful purpose in</p>

Issues	Proposed Comment
	resolving technical issues. In non-enforcement cases, particularly those involving complex technical issues, the ability of the presiding officer to propound questions, including questions suggested by the parties, is fully adequate to serve any purpose that cross-examination could accomplish, and would serve those purposes more effectively and efficiently.
8. The Commission welcome comments on whether firm schedules or milestones should be established in the NRC 's rules of practice in 10 CFR part 2.	We support the inclusion in Part C of the firm schedules and milestones for several portions of adjudicatory proceedings. For example, the times within which to demonstrate standing and file contentions should be fixed so that excessive time and resources are not consumed in pre-hearing proceedings. The proposed rules' time limits are satisfactory in this regard. Furthermore, a decision on standing and admissibility of contentions should be issued within 30 days of the parties' final filings. The regulations should require that once the decision on standing and contentions has been issued, the presiding officer shall establish an enforceable milestone schedule. The presiding officer would establish this schedule based upon the scope and nature of the contentions admitted for adjudication. See cover letter Principle 3 and Comment 4.
9. The Commission seeks public comment and views on the appropriate time frame for filing a petition/request for hearing and contentions.	The time limits proposed in Section 2.309(b) are appropriate. See cover letter Comment 4. The requirement that contentions be filed within the time frame specified for filing of a petition to intervene is also appropriate. The information provided in the contentions may provide a clearer understanding of the basis for standing. In addition, this provision would cure a flaw in the current rules that makes the time period for final submissions for contentions unclear.
10. The Commission requests public comment and suggestions on whether the standard for discretionary intervention should be extended by providing an additional alternative for discretionary intervention in situations when another party has already established standing and the discretionary intervenor may "reasonably be expected to assist in developing a sound record."	The Commission should not provide any additional alternatives for discretionary intervention. See cover letter Principle 1 and Comment 1.
11. The Commission requests public comments on whether, as an alternative to codification of the six-part Pebble Springs	Discretionary intervention should not be permitted. See cover letter Comment 1.

Issues	Proposed Comment
<p>standard for discretionary intervention, the Commission should adopt a simpler test for permitting discretionary intervention and the nature of such a standard. Commenters advocating a simpler standard should address how their alternative requirements would help ensure that proceedings are conducted in a timely fashion and are not made unduly complex by multiple intervenors.</p>	
<p>12. The Commission proposes that where Federal Register a notice is not required by statute or regulation, any notice of agency action (for which an opportunity for hearing may be required) published on the NRC Website initiates the 45-day period in which timely requests for hearing must be filed. The Commission requests public comment on this proposal including whether there are other notification methods that the NRC could utilize to provide timely notice of licensing actions which are not required to be noticed in the <i>Federal Register</i></p>	<p>We support the proposal to provide notice of agency action on the NRC Website in cases where Federal Register notice is not required by statute or regulation, thereby initiating the 45-day period in which timely requests for hearing and contentions must be filed. The NRC website is broadly and easily accessible to the public, both from home computers and through public libraries and educational institutions.</p>
<p>13. The Commission requests public comment on whether both a hearing request and proposed contentions should be filed simultaneously, or whether this approach should be rejected and something closer to the current NRC practice be retained, viz., filing of petitions for hearing within thirty (30) days of notice, and filing of contentions later.</p>	<p>We strongly support the proposal that requests for hearing and proposed contentions be filed simultaneously. As a practical matter, these filings often contain much of the same information, and unless a party can formulate a litigable contention, it is unlikely to be able to demonstrate standing. The NRC's proposed timeframe of 45 days for the filing of the hearing request and proposed contentions provides adequate time for the formulation of contentions and the preparation of a well-supported hearing request. Adoption of this proposal would eliminate the need for serial decisions on standing and contentions and would ensure that the parties begin to focus more quickly on matters actually in dispute. See cover letter Principle 3 and Comment 4.</p>
<p>14. The Commission also requests public comment and suggestions on whether it should allow seventy-five (75) days from notice of opportunity for hearing for filing of contentions, or whether some other time frame for requesting a hearing and submitting contentions should be established.</p>	<p>We strongly oppose providing a 75-day period within which to file requests for hearing/petitions to intervene and contentions. The proposed 45-day time period following notice of a proposed action is fully adequate. A 75-day (2.5 months) period before a party is required to identify the issues it intends to raise is excessive and is not consistent with efficient conduct of licensing actions. See cover letter Principle 3 and Comment 4.</p>

Issues	Proposed Comment
<p>15. Proposed § 2.309(h) allows the applicant or licensee and the NRC staff twenty-five (25) days to file written answers to requests for hearing/petitions to intervene and contentions, and permits the petitioner to file a written reply to the applicant/licensee and staff answers within 5 days after services of any answer. No other written answers or replies will be entertained. The Commission seeks public comment on whether the proposed time limits for replies and answers should be expanded.</p>	<p>We support the timeframe proposed in Section 2.309(h). See cover letter Comment 4.</p>
<p>16. The Commission requests comments on the proposal to require the application of formal hearing procedures in hearings involving enforcement matters and views on whether and when to allow the use of informal hearing procedures for these matters.</p>	<p>In general, we support the proposal to apply formal hearing procedures to enforcement matters. See cover letter Principle 2 and Comment 2. However, the Commission should provide the option for less formal procedures at the request of the affected licensee or individual.</p>
<p>17. Section 2.310 of the proposed rule provides that amendments to the construction authorization for the HLW repository, and amendments to the authority to receive and possess HLW should be subject to the same criteria as other proceedings in determining what hearing procedures will be used. The Commission welcomes public comment on this subject.</p>	<p>In determining what hearing procedures will be used to conduct proceedings for construction amendments for the HLW repository, and amendments to the authority to receive and possess HLW, criteria consistent with those used in other proceedings should be employed. The nature and subject matter of these proceedings is similar to those in Commission proceedings involving reactor licensees and other licensing actions, and there is no principled basis for applying different hearing procedures. In particular, we believe that these proceedings should be conducted under proposed Subparts L or N.</p>
<p>18. Section 2.310(c) includes a criterion that would call for the use of the formal hearing procedures of subpart G in those reactor licensing proceedings that involve a large number of complex issues which the presiding officer determines can best be resolved through the application of formal hearing procedures. The Commission requests public comments on the appropriateness of this criterion, and representative examples of the type of "complex issues" that would benefit from the use of formal hearing procedures.</p>	<p>As noted in cover letter Comments 2 and 3, we believe that there is no basis for applying formal hearing procedures of Subpart G to reactor licensing proceedings that "involve a large number of complex issues." On the contrary, it is precisely these types of proceedings which are likely to benefit from a process based on written submittals.</p>
<p>19. The Commission requests public comment on whether section</p>	<p>Because of the wide variety and nature of motions that may occur in a</p>

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2.323(a) should be more specific with respect to the time limit for filing all motions by specifying a time limit of ten (10) days for filing of motions, beginning from the action or circumstance that engenders the motion.	particular proceeding, we do not believe it would be useful to broadly specify a 10-day time limit for the filing of motions.
20. The Commission requests public comment on whether the “compelling circumstances” standard for reconsideration in the proposed rule should be adopted or eliminated from the final rule.	We support the inclusion of the “compelling circumstances” standard for reconsideration in the final rule. This standard will help ensure that Commission proceedings are concluded efficiently and predictably. See cover letter Principle 3. Unless there is some clear and material error in the decision, which would render the decision invalid, reconsideration is not appropriate. Permitting reconsideration absent such an error would elevate procedural nicety over substantive quality and would adversely affect the ability to conclude proceedings.
21. The Commission requests comment on the case management provisions proposed in § 2.332 and welcomes suggestions for additional case management techniques.	We support the case management provisions proposed in Section 2.332. We also suggest that the Commission maintain strong oversight of case management by requiring the presiding officer to provide copies of scheduling orders to the Commission and also to provide the Commission with copies of any subsequent orders modifying an initial scheduling order.
22. The Commission seeks public comment on the use of ADR in NRC proceedings.	We generally support the availability of ADR in the content of NRC proceedings. We believe that licensees and intervenors should be provided with broad flexibility, on a voluntary basis, to agree upon mutually acceptable ADR procedures.
23. The Commission requests public comment on whether subpart G should be used in all initial power reactor construction permit and operating license proceedings rather than in reactor licensing proceedings involving a “large number of complex issues.”	We oppose the application of Subpart G to all initial reactor construction permit and operating license proceedings, particularly those in which a “large number of complex issues” is presented. Subpart G procedures have not proven to be an efficient and predictable means for resolving reactor licensing proceedings. The types of technical and engineering issues that predominate in these proceedings are generally better resolved through written submittals and informal hearings. See cover letter Principle 2 and Comment 2.
24. The proposed rule would expand the presiding officer’s discretion not to consider a motion for summary disposition by providing that the presiding officer need not consider the summary disposition motion unless he or she determines that	We do not oppose some discretion on the part of the presiding officer not to consider a motion for summary disposition; however, we believe that the presiding officer should rule on such motions unless consideration of the motion would clearly result in a delay to the overall conclusion of the

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<p>resolution of the motion will serve to expedite the proceeding. Alternatively, the Commission could adopt a standard whereby the presiding officer need not consider a summary disposition motion unless the motion would “substantially reduce the number of issues to be decided or otherwise expedite the proceeding.” The Commission requests public comment on whether the revised standard for consideration of summary disposition motions in the proposed rule should be adopted, or whether the alternate standard set forth above should instead be adopted.</p>	<p>proceedings.</p>
<p>25. The Commission requests public comment on the advantages and disadvantages of shifting the focus of subpart L to informal oral hearings, including the proposed requirement for submission of contentions, and the opportunity to pose questions indirectly to witnesses by proffering proposed questions to the presiding officer.</p>	<p>We strongly support shifting the focus of Subpart L to an informal hearing process and requiring that contentions be submitted. See cover letter Principles 1 and 2. We believe that requiring the parties to articulate litigable contentions will ensure that hearings are focused on real matters in dispute that are material to the overall outcome of the proceeding. Furthermore, this approach will reduce the amount of pre-hearing litigation on procedural matters. However, as noted in Comment 3 to the cover letter, we believe that in most cases hearings can be conducted by means of written submittals without the need for an oral hearing.</p>
<p>26. The Commission requests public comment on the desirability of appointing three-judge panels in informal hearings under subpart L, and the circumstances in which appointment of such panels would be useful.</p>	<p>We believe that it may be appropriate to appoint three judge panels for initial reactor construction permit and operating licensing cases, and other cases in which there is likely to be a large number of complex issues, including technical issues. In these cases, the employment of a panel will ensure balanced judgment and the availability of the necessary technical expertise to resolve the proceeding.</p>