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**DOCKETED NUMBER**

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

September 14, 2001

**DOCKETED  
USNRC**

September 17, 2001 (4:38PM)

Ms. Annette L. Vietti-Cook  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Att'n: Rulemakings and Adjudications Staff

**OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF**

**Re: Comments on Proposed Rule  
Making Changes to Adjudicatory Process**

Dear Ms. Vietti-Cook:

Pursuant to the Nuclear Regulatory Commission's ("NRC") Federal Register Notice (66 Fed. Reg. 19610 (April 16, 2001)) ("NRC Notice"), we are pleased to submit the following comments on behalf of Constellation Energy Group, Inc., Detroit Edison Company, Florida Power & Light Company, Nuclear Management Company LLC (on behalf of itself and as operator of nuclear plants owned by Xcel Energy Inc., Alliant Energy Corporation, Wisconsin Electric Power Company, Wisconsin Public Service Company and Consumers Power, Inc., Public Service Company of New Mexico, and Rochester Gas and Electric Corporation ("the Utilities") in support of the NRC's proposed rule. These comments are intended to supplement those being submitted by the Nuclear Energy Institute ("NEI") on behalf of the nuclear industry. The Utilities fully endorse and adopt as their own the NEI comments. In particular, the Utilities agree with NEI that the national goal of preserving the nuclear option for environmentally benign generation of electricity will not be achieved without a licensing process that eliminates crippling time delays and uncertainties.

The NEI comments provide an extensive discussion of the background of the NRC's proposed changes to the Commission's adjudicatory process, and underscore the importance and significance of those changes to the future of the nuclear energy industry in the United States. Those subjects, therefore, will not be addressed in these comments. The Utilities agree with NEI's assessment that the proposed rule fills an obvious and important gap in the NRC's efforts at regulatory reform. For that reason, the Utilities urge the Commission to adopt the revisions to its regulations as set forth in the proposed rule with the modifications suggested below.

These comments consist of three parts. In the first part, the Utilities address certain general issues which are particularly important to improving the NRC licensing process. In the second part, the Utilities respond to the NRC's request for comments on aspects of the proposed changes. In the last part, specific comments on the text of the proposed rule are provided.

**TEMPLATE = SECY- 067**

**SECY-02**

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## A. General Comments

### 1. **Timeliness of Decisions**

The Utilities strongly support the Commission's efforts to streamline and increase the efficiency of its adjudicatory processes. Commission proceedings generally take too long and consume far too many resources. To date, the Commission has generally left the timing of decisions to the discretion of presiding officers and licensing boards, who have historically sought to be exceedingly thorough in their reasoning and analyses. This has often delayed the issuance of decisions and rulings on motions. We believe, however, that timely decisions are crucially important in the NRC adjudicatory process. In the absence of timely decisions, efforts to streamline the Commission's adjudicatory process may not be successful.

It appears to the Utilities that the Commission is the appropriate body to determine in a given instance if a decision should be allowed to be delayed. The Commission has recognized the adverse impact on all parties from delayed decisions and unnecessarily prolonged proceedings. *See, e.g.*, Policy on Conduct of Adjudicatory Proceedings, Policy Statement, CLI-98-12, 48 NRC 18 (1998). We therefore strongly endorse the requirement in proposed §2.334(b) that a presiding officer or licensing board must report in writing to the Commission whenever it appears that a decision will be delayed beyond the time specified in the schedule set for the proceeding. (The Utilities recommend, however, that such a schedule call for decisions by the presiding officer or licensing board no later than the 60-day time period suggested by the Commission's Policy.) As indicated in proposed §2.334(b), the content of this report should be similar to the report required when a Commission-set milestone is missed (*e.g.*, why the decision has not been issued, what action(s) or information is required to issue the decision, and when the decision is expected to be issued). The Utilities believe that the proposed new requirement will have a salutary effect in expediting decision-making by the presiding officers and licensing boards; nonetheless, the Utilities recommend that upon receipt of such a report, the Commission exercise its oversight authority to provide a resolution of the pending issues, whether by directing expeditious issuance of the decision, resolving the matter itself, or taking other appropriate action. The Utilities thus urge the Commission to exercise its authority, when necessary, to ensure that the full benefit of the new, streamlined procedures is realized.

### 2. **Timeliness of NRC Staff Reviews**

Likewise, while not part of the adjudicatory process addressed by the proposed rule, the timely completion of the safety and environmental reviews by the Commission Staff is often the most critical aspect of the NRC licensing actions. The Utilities would welcome Commission

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initiatives to further assure that the Staff's safety and environmental reviews are conducted in an efficient and expeditious manner. In particular, the Commission could realize significant improvement in the efficiency of certain proceedings by explicitly directing that final NRC Staff documents (e.g., Safety Evaluation Report ("SER") and Environmental Impact Statement ("EIS")) not be required before adjudication of safety or environmental contentions. Indeed, holding adjudication in abeyance waiting for the completion of these Staff documents undermines the reasoning for early submission of contentions.

In the Statement of Considerations to the 1989 amendments to the Rules of Practice, the Commission directly addressed the role of Staff-prepared evaluations in licensing hearings being conducted by its licensing boards. The Commission stated there that:

With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.

54 Fed. Reg. 33,168, 33,171 (1989). Thus, the adequacy of the Staff's SER is not the proper subject of an adjudicatory proceeding before a presiding officer or licensing board; it is only the Staff's position with respect to the specific issues being adjudicated that is germane.

The Commission should, therefore, establish procedures for scheduling the orderly and final resolution of contested health and safety and environmental issues in adjudicatory proceedings independent of the NRC Staff's scheduled completion or issuance of an SER or EIS. The Staff should be directed to prepare statements of position on the issues being adjudicated and/or issue "partial" SERs or EISs presenting the Staff's views in advance of the completion of the remainder of the document, and proposed §2.232(d) should be modified to that effect. Indeed, the final versions of these documents would benefit from the scrutiny of the issues examined during the adjudicatory proceeding.

### 3. Expert Witness Qualifications and Testimony

The legal threshold for qualification as an "expert" witness in a Commission proceeding, as applied by presiding officers and licensing boards, is ineffective at ensuring that only scientifically supportable issues are adjudicated. As a practical matter, the *de facto* test for an expert witness has devolved to having an advanced degree in any subject associated with a contention. Further, once admitted on one issue, the "expert" is often permitted to opine on other issues in the same proceeding unrelated to the purported "expertise." Proceedings which include the participation of unqualified "experts" result in adjudication delays and increased litigation

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burdens on the parties. The Commission should encourage presiding officers to admit only properly qualified experts, fully satisfying the standards it has established. *See e.g., Duke Power Co.* (William B. MCGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982). Hearings which debate "junk science" are the inevitable consequence of an overly permissive standard for qualification of expert witnesses. The technical members of the Atomic Safety and Licensing Boards are fully capable of recognizing unqualified witnesses and unscientific testimony. Boards should be empowered and encouraged to strike unsupportable "expert" witness testimony.

The Commission should also formally adopt a standard for determining the adequacy of expert opinions tendered as the basis for proposed contentions. One standard applied by some licensing boards is that expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is insufficient to support a contention. *See, e.g., Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd*, CLI-98-13, 48 NRC 26 (1998). Also, speculation without basis, even by an expert, is not sufficient to support the admission of a contention. *See, e.g., Yankee Atomic Energy Company* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996); *Consolidated Edison Co. of New York* (Indian Point Nuclear Generating Units 1 and 2), CLI-01-19, 54 NRC \_\_, slip op. at 40 (2001). The Utilities support this standard.

#### **4. Establishment of Informal Hearing Framework**

The Utilities support the establishment of a uniform informal hearing framework (through amended subpart L) that should become the presumptive hearing mechanism for Commission licensing actions. Moreover, the Utilities believe that the proposed regulatory framework could be further simplified by merging the license transfer hearing provisions in subpart M into subpart L, and making the "fast-track" hearing set forth in proposed subpart N an option available to the Commission or the presiding officer, where appropriate, in subpart L proceedings.

#### **B. Response to NRC's Requests for Comments**

In the NRC Notice, the Commission identified a number of topics about which it solicits comments from interested parties. Following are the Utilities' responses to those requests for comments.

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On 66 Fed. Reg. at 19,622, the Commission requests comments 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 Utilities believe that discretionary intervention should only be allowed in extraordinary circumstances and only if a hearing has already been granted as a matter of right. Therefore, the Utilities would oppose expanding the potential for discretionary intervention. Also, the suggested standard – which rests solely on the requestor’s potential contribution to the record – may be appropriate in some narrow circumstances, such as when a party is already litigating in another proceeding an issue being addressed in the proceeding in which intervention is sought. However, the potential contribution to the record is only one of the factors to be considered whether to allow discretionary intervention; making it the sole factor may allow parties to gain standing (once another party has already been allowed to participate) even though they only have an academic or ideological interest in the proceeding.

On 66 Fed. Reg. at 19,622, the Commission requests comments on its proposal to provide notice by publication in the NRC Website of proposed agency actions where Federal Register notice is not required by statute or regulation. The Utilities support the proposal, and also support the proposed requirement that contentions be filed simultaneously with hearing requests. We oppose as an unwarranted source of delay the possibility raised by the Commission of allowing contentions to be filed 75 days after the NRC gives notice of proposed action.

On 66 Fed. Reg. at 19,623, the Commission notes that it is changing the Subpart L rules to require the filing of contentions with basis and specificity in order to obtain a hearing rather than the raising of “areas of concern” as was allowed previously. The Utilities support the proposed change, since it will lead to the early definition of issues and will allow the determination of which issues merit the use of the adjudicatory process.

On 66 Fed. Reg. at 19,623, the Commission asks for comments on whether the periods allowed for answering requests for hearing/petitions to intervene and contentions, and replies to such answers, should be expanded. As set forth in the specific comments below, such expansion would only be warranted in situations in which the times allowed by the rule are unworkable.

On 66 Fed. Reg. at 19,623, the Commission asks for “specific comments and suggestions on the matter of criteria for the selection of cases where the use of formal hearing procedures would be of benefit.” The Utilities believe that formal hearing procedures should be provided where required by statute and where the hearing may result in adverse enforcement action against individuals or entities. The Utilities do not believe that a formal hearing should necessarily be

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held in cases involving "very complex issues." The implicit assumption by the Commission is that complex technical issues are best handled through the formal procedures of discovery, oral presentation at a hearing, and cross-examination. That assumption is erroneous. Many of the complex technical issues in NRC proceedings are addressed through the testimony of experts. Expert testimony is in most cases presented in written form, *see, e.g.*, Fed. R. Civ. P. 26(a)(2), and so is the corresponding testimony of experts retained by other parties to the proceeding. Therefore, cases involving complex technical issues lend themselves well to the informal proceeding being proposed under amended subpart L.

On 66 Fed. Reg. at 19,624, the Commission seeks comment on its proposal to retain formal hearings for the initial authorization to construct a high-level waste ("HLW") repository, but dispense with such hearings for proceedings to change the authorization to construct and operate such a repository. The Utilities disagree with the proposition that initial licensing of a high level waste repository should require a formal hearing. For the reasons discussed in the preceding paragraph, the complex issues raised by the initial licensing of the facility can be handled better through an informal proceeding. The Commission implicitly recognizes this when it proposes to use informal procedures for subsequent amendments to the initial licensing action.

On 66 Fed. Reg. at 19,624, the Commission seeks comment on whether formal hearings should be required in all instances in "(i) Initial power reactor construction permit proceedings, (ii) initial operating license proceedings, (iii) combined license issuance proceedings under 10 CFR part 52, subpart C, and (iv) hearings associated with authorizations to operate under a combined license under 10 CFR 52.103." The Utilities oppose making such a blanket determination by rule, since in most situations the proceedings identified in (i) through (iv) would involve technical issues requiring expert testimony and would lend themselves to the informal procedures of subpart L.

On 66 Fed. Reg. at 19,625, the Commission requests comments and suggestions on the appropriate criteria for the use of subpart N. The Utilities have two comments in this regard. First, no specific set of criteria need to be defined for establishing whether a proceeding should be conducted under subpart N other than a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the proceeding would demonstrably benefit from the use of such procedures. Second, the applicability of subpart N procedures should not be limited to proceedings in which the decision is made to proceed under that subpart. Rather, subpart N procedures should also be available in proceedings conducted under other subparts (e. g., subpart G) to the extent that there are issues or aspects of the proceeding that lend themselves to resolution via the "fast track" approach of subpart N.

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On 66 Fed. Reg. at 19,625, the Commission requests comments on whether a ten day time limit should be set for filing motions from the time of the action or omission that elicits the motion. The Utilities agree with this suggestion. If no time limit is set for the filing of motions, delays and inefficiencies may result as a result of the granting of belated motions.

On 66 Fed. Reg. at 19,625, the Commission requests comment on the case management provisions set forth in proposed §2.332. The Utilities support the provisions in §2.332 intended to maintain control over Commission proceedings. As noted in the general comments, however, in order for the quality and expeditiousness of the hearing process to improve it will be necessary for the Commission to require the licensing boards and hearing examiners to comply strictly with the deadlines set in the regulations for the holding of hearings and the issuance of decisions on various matters.

On 66 Fed. Reg. at 19,625, the Commission notes that it is proposing to change the standard for evaluating motions for reconsideration (in proposed §§ 2.323(e) and 2.344(b)) to one of "compelling circumstances." We believe that the current standard, as defined by NRC case law, should be retained. That standard allows for motions to request the presiding officer to reexamine existing evidence that may have been misunderstood or overlooked or to clarify a ruling on a matter. A motion may not be based on new information or a new thesis not earlier presented, unless the new material relates to a concern of the presiding officer that could not have been reasonably anticipated. In our experience, a motion for reconsideration can be a helpful tool for noting oversights or obtaining clarifications at an earlier stage in the process and thus reducing the amount of litigation downstream.

On 66 Fed. Reg. at 19,626, the Commission requests comment on its proposal to make settlement and alternative dispute resolution ("ADR") procedures available to the parties to Commission proceedings. The Utilities support the use of ADR methods, particularly mediation, to facilitate resolution of some or all the issues in a proceeding. The Utilities believe, however, that use of ADR procedures should be and remain voluntary.

On 66 Fed. Reg. at 19,627, the Commission suggests an alternative standard for considering motions for summary disposition (in proposed § 2.710) in which the presiding officer need not consider a motion unless it would "substantially reduce the number of issues to be decided or otherwise expedite the proceeding." The Utilities believe that the current standard, which includes no such guidance, is preferable. Motions for summary disposition are useful to reduce the litigation burdens. If issues on which no genuine dispute of material fact existed (*i.e.*, those that were suitable for summary disposition) went to hearing, it would result in an unnecessary burden on the parties and the presiding officer. In addition, the effort required to

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prepare an issue for hearing, conduct a hearing on it and address it in post-hearing filings is significantly greater than the effort required to prepare, file and respond to a summary disposition motion. The important contribution of motions for summary disposition to streamlining a proceeding has been demonstrated in numerous "big cases," most recently the *Private Fuel Storage* litigation.

Indeed, the Utilities urge that the use of summary disposition be expanded. The standard for summary disposition before an Atomic Safety and Licensing Board should allow the Board to determine that even genuine disputes of material fact may not require an adjudicatory hearing to resolve. Thus, we propose that the standard of subpart K be adopted more generally to allow the Boards to decide motions for summary disposition where the Board, in its own technical judgment, determines that issues of material fact may be decided by the Board without the aid of live witnesses and cross-examination. This is particularly true where the intervenor in a proceeding attempts to develop its position without the aid of an expert purely by cross-examination or with an expert with little or no relevant expertise in the field.

On 66 Fed. Reg. at 19,628, the Commission requests comments on the proposed shifting of focus in Subpart L proceedings to informal oral hearings. As noted above, the Utilities support such a shift. The Commission also ask whether the proposed rule should explicitly provide for the establishment of three-judge panels on a case-by-case basis. The Utilities do not believe such an express provision is necessary, since under proposed §§ 2.312 and 2.321 a three-judge panel could be designated in the notice of hearing to conduct a hearing in lieu of a single presiding officer. Expressly providing for three-judge panels in subpart L proceedings could be interpreted as a preference for such panels, which would run contrary to the simplified, informal nature of the subpart L proceedings.

**C. Specific Comments<sup>1</sup>**

**1. Comments on Proposed New Subpart C to 10 CFR Part 2**

The Utilities believe that the concept behind the proposed new subpart C is sound, since the proposed subpart would provide a common starting point and uniform rules applicable to all NRC adjudicatory proceedings, subject to specified exceptions. The suggestions offered below

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<sup>1</sup> Added text shown in italics, deleted text indicated by overstrike.

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are intended to clarify the operation of the subpart, eliminate inconsistencies and correct minor errors in the text of the proposed rule.

**a. Section 2.304(f)**

Recommended change:

(f) A document filed by electronic mail or facsimile transmission need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and *two* copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

Comment: There appears to be a typographical error in the proposed rule. Current rules require submission to the Secretary of the original and two copies of the documents in a filing.

**b. Section 2.305(e)(3)**

Recommended change:

(3) By electronic mail, on transmission and receipt of electronic confirmation that one or more of the addressees for a party has successfully received the transmission. If the sender receives an electronic message that transmission to an addressee was not deliverable, *or an addressee informs the sender within one business day that the transmission was not readable*, transmission to that person is not considered complete. *In such an event, service will be deemed complete when accomplished through the means provided in subsections (2) or (4) hereof. A party serving by electronic mail shall serve the original signed copy of the filing to the Secretary in accordance with § 2.305(c), and shall serve hard copies of the filing to the other parties in the proceeding.*

Comment: Service by mail or fax should be provided, as an alternative to electronic filing, in those cases in which an electronic transmission is undeliverable or the sender receives prompt notification from the addressee that the transmitted communication was not readable.

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Even when service is provided electronically, service of hard copies is necessary to ensure consistency in pagination for citation purposes.

**c. Section 2.306**

Recommended change:

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days is added to the prescribed period. Only two (2) days is added when a document is served by express mail. No time is added when the notice or paper is served by electronic mail or facsimile transmission if the recipient has the capability to receive electronic mail or facsimile transmissions, *provided confirmation of service in accordance with § 2.305(e) is obtained. The period allotted for the recipient's response starts upon such confirmation; provided, however, that if a document is served by electronic transmission or facsimile and is not received by a party before 5 PM in the recipient's time zone on the date of transmission, the recipient's response date is extended by one business day.*

Comment: This change is required for consistency with the suggested change to §2.305(e)(3).

**d. Section 2.309(d)(1)**

Recommended change:

(d) Standing.

(1) General requirements. *Except as specified in §2.309(d)(2) and as permitted under §2.309(e), a request/petition to intervene*

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*will be granted only if the requestor/petitioner demonstrates that he or she has standing to intervene as a matter of right. In order to demonstrate such standing, a request for hearing or petition for leave to intervene must state:*

Comment: The standing provisions in subpart C should make it clear that standing as of right, as established by the Commission, the presiding officer, or the Atomic Safety and Licensing Board ("ASLB") designated to rule on the requests for hearing and/or petitions for leave to intervene, is the presumed rule for allowing participation in Commission proceedings.

**e. Section 2.309(e)**

Recommended change:

(e) Discretionary Intervention. (1) *In proceedings where at least one other party has been granted a hearing as a matter of right, a requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under Sec. 2.309(d)(1). Requests for discretionary intervention shall be granted only in exceptional circumstances.* (2) ~~Accordingly,~~ *In addition to addressing the factors in Sec. 2.309(d)(1), a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:*

Comment: There should be a strong presumption against discretionary intervention, and such intervention should in no event be allowed unless a hearing is already scheduled to take place because it was requested by another party as a matter of right.

**f. Section 2.309(f)(1)(iv)**

Recommended change:

(iv) *Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is*

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involved in the proceeding *and that the contention, if proven, would entitle the petitioner to relief;*

Comment: The proposed addition is currently included in §2.714(d)(2)(ii). It is intended to ensure that any contention that is admitted meet materiality requirements.

**g. Section 2.309(f)(2)**

Recommended change: Add after proposed Section 2.309(f)(2) a new subsection (f)(3) as follows:

*(3) A petitioner who has had at least one contention admitted into a proceeding may adopt an admitted contention proposed by another party; however, the presiding officer or Atomic Safety and Licensing Board may require the parties supporting a contention to designate a lead party with respect to that contention, and allow only the lead party to introduce evidence and conduct examination at the hearing on the contention. If all contentions submitted by a petitioner are dismissed from a proceeding, the petitioner will be dismissed even if the contentions proposed by other parties and adopted by the petitioner remain to be litigated. If a petitioner is dismissed from a proceeding, all contentions submitted by the petitioner will be dismissed even if adopted by other parties.*

Comment: While the Commission has ruled that a petitioner who has had at least one contention admitted may adopt the contentions introduced by other parties, the Commission has noted that it does not “give *carte blanche* approval of the practice for all contexts.” *Consolidated Edison of New York* (Indian Point Nuclear Generating Units 1 and 2), CLI-01-19 (August 22, 2001), slip. op. at 10. In order to assure the orderly conduct of a proceeding, it is necessary to authorize the presiding officer or licensing board to require that one of the petitioners sponsoring a contention serve as the lead in its litigation. It is also important to avoid the adoption of other parties’ contentions as insurance against dismissal from a proceeding, that is, a situation in which a petitioner remains a party to a proceeding even though all contentions it proposed have been dismissed, solely by virtue of its having adopted the contentions of other parties that remain in litigation.

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**h. Section 2.310(c)**

Recommended change:

(c) Reactor licensing proceedings *shall be conducted utilizing the procedures of subpart L involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures, unless the Commission, the presiding officer or the Atomic Safety and Licensing Board determine that the proceeding is suitable for the utilization of the simplified procedures of subpart N or the parties agree to utilize such simplified procedures.*

Comment: The permissive language of this proposed section, as written, would lead to uncertainty as to what procedures should be used in reactor licensing proceedings. The proposed change eliminates the uncertainty by making the subpart L procedures applicable unless the proceeding was simple enough that the procedures in subpart N could be applied.

**i. Section 2.310(d)**

Recommended change:

(d) At the request of any party in proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant, the proceeding *shall may* be conducted under the procedures of subpart K of this part; *otherwise, the proceeding shall be conducted under the procedures set forth in subpart L, unless the parties agree to utilize the expedited procedures of subpart N.*

Comment: The recommended change would make the subpart K procedures the norm if requested by any party, otherwise the procedures of subpart L would apply, unless parties agree to use the expedited subpart N procedures.

**j. Section 2.310(e)**

Recommended change:

(e) Proceedings on an application for authorization to construct a high-level radioactive waste repository at a geologic repository

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operations area noticed pursuant to Secs. 2.101(f)(8) or 2.105(a)(5), and proceedings on an application for authorization to receive and possess high-level radioactive waste at a geologic repository operations area must be conducted under the procedures of subparts G and J of this part. ~~Subsequent amendments to the license to construct.~~ Amendments to an authorization to construct a high-level radioactive waste repository at a geologic repository operations area, and amendments to an authorization to receive and possess high level waste at a geologic repository operations area may be conducted under the procedures of subpart L or N of this part.

Comment: Typographical corrections.

**k. Section 2.310(f)**

Recommended change:

(f) Proceedings on an application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes or pursuant to a license condition *shall* ~~may be~~ conducted under the procedures of subpart M of this part.

Comment: See comment on Section 2.310(c), *supra*.

**l. Section 2.310(g)**

Recommended change:

(g) Except as determined through the application of paragraphs (a) through (f) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32 through 35, 39, 40, 50, 52, 54, 55, 61, ~~and 70~~, *and 72* may be conducted under the procedures of subpart L of this part.

Comment: The omission of Part 72 proceedings in this listing appears to be a typographical error.

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m. Section 2.310(h)

Recommended change:

(h) Except as determined through the application of paragraphs (a) through (f) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32 through 35, 39, 40, 50, 52, 54, 55, 61, 70 and 72, and proceedings on an application for the direct or indirect transfer of control of an NRC license may be conducted under the *simplified* procedures of subpart N of this part *if all parties agree to the use of subpart N procedures or if the Commission, the presiding officer or the Atomic Safety and Licensing Board determine that the proceeding would demonstrably benefit from the use of such procedures.* ~~if~~

~~—(1) The hearing itself is expected to take no more than two (2) days to complete; or~~

~~—(2) All parties to the proceeding agree that it should be conducted under the procedures of subpart N of this part.~~

*(i) Notwithstanding the provisions of paragraphs (a) through (g) of this section, the simplified procedures of subpart N of this part may be utilized in a portion of a proceeding otherwise conducted in accordance with another subpart of this part if the Commission, the presiding officer or the Atomic Safety and Licensing Board determine that such portion of the proceeding is suitable for the application of subpart N procedures and its adjudication would demonstrably benefit from the use of such procedures.*

Comment: The applicability of simplified procedures under subpart N should be subject to a determination by the Commission, the hearing examiner or the Atomic Safety and Licensing Board that simplified hearing procedures are suitable. See comment on Section 2.310(c), *supra*. The criteria set on the proposed rule for the application of subpart N are not workable, since criterion (1) is unduly restrictive and fails to specify who determines that the hearing would be expected to take no more than two days to complete, and on what basis is that determination to be

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made, and criterion (2) unrealistically assumes that all parties to a proceeding may agree that the hearing should be conducted under subpart N procedures.

The proposed addition of a paragraph (i) is intended to expedite the resolution of individual issues or contentions which arise in the context of a proceeding governed by more formal procedures (such as those under subpart G) but which, nonetheless, because of their simplicity are amenable to treatment under the simplified subpart N procedures.

**n. Section 2.311(d)**

Recommended change:

(d) An order selecting hearing procedures may *only* be appealed *on the ground that by any party on the question as to whether the selection of the particular hearing procedures were selected in contravention of the standards set forth in this subpart. Any objection to an order selecting hearing procedures that is not appealed within ten business days from the issuance of the order is deemed waived. -was erroneous-*

Comment: This proposed section should be reworded to make it clear that the only permissible ground for challenging an order selecting hearing procedures is that the selection was in violation of subpart C standards. Also, an untimely objection to the selected hearing procedures, if granted, could cause delay in the proceeding and waste of resources, thus a time limit should be imposed on a party's ability to raise such an appeal.

**o. Section 2.319(d)**

Recommended change:

(d) Rule on offers of proof and *on whether to receive evidence*. In proceedings under this part, strict rules of evidence do not apply to written submissions. However, the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written *or oral submission presentation* or a response to a written question that is cumulative, irrelevant, immaterial, or unreliable;

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Comment: The Presiding Officer's power should explicitly include striking any portion of written or oral submissions, whether at the hearing or elsewhere in the course of the proceeding.

**p. Section 2.320(a)**

Recommended change:

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, *or if appropriate dismiss the claim or contention which is the subject of the default*, and enter the order as appropriate; or

Comment: Dismissing claims or contentions for default is consistent with well-established NRC practice.

**q. Section 2.323(a)**

Recommended change:

(a) Presentation and disposition. All motions must be addressed to the Commission or other designated presiding officer. All written motions must be filed with the Secretary and served on all parties to the proceeding *no later than ten (10) days after occurrence of the action or other circumstance from which the motion arises*.

Comment: If no time limit is set on the filing on motions, there is the possibility that delays and inefficiency may result from the granting of a belated motion.

**r. Section 2.323(b)**

Recommended change:

(b) Form and content. Unless made orally on the record during a hearing, or the presiding officer directs otherwise, or under the provisions of subpart N of this part, a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion *relating to procedural or discovery matters* must be rejected if it does not

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include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

Comment: Except in the context of discovery or procedural matters, requiring the moving party to confer with the other parties in advance of filing a motion would in most instance be a futile exercise that adds unnecessary delay to a proceeding. The subjects of most non-discovery motions (e.g., motions to strike, motions to dismiss or for summary disposition) are sufficiently detrimental to the interests of another party that it is extremely unlikely that conferring with the potentially affected party would resolve the issue.

**s. Section 2.323(f)(1)**

Recommended change:

(1) If, in the judgment of the presiding officer, prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity, the presiding officer ~~may~~ *shall* refer the ruling promptly to the Commission. The presiding officer must notify the parties of the referral either by announcement on the record or by written notice if the hearing is not in session.

Comment: If the Presiding Officer makes any of the determinations set forth in Section 2.323(f)(1), referral to the Commission should be mandatory, not discretionary.

**t. Section 2.324**

Recommended change: Insert a new section 2.324a as follows after proposed section 2.324:

**§2.324a. Evidence at a Hearing**

*(a) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or*

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*irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.*

*(b) Objections. An objection to evidence must briefly state the grounds of objection. The transcript must include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on the record.*

*(c) Offer of proof. An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.*

*(d) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.*

*(e) Official record. An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.*

*(f) Official notice.*

*(1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the*

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*parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.*

*(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.*

Comment: The proposed new section is taken verbatim from proposed sections 2.711(e) through (h), (j) and (k). Those sections set forth matters regarding the receipt of evidence at adjudicatory hearings which are of such general nature that should be included in subpart C so they are applicable to all proceedings.

**ii. Section 2.325**

Recommended change:

*Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof in demonstrating the order should be issued. The proponent of a contention has the burden of coming forward with sufficient evidence to establish a prima facie case. The applicant has the ultimate burden of proof as to the ultimate approval of the application.*

Comment: As written, the proposed section fails to distinguish sufficiently between the burden of proof with respect to a Commission action sought by a party and the ultimate burden on proof on a licensing application, which remains with the applicant.

**v. Section 2.326(a)(1)**

Recommended change:

*(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented, if good cause for the untimeliness is shown.*

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Comment: Motions to reopen a closed record should be denied except in exceptional circumstances, as outlined in Section 2.326. Therefore, the Presiding Officer's discretion to consider such a motion, if untimely filed, must be limited by requiring at least a showing of good cause for the untimeliness on the part of the movant.

**w. Section 2.327(c)**

Recommended change:

(c) Availability of copies. Copies of transcripts prepared in accordance with paragraph (b) of this section are available to the parties and to the public from the official reporter on payment of the charges fixed therefore. If a hearing is recorded on videotape or 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 payment of a charge specified by the Chief Administrative Judge.

Comment: Typographical error correction.

**x. Section 2.329(c)(4)**

Recommended change:

(4) The appropriateness and timing of summary disposition motions under subparts G, ~~and~~ L and M including appropriate limitations on the ~~page~~ *page* length of motions and responses thereto.

Comment: Summary disposition motions should be available in subpart M proceedings.

**y. Section 2.332(d)**

Recommended change:

(d) Effect of NRC staff's schedule on scheduling order. In establishing a schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. *The NRC staff shall*

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*issue as expeditiously as feasible partial SERs and EISs or statements of position on such safety and environmental issues as are raised in the proceeding. Hearings on safety or environmental issues may be commenced before publication of the NRC staff's safety evaluation or Environmental Impact Statement upon issuance by the NRC staff of the partial SERs or EISs or statements of position on those issues. ~~a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS. In addition, a Discovery against the NRC staff on safety or environmental issues, respectively, should be suspended until the staff has issued its partial SERs or EISs or statements of position on the issues that are raised in the proceeding. the SER or EIS, unless the presiding officer finds that the commencement of discovery before the publication of the pertinent review document will expedite the hearing.~~*

Comment: Holding an adjudicatory proceeding in suspense while awaiting the issuance by the Staff of its complete safety evaluation and EIS introduces an unnecessary element of delay that can be obviated by requiring the NRC staff, to the extent feasible, to complete early its review of the safety and environmental issues that are in controversy in the proceeding and issue partial SERs and EISs or statements of position addressing those issues, and then allowing discovery by the parties against the Staff once those partial SERs or EISs or statements of position have been issued.

Proceeding in this manner is consistent with established NRC practice. In particular, with respect to environmental issues, it is within the discretion of the NRC to allow hearings on environmental issues before release of the draft EIS where the resolution of the issues does not require passing on the ultimate cost-benefit balance required by NEPA. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 862-66 (1984).

**z. Section 2.333**

Recommended change:

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*To provide for the orderly conduct of a proceeding, ~~prevent unnecessary delays or an unnecessarily large record,~~ the presiding officer may, on his or her own initiative or upon motion by a party:*

Comment: The reasons for the presiding officer taking actions to control the course of a proceeding may go beyond avoiding delay or managing the size of the record, thus the text of the proposed section is too narrow. Also, parties should be able to request by motion that the Presiding Officer take appropriate actions to regulate hearing procedures.

**aa. Section 2.334(a)**

Recommended change:

(a) Unless the Commission directs otherwise in a particular proceeding, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall, based on information and projections provided by the parties and the NRC staff, establish and take appropriate action to maintain a schedule for the completion of the evidentiary record and, as appropriate, the issuance of its initial decision. *Absent Commission authorization, however, such a schedule shall not call for a period in excess of sixty (60) days after the completion of the post-hearing filings for the issuance of the initial decision.*

Comment: Unless the Commission authorizes otherwise, presiding officers and licensing boards should abide by the guidelines in the Commission's Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998).

**bb. Section 2.334(b)**

Recommended change:

(b) The presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall provide written notification to the Commission any time during the course of the proceeding when it appears that the completion of the record or the issuance of the initial decision will be delayed more than *thirty (30) ~~sixty (60)~~ days beyond the time specified in the*

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schedule established under Sec. 2.334(a). The notification must include an explanation of the reasons for the projected delay and a description of the actions, if any, that the presiding officer or the Board proposes to take to avoid or mitigate the delay.

Comment: A greater than thirty day projected slip in the schedule for completion of the record or the issuance of the initial decision would in most cases be a sufficient reason for concern to require the presiding officer or the licensing board to notify the Commission of the anticipated delay so that the Commission can take appropriate action.

**cc. Section 2.335(a)**

Recommended change:

(a) ~~Except as provided in paragraphs (b), (c), and (d) of this section,~~ Any rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is not subject to attack by way of discovery, proof, argument, *motion*, or other means in any adjudicatory proceeding subject to this part. *A party to such a proceeding may petition, subject to the provisions of paragraphs (b), (c) and (d) of this section, for the waiver of the applicability of a Commission rule or regulation or a provision thereof for the particular proceeding.*

Comment: A clear distinction should be made between a challenge to any Commission rule or regulation (which would be impermissible) and a request for a waiver of the application of such rule or regulation in a particular proceeding (which might be authorized in exceptional cases, subject to the requirements of this section).

**dd. Section 2.336(a)**

Recommended change:

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any

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proceeding subject to this part shall, within ~~thirty (30)~~ *sixty (60)* days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and provide:

Comment: Given the significant burden that the new discovery rules place on applicants, a thirty day period for providing the materials identified in this section is unrealistically short. For example, if experts need to be retained to respond to a contention raised by an adverse party in a proceeding, it would be unreasonable to expect that such experts would be able to develop opinions and prepare analyses responding to the contention in the short time allowed.

**ee. Section 2.336(a)(1)**

Recommended change:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and a copy of the analysis or other authority upon which that person bases his or her opinion disclosure, *the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.*

Comment: The suggested additional text, taken from proposed section 2.704(b)(2), is intended to make available as part of the discovery process the backup data on which the analyses and opinions of experts are based. We would also note that, taken literally, the proposed requirement (and a similarly worded requirement in §2.336(a)(2)) that a party identify “each person” upon whose opinion the party bases its claims and contentions could elicit – in the case of a nuclear power plant licensee or applicant – the names of hundreds of persons or organizations. The Commission may wish to consider providing additional guidance to avoid imposing such an unnecessary burden on the parties to a proceeding.

**ff. Section 2.336(a)(3)(ii)**

Recommended change:

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(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (e.g., books, publications and treatises) in the possession, custody or control of the party that are relevant to the contentions.

*Provided, however, that if any of the documents, data, or other tangible things in the control of the party making the disclosure are publicly available, it shall be sufficient for the disclosing party to identify where the documents, data or other tangible things may be found.*

Comment: A party making a disclosure pursuant to Section 2.336 should not be required to produce copies of documents publicly available, since the burden of obtaining such documents is equal on either party. See also next comment.

gg. Sections 2.336(a)(4) and (a)(5)

Recommended change:

~~(4) All other documents (for which there is no claim of privilege or protected status) 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, and~~

(54) A list of all discoverable documents *relevant to the contentions* for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

Comment: To the extent that the materials that would be produced in this proposed section are relevant to the contentions raised in the proceeding, they would be provided under subsection (a)(3). If they are not relevant to such contentions, they should not need to be provided. In addition, as written Section 2.336(a)(4) would require a license applicant to produce to all parties copies of all documents in its possession, custody, and control related to the application, regardless of whether they related to any of the admitted contentions. Such a requirement would be unreasonably burdensome in many cases and would not further the interest in public participation in NRC proceedings. The requirement in proposed section 2.336(a)(3)(ii) that a party produce all documents relevant to the admitted contentions should be sufficient to

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ensure that all parties receive the information possessed by the other parties that is pertinent to the issues raised in the proceeding.

**hh. Section 2.336(b)**

Recommended change:

(b) The NRC staff shall, within ~~thirty (30)~~ *sixty (60)* days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

Comment: See comment on Section 2.336(a).

**ii. Section 2.339(a)**

Recommended change:

(a) Production or utilization facility operating license. In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only *upon Commission approval and subject to a determination by the Commission where he or she determines* that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

Comment: Presiding officers should not have unbridled authority to expand the scope of a proceeding beyond the issues put in controversy by the parties or identified by the Commission.

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If the presiding officer determines that an issue has not been put in controversy by the parties but raises, in the presiding officer's opinion, a serious safety, environmental, or common defense and security matter, such issue should be referred to a Commission for a ruling whether it should be included in the proceeding.

**jj. Section 2.339(g)(2)(iv)**

Recommended change:

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. ~~Furthermore, the Commission may, in a particular case, determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.~~

Comment: The last sentence of this proposed subsection would appear to give the Commission the power to deny approval of a license application even though the applicant meets all existing regulations and Commission policies. Such a provision would permit ex-post-facto changes to the licensing standards to the detriment of applicants, and thus could lead to unfair and potentially unlawful actions by the Commission.

**kk. Section 2.340(b)(3)**

Recommended change:

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than twenty-five (25) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within ~~five (5)~~ ten (10) days of service of any answer. This reply brief may not be longer than ~~five (5)~~ ten (10) pages.

Comment: Both the time and page limits allowed for the filing of reply briefs are too restrictive to permit a petitioner to submit an adequate reply to the arguments raised in the answers to the petition, which themselves may extend for twenty-five pages.

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**II. Section 2.340(b)(4)(v)**

Recommended change:

*(v) A material action by the presiding officer was inconsistent with the provisions of this subpart or other Commission rules or regulations*

(vi) Any other consideration which the Commission may deem to be in the public interest.

Comment: The section as written does not explicitly provide for the possibility of filing a petition for review of actions by the presiding officer which may be inconsistent with Commission rules and regulations, including those in this subpart.

**mm. Section 2.340(d)**

Recommended change:

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any motion for reconsideration will be evaluated against the standard in Sec. 2.323(e) of this section *part*.

Comment: Typographical error correction.

**2. Comments on Amended Subpart G**

**a. Section 2.704(b)(3)**

Recommended change:

(3) These disclosures must be made at the times and in the sequence directed by the presiding officer. In the absence of other directions from the presiding officer, or stipulation by the parties,

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the disclosures must be made at least ninety (90) days before the hearing commencement date or the date the matter is to be presented for hearing. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(2) of this section, within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under paragraph (e) of this section.

Comment: Typographical error correction, making section consistent with Fed. R. Civ. P. 26(a)(2)(C).

### 3. Comments on Amended Subpart K

The proposed rule would make only minimal changes to existing subpart K, retaining the procedures it sets up basically intact. However, the limited experience to date with application of subpart K suggests that a number of improvements should be made to the hybrid procedures established under the subpart.

The first spent fuel expansion license amendment proceeding to be finally decided pursuant to subpart K took over two years to reach resolution, despite a Congressional directive that licensing proceedings under subpart K be expedited. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247 (2000). Although only three contentions were admitted in the proceeding, it took over a year for oral argument to be held on the two safety contentions and another ten months for an oral argument to take place with respect to the single environmental contention. All told, this "expedited" proceeding to consider a license amendment to expand spent fuel storage in water pools in a dedicated fuel handling building took over twenty-seven months to complete.

The experience of the *Shearon Harris* subpart K proceeding indicates that the process set forth in the subpart is likely to lead to protracted proceedings in the future, due to:

- No time limits set on the NRC staff's performance of its review
- Potential conduct of an Environmental Assessment by the NRC staff, although the Commission rules exempt certain licensing actions from such assessments
- Unlimited discretion in the licensing board as to when to rule on proposed contentions and to rule on admitted contentions following oral argument

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- Bifurcation of safety and environmental contentions effectively results in two subpart K proceedings
- Restrictions on oral argument make it difficult to respond to inter-related technical issues, leading to inefficient presentation of the parties' positions.

The Utilities recommend that, in addition to the changes to proposed subpart C discussed above, the following changes be made to the subpart K regulations to overcome these potential sources of delay:

- Section 2.1113(a) should be amended to specify that all issues of whatever nature that are identified for oral argument shall be heard together.
- Section 2.1113(b) should be amended to allow experts who prepare affidavits in support of written submissions to respond directly to questions posed by the hearing examiner at the oral hearing.
- Section 2.1115(a) should be amended to establish a firm deadline (e.g., 30 days) after oral argument for the hearing officer to rule on whether any issues remain to be heard at an adjudicatory hearing. The section should also specify that all issues admitted for an adjudicatory hearing shall be heard together.
- Section 2.1115(b) should be amended to specify that the party raising an issue of fact or law for consideration in an adjudicatory hearing has the burden of proof as to whether the proposed issue meets the standards for holding such a hearing.

#### **4. Comments on Amended Subpart L**

The Utilities support the establishment of a uniform informal hearing framework (through amended subpart L) that should become the presumptive hearing mechanism for Commission licensing actions. Moreover, the Utilities believe that the proposed regulatory framework could be further simplified by merging the license transfer hearing provisions in subpart M into subpart L, and making the "fast-track" hearing set forth in proposed subpart N an option available to the Commission or the presiding officer, where appropriate, in subpart L proceedings. Nonetheless, should the proposed framework be retained, the Utilities suggest that the following specific changes be made to the text of the amended subpart.

##### **a. Section 2.1206**

Recommended change:

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Add the following new sections after §2.1206:

*§2.1206a Notice of oral hearing.*

*(a) A notice of oral hearing will--*

*(1) State the time, place, and issues to be considered;*

*(2) Provide names and addresses of participants,*

*(3) Specify the time limit for participants and others to indicate whether they wish to present views;*

*(4) Specify the schedule for the filing of written testimony, statements of position, proposed questions for the Presiding Officer to consider, and rebuttal testimony consistent with the schedule provisions of §2.1208.*

*(5) Specify that the oral hearing shall commence within 15 days of the date for submittal of rebuttal testimony unless otherwise ordered;*

*(6) State any other instructions the Commission deems appropriate;*

*(7) If so determined by the NRC staff or otherwise directed by the Commission, direct that the staff participate as a party with respect to some or all issues.*

*(b) If the Commission is not the Presiding Officer, the notice of oral hearing will also state:*

*(1) When the jurisdiction of the Presiding Officer commences and terminates;*

*(2) The powers of the Presiding Officer;*

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*(3) Instructions to the Presiding Officer to certify promptly the completed hearing record to the Commission without a recommended or preliminary decision.*

*§2.1206b Notice of hearing consisting of written comments.*

*A notice of hearing consisting of written comments will:*

*(a) State the issues to be considered;*

*(b) Provide the names and addresses of participants;*

*(c) Specify the schedule for the filing of written testimony, statements of position, proposed questions for the Presiding Officer to consider for submission to the other parties, and rebuttal testimony, consistent with the schedule provisions of §2.1208.*

*(d) State any other instructions the Commission deems appropriate.*

*§2.1206c Conditions in a notice or order.*

*(a) A notice or order granting a hearing or permitting intervention shall--*

*(1) Proscribe irrelevant or duplicative testimony; and*

*(2) Require common interests to be represented by a single participant.*

*(b) If a participant's interests do not extend to all the issues in the hearing, the notice or order may limit her/his participation accordingly.*

Comment: As proposed, subpart L does not specify the form of the notice of a hearing to be issued by the Commission in a proceeding under the subpart. The recommended additional sections are taken from subpart M.

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**b. Section 2.1207(b)(6)**

Recommended change:

(6) Participants and witnesses will be questioned orally or in writing and only by the presiding officer or the presiding officer's designee (e.g., an Special Assistant appointed under Sec. 2.322). The presiding officer will examine the participants and witnesses using questions prepared by the presiding officer or the presiding officer's designee, questions submitted *in advance of the hearing as specified in §2.1207(a)* by the participants at the discretion of the presiding officer, or a combination of both. *Only in exceptional circumstances, such as when unexpected information is provided by a witness as a result of the presiding officer's questions, will parties be allowed to submit proposed questions for the hearing examiner to consider posing to the witness. Such proposed questions should be submitted in writing in the manner prescribed by the presiding officer.*

Comment: Consistent with the guidance provided by the Commission in *Power Authority of the State of New York* (Indian Point Nuclear Generating Unit No. 3), CLI-01-14 (June 21, 2001), this section should be modified to make it clear that parties must submit in advance of an oral hearing, such proposed questions as they wish to be posed by the presiding office to the witnesses at the hearing. Proposing questions at the hearing should only be allowed under exceptional circumstances, such as upon the emergence of unexpected information as a result of the presiding officer's questions, and should be submitted in writing to assure the orderly progress of the hearing.

**5. Comments on Amended Subpart M**

**a. Section 2.1331**

Recommended change:

Add a new section following §2.1331:

*Sec. 2.1332. Applicability of other sections.*

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*In proceedings subject to this subpart, the provisions of subparts C and L of this part are also applicable, except where inconsistent with the provisions of this subpart.*

Comment: The proposed addition, analogous to proposed section 2.1117 for subpart K proceedings, is needed to make it clear that to the extent not specifically addressed in subpart M, the general hearing procedures in subpart C and the simplified hearing procedures in subpart L would apply to hearings on license transfer applications under subpart M.

**6. Comments on Proposed Subpart N**

**a. Section 2.1402(c)**

Recommended change:

*(eb) Request for cross-examination. A party may present an oral motion to the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The presiding officer may allow cross-examination by the parties if he or she determines that cross-examination by the parties is necessary for the development of an adequate record for decision and will not result in significantly extending the duration of the hearing.*

Comment: Allowing cross-examination at the informal hearing risks protracted or dilatory questioning that could defeat the advantages in proceeding under the simplified procedures in subpart N. Therefore, in determining whether such examination is necessary and should be allowed, the presiding officer ought to factor explicitly the potential hearing delay resulting from the examination.

**b. Section 2.1404(a)**

Recommended change:

(a) No later than ~~40~~ 60 days after the order granting requests for hearing/petitions to intervene, the presiding officer shall conduct a prehearing conference. At the discretion of the presiding officer, the prehearing conference may be held in person or by telephone or through the use of video conference technology.

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Comment: Holding a prehearing conference 40 days after an order granting requests for hearings, in which parties must present summaries of the testimony they intend to offer on the admitted contentions, is too short a period even for a "fast-track" proceeding, given that the time limit for providing documents to the other parties set in proposed section 2.336(a) is 30 days after the order.

**c. Section 2.1407(b)(5)**

Recommended change:

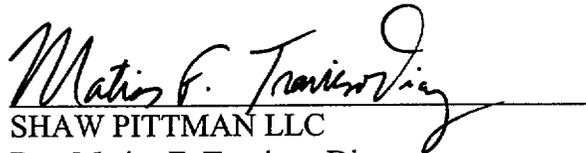
Add the following new subsection (5) and renumber existing subsection (5) as (6):

*(5) A material action by the presiding officer was inconsistent with the provisions of this subpart or other Commission rules or regulations.*

*(56) Any other consideration which the Commission may deem to be in the public interest.*

Comment: See comment on corresponding proposed section 2.340(b)(4)(v).

Respectfully submitted



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