

DOCKETED NUMBER

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

1213

Secretary Vietti-Cook
September 14, 2001
Page 1

**DOCKETED
USNRC**



**September 20, 2001 (2:57PM))
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

Robert Willis Bishop
Vice President &
General Counsel

September 14, 2001

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attention: Rulemakings and Adjudications Staff

Subject: Comments on Proposed Changes to NRC's Rules of Practice

Dear Ms. Vietti-Cook;

On behalf of the nuclear energy industry, the Nuclear Energy Institute ("NEI")¹ is pleased to provide comments on NRC's proposed changes to its Rules of Practice on the conduct of hearings in NRC adjudications. (66 Fed. Reg. 19610; April 15, 2001). The industry strongly supports this rulemaking initiative and urges the Commission to promulgate expeditiously a revised rule that will more effectively and efficiently resolve disputes between parties whose interests are likely to be affected by the result of an NRC adjudicatory proceeding.

The NRC's proposal to change its Rules of Practice comes at a pivotal point in the history of nuclear energy in the United States. Nuclear energy is widely recognized as a safe and environmentally sound source of electricity, and currently constitutes over

¹ NEI is the organization of the nuclear energy industry responsible for coordinating the combined efforts of all companies licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every company responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NEI. In addition, NEI's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

Secretary Vietti-Cook

September 14, 2001

Page 2

twenty per cent of U.S. electrical energy supply. In recent years there have been significant improvements in the nuclear industry's safety record as well as significant increases in the amount of electricity generated by nuclear energy. Nuclear facilities now operate routinely at capacity factors of greater than 90 per cent while the industry continues to maintain outstanding safety levels, as demonstrated by the NRC's own safety performance indicators.

However, even as the nuclear energy industry is performing at record levels, and public support for new nuclear plant construction is increasing, the United States is facing an energy supply problem of serious proportion and, with it, a potential for serious economic disruption. Even at a modest 1.8 per cent per year growth rate, there will need to be nearly 400,000 megawatts of replacement and new electric generation installed by 2020. To meet this need, and at the same time respond to the challenges posed by global warming and other environmental issues, it will be necessary to increase our nation's reliance on nuclear generation for electricity. Indeed, the nuclear energy industry projects that there will be a need for at least 50,000 megawatts of new nuclear generating capacity by 2020 in order to meet the national target of 400,000 additional megawatts.

In order to meet this challenge, the nuclear energy industry needs an efficient, effective, and predictable regulatory framework. In the last few years, the NRC has made great strides in improving its inspection, performance assessment, enforcement, and other substantive regulatory systems. Yet the NRC hearing process for reactors remains infused with old regulatory concepts and traditions, many originating in the 1950s and 1960s. Without extensive reform, the NRC hearing process will continue to impose substantial resource burdens and delays that potentially threaten the nuclear industry's ability to respond effectively to energy demands. Reform of the hearing process is also necessary for the NRC to most effectively carry out its statutory mandate.

Thus, the NRC's proposal to change its Rules of Practice not only comes at a critical time, but its adoption (with the additional revisions recommended in the attachments hereto) would fill an obvious and important gap in the NRC's enhanced approach to nuclear safety regulation. Specifically, the industry supports the proposal for new subparts C and N, and the retention of subparts G, J, K, L and M. In the attached comments, the industry also suggests a number of changes designed to make the NRC's hearing process more efficient and effective. In this regard, we strongly urge the NRC to reevaluate and revise its current position that trial-type hearings, with oral testimony and cross-examination, are necessary to adjudicate a large number of very complex issues or an application for a high-level waste repository license (see proposed section 2.310(c)). Federal case law and practices of other federal agencies suggest the contrary proposition -- that while trial-type hearings are appropriate for resolution of genuine issues of material fact (i.e., issues of motive, intent, credibility, and details of past events), they are not appropriate for resolution of purely technical

Secretary Vietti-Cook

September 14, 2001

Page 3

and policy issues of the sort that are typically raised in NRC licensing cases. As such, we strongly recommend that the final rule recognize NRC authority to conduct administrative hearings that do not necessarily retain all features of trial-type hearings and, further, that the NRC exercise agency discretion to hold these administrative hearings for all licensing matters, including initial licensing of a HLW repository.

Although the industry strongly supports the NRC's instant rulemaking initiative, we also strongly believe that the NRC's characterization of its actions in this regard must be given very careful consideration. That is, the NRC has characterized its proposal for revised hearing procedures as a change from primarily "formal" hearings to "informal" hearings. Although these terms may have become terms of convenience, a short hand means of expressing concepts that take considerably more explanation, their use by the NRC is likely to affect substantially the public's perception of the NRC's intent and action. Using the term "informal hearings" for the various subparts that do not provide for trial-type procedures undercuts the NRC's credibility. Use of the term is likely to prompt a natural concern from the public that implementation of this rulemaking initiative will reduce their hearing rights, when, in fact, that is not the case. The NRC must clearly explain to the public that a hearing that does not include all features of trial-type proceedings nevertheless can and will be a fair and effective means for the public to participate in the NRC licensing process (i.e., fully litigate, issues deemed appropriate for the subject proceeding). We strongly urge the NRC to develop more accurate terms to describe the proceedings that will result from this rulemaking initiative.

The NRC has conducted a very thorough and comprehensive review of its current hearing processes to develop the proposed rule. The industry commends the NRC for its willingness to consider changes in its practices and strongly supports the proposal to tailor NRC hearing procedures based on the nature of the issue to be determined. The attachments hereto contain NEI's comments, on behalf of the industry, on the proposed hearing revisions, responses to questions posed by the Commission in the Federal Register notice, and a discussion of additional issues the industry believes the NRC should consider prior to promulgating a final rule. With the adoption of the proposal and the relatively few changes suggested, the NRC will have taken an important step forward, improving its hearing processes and better focusing the limited resources of all parties participating in NRC proceedings.

Secretary Vietti-Cook
September 14, 2001
Page 4

If you have any questions concerning this petition, please contact Ellen Ginsberg at 202.739.8140 or ecg@nei.org or me at 202.739.8139 or rwb@nei.org.

Sincerely,



Robert W. Bishop

c: Karen D. Cyr, General Counsel, NRC

Attachment 1**Comments of the Nuclear Energy Institute on the NRC's Proposed Changes to Rules of Practice on the Conduct of Hearings****I. BACKGROUND**

Since the 1950s, the NRC and its predecessor, the U.S. Atomic Energy Commission, have used trial-type hearing procedures in both contested and uncontested reactor licensing cases. The current procedures, which include provisions for discovery, oral testimony, and cross-examination of witnesses, were developed to be consistent with the "on the record" hearing requirements of sections 5, 7, and 8 of the Administrative Procedure Act of 1946 ("APA"), even though the Atomic Energy Act does not require "on the record" hearings.

The NRC permitted less formality in non-reactor cases following its decision in *City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983). More recently, the NRC made additional improvements to its hearing processes when it created a framework to resolve design issues by rulemaking in 10 CFR Part 52, extended the concept of less formal hearings to reactor license transfers, took additional steps to assure that only material issues are litigated in trial-type hearings, and adopted improved case management techniques. Despite these appropriate and successful reforms, the basic framework of hearings in reactor licensing cases remains unchanged.

The use of formal hearings has, in some cases, caused extensive delays and created significant demands on NRC, license and intervenor resources, without any commensurate safety benefit. For example, the NRC operating licensing hearings for the Shoreham nuclear power plant spanned almost a decade, and required hundreds of days of hearings, over two hundred witnesses, some sixty thousand pages of testimony and argument, virtually uncountable pages of documents, and hundreds of pages of initial, intermediate, and final NRC licensing decisions. The end result was that the intervenors were dismissed from the proceeding, and the license was issued.²

The Indian Point probabilistic safety assessments hearing, which consumed five years, provides another example of extensive delay and unnecessary burden caused by the NRC hearing process. Procedural and other preliminary matters delayed the actual start of the hearing by two years, and then three more years were required to complete the process. There were fifty-five days of actual hearings, almost two hundred witnesses, over eighteen thousand pages of testimony and argument, thousands of additional pages of documentary materials, and initial and final decisions that totaled over three hundred pages.³ The purpose of the hearing was to determine if

² See Long Island Lighting Company (Shoreham Nuclear Power Station), 39 NRC 211 (1989).

³ See Consolidated Edison Co. of New York and Power Authority of the State of New York (Indian Point Units), 18 NRC 811 (198).

the plants should be shut down because they posed risks that were significantly larger than other nuclear plants in the United States. The hearings produced an answer to this root question that was in accord with NRC Staff and licensee safety evaluations that were completed years before the hearings began.

These examples of hearings on initial license applications, and numerous others that could be documented from a review of NRC adjudicatory decisions, show the essential problem with the NRC's adjudicatory hearing practice: NRC adjudicatory hearings were, and in the future threaten to be, huge endurance contests, consuming significant amounts of time and resources and often with no safety benefit. It is inconceivable that Congress had this result in mind when it enacted (and periodically amended) the licensing hearing requirements in section 189 of the Atomic Energy Act. In addition, hearing delays of the magnitude experienced by NRC are contrary to the requirement in section 6 of the APA (expressly applicable to NRC by section 181 of the Atomic Energy Act) that NRC complete action on license applications within a reasonable time.

II. DISCUSSION

A. Fundamental Principles

The nuclear industry believes that public participation is an essential element of the NRC licensing process. The NRC licensing process as a whole offers numerous avenues for interested groups and members of the public to become involved and have their concerns addressed and their questions answered. NRC Staff meetings with license applicants are open to the public, and the NRC's practice is to hold numerous public stakeholder meetings to explain the NRC's review processes, elicit questions and concerns, and provide answers. The Commission's meetings are open to public attendance and participation pursuant to the Government in the Sunshine Act, and meetings of NRC's advisory committees, such as the Advisory Committee on Reactor Safeguards ("ACRS"), which deliberates on every power reactor construction permit and operating license application, are also open to public attendance and participation under the Federal Advisory Committee Act.

With these and other opportunities available, hearings under section 189 of the Atomic Energy Act should not be a forum to elicit concerns, educate citizens about nuclear technology or NRC review processes, or publicize the results of NRC reviews. Further, section 189 hearings were never intended to serve as a quality check on NRC Staff, even assuming that these hearings could realistically perform such a function on a rational or consistent basis. Thus, the nuclear industry concludes that the proper and intended function of section 189 hearings is very limited: it is to resolve specific disputes between interested parties who are likely to be affected by the results of the proceeding. Such disputes may involve only matters that are material to and appropriately the subject of the proceeding. Citizens or special interest groups (and applicants and licensees) with an affected interest, with adequate technical and other resources, and with genuine issues of material fact, must have a fair process before an

independent tribunal, separate from NRC Staff, that will consider their evidence and compile a well-defined record for decision.

However, oral testimony and cross-examination, as in trials before a federal district judge, are not necessary for a presiding officer or licensing board to reach a sound decision sufficient to facilitate the judicial review that section 189 makes available. As Justice Frankfurter recognized over sixty years ago, the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of the courts."⁴ The history and experience of the NRC suggests a similar conclusion.

The NRC should look to the recent decisions and experience of other federal agencies and the courts for guidance on fashioning an adjudicatory hearing process that fulfills the proper function described above and provides due process of law.⁵

B. The Requirements of the Atomic Energy Act.

The NRC's notice of proposed rulemaking provides a thorough legal analysis of section 189 of the Atomic Energy Act and correctly concludes that the Act does not require "on the record" hearings subject to sections 5, 7, and 8 of the APA.

The starting point of any proper legal analysis is the well-established *Chevron* principle that the NRC's interpretation of section 189 will be upheld if (1) Congress has not spoken to the precise question and decided specifically that formal "on the record" hearings are required, and assuming the answer to (1) is that it has not, (2) the NRC's interpretation is reasonable. *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989).

(1) Congress Has Not Spoken to the Precise Question Whether Trial-Type Hearings Are Required.

Section 189 just uses the term "hearing." It is well established that "hearing" does not necessarily imply a trial-type hearing, even in a licensing adjudication. For example, *U.S. v. Allegheny-Ludlum Steel Corp.*, 466 U.S. 742 (1972); *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 445 (D.C. Cir. 1989); *FOE v. Reilly*, 966 F.2d 690 (D.C. Cir. 1992). A suggestion to the contrary in *UCS v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) was overruled in *Chemical Waste Management v. EPA*, supra. The D.C. Circuit has even held that a statutory requirement for a "full hearing" in an adjudication does

⁴ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). In a similar fashion, the D.C. Circuit has remarked that "[t]he requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama." *Marine Space Enclosures, Inc. v. FMC*, 420 F.2d 577, 598-590 (D.C. Cir. 1969).

⁵ While the industry also has concluded, based on extensive legal analysis, that Section 189 does not require an "on the record" hearing in accordance with the provisions of the APA, the NRC's proposal fashions a hearing process that essentially comports with APA requirements. Indeed, we believe that even if the APA did apply, the APA does not require NRC to retain subpart G in its present form for all hearings.

not necessarily require a trial-type hearing. *Railroad Commission of Texas v. U.S.*, 755 F.2d 221 (D.C. Cir. 1985).

The legislative history of section 189 is fully and adequately addressed in the NRC notice of proposed rulemaking and in the Commission's extensive treatment of the subject in *Kerr-McGee Corporation* (West Chicago Rare Earths Facility), 15 NRC 232, 247-255 (1982). We fully agree with the well-supported conclusions in the notice and Commission opinion that Congress has not spoken to the precise question whether section 189 requires an "on the record" hearing in NRC adjudications.

The introductory clause beginning with the term "notwithstanding" in section 191 (authorizing the use of atomic safety and licensing boards) might be read to imply a Congressional understanding in 1962 of what Congress intended in 1954 and 1957 when it added requirements for a "hearing." However, the NRC's analysis appropriately dismisses such an argument based on the limited weight to be accorded to subsequent legislative history. We would add that the "notwithstanding" clause also may be explained if section 189 was understood by the Congress in 1962 to require an "on the record" hearing in any circumstance, no matter how limited. The "notwithstanding" clause was added in 1952 before the full implications of *Matthews v. Eldridge*, 424 U.S. 319 (1975), would have been understood, and Congress would have reasonably assumed that *Wong Yan Sung v. McGrath*, 339 U.S. 33 (1950), required an "on the record" hearing in certain enforcement cases (for example, a proposed revocation of a license based on a disputed allegation of a willful violation) because of Constitutional due process. The same argument applies to the term "notwithstanding" in section 304(c) of the Nuclear Nonproliferation Act of 1978.

(2) NRC Construction of Section 189 As Not Requiring a Trial-Type Hearing Is Reasonable.

The NRC has correctly interpreted section 189 as not requiring a trial-type, "on the record" hearing in all cases. The requirements of administrative due process are inherently flexible and require no such result. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Due process "is flexible and calls for such procedural protections as the particular situation demands." Id at 334. Moreover, it is far from clear that the kinds of generalized safety and environmental issues ordinarily raised by intervenors in NRC licensing hearings are the kind of limited interests that Constitutional due process was intended to protect (e.g., *Izaak Walton League v. Marsh*, 655 F.2d 345, 351 (D.C. Cir. 1981)).

Most important, in interpreting section 189, the NRC is entitled to consider its more than forty years of experience with formal hearings, especially the huge demands of time and resources and little or no resultant safety benefit which that experience demonstrates. NEI believes also that forty years of experience demonstrates the manifest unsuitability of "on the record" courtroom drama to resolve the kind of complex technical and policy disputes that abound in contested NRC licensing adjudications.

C. The Proper Resolution of Complex Technical Disputes.

(1) Oral Testimony and Cross-Examination

The existence of one or more complex technical issues, standing alone, does not require a trial-type hearing with cross-examination. It is the nature of the issues, rather than their number or complexity, which is key to the need for cross-examination.

As stated above, formal trial-type procedures with oral testimony and cross-examination are not necessary to resolve policy issues and legal issues. Such trial-type procedures can be suitable for the resolution of factual issues, but only if they are pure factual issues -- questions of who did what, when, where, why, and with what motive or intent. As a general rule, trial-type procedures with oral testimony and cross-examination are not needed for the resolution of expert opinion issues. Pure factual issues predominate in NRC enforcement cases, which is why formal procedures should be available in such proceedings, as proposed section 2.310(a) recognizes. On the other hand, expert opinion issues predominate in initial licensing cases, so trial-type procedures should not generally be needed in these kinds of cases. The use of subpart L for contested initial licensing cases should be sufficient even if the APA were to apply.

The Supreme Court and the other federal courts have recognized that cross-examination, as in a trial-type hearing, is not required for the correct resolution of issues of expert opinion. *Matthews v. Eldridge*, supra at 343-344; *Chemical Waste Management v. EPA*, supra at 1484; *FOE v. Reilly*, supra at 694. Indeed, written testimony is entirely sufficient for many agency proceedings. *U.S. v. Florida East Coast*

Ry. Co., 410 U.S. 224 (1973); *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986).

More specifically, the courts have recognized that expert opinion evidence is most appropriately addressed by rebuttal testimony. *Cellular Mobile Systems of Pennsylvania v. FCC*, 782 F.2d 182, 198-200 (D.C. Cir. 1985) is instructive as to the limited role for cross-examination of experts under the APA. In *Cellular*, the Court upheld the FCC's denial of cross-examination of an expert, even in the face of a clear cross-examination plan, "for the simple reason that these are all issues that should properly have been addressed in direct and rebuttal submissions, not by cross-examination."

Thus, other agencies have limited trial-type hearings, with cross-examination, to pure factual issues rather than opinion issues and the courts have confirmed the acceptability of this approach (e.g., *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997); *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992)). In providing for approval of certified designs by rulemaking in 10 CFR Part 52, subpart B, NRC has itself recognized that trial-type procedures are not necessary and may not be appropriate for resolution of technical issues. And Congress has recognized in the Atomic Energy Act that complex technical issues do not always require trial-type hearing procedures. See section 189a.(1)(B)(iv). Thus, settled administrative practice and precedent do not substantiate the Commission's contention that trial-type hearings are always necessary or appropriate for resolution of complex technical issues.

Conduct of cross-examination under section 2.711 is a key distinction between a hearing under subpart G and hearings under the other subparts. While subparts K, L, M and N allow for cross-examination upon request by the party and approval by the Commission or presiding officer (see sections 2.1115 (subpart K); proposed section 2.1204 (subpart L); proposed section 2.1322(d) (subpart M); and proposed section 2.1402 (subpart N)), cross-examination nevertheless should be allowed only when there are material issues of motive, intent, credibility, or the details of one or more past events. This criterion for allowing cross-examination should be added to sections 2.1115, 2.1204, 2.1322, 2.1402, and 2.711.

(2) Hearings on a High Level Waste Repository

The NRC states that it proposes to apply formal hearing procedures to the initial authorization to construct a high level waste repository and to the initial authorization to receive and possess high level waste at a high level waste repository because (1) these licensing actions are likely to be controversial, (2) they will involve a large number of complex issues, and (3) the Commission's previously raised the public's expectation in this regard by stating it would provide formal hearings for repository licensing. See 66 Fed. Reg. 19624. We address these matters seriatim.

First, the fact that a licensing action is likely to be controversial should not be relevant to the adjudicatory model an agency adopts. Regardless of the potential level of controversy, the objective of any licensing proceeding should be to obtain evidence and reach an informed decision in a timely fashion regarding the matters deemed legitimately in dispute. Courts, for example, do not provide fundamentally different litigation procedures for cases likely to be more highly controversial or hotly contested. While there may be numerous parties and many complex issues in a particular federal or state court proceeding, the fundamental process is not affected by the potential controversy—recall, for example, that civil court procedures for a run-of-the-mill antitrust action are the same as for the federal government's antitrust action against Microsoft.

Second, the industry's position regarding the type of hearings appropriate to license a high-level radioactive waste repository stems from our position regarding the legitimacy and appropriateness of tailoring NRC hearing procedures to the kind of issues to be decided. Licensing a high-level waste repository at Yucca Mountain, if that site is recommended, does not require trial-type procedures with oral testimony and cross-examination, as the issues likely to be subject to litigation are likely to be based largely on expert opinion. Expert testimony, with which an opposing party disagrees, can be effectively addressed by submission of written rebuttal testimony. Past history and experience demonstrate that licensing boards are quite capable of evaluating such testimony and the rebuttal thereto, and rendering a reasoned decision thereon. There are not likely to be any purely factual questions relating to motive, intent, credibility or other issues for which trial-type hearings are appropriate.

The kinds of issues the NRC identifies as appropriate for a formal proceeding, and which the NRC has concluded are not likely to be subject of litigation in *subsequent* licensing proceedings—technical feasibility, appropriateness of siting, adequacy of construction, etc.—largely are issues of expert opinion, compliance with regulations and Commission policy. As explained above, these are not issues for which a formal adjudication is necessary and, it could be argued, may actually hamper the ability of the presiding officer or board to render a sound and timely decision.

Third, the NRC appears to be concerned about having previously stated that there would be formal hearings for the initial licensing of a high level waste repository. In essence, the agency's concern appears to be based on its perception that there can

only be public confidence in the agency's decision-making process if the repository hearings remain formal, trial-type adjudications. We question this perception, because it seems to assume that a hearing largely limited to written submissions may not be as fair as an adjudicatory hearing or is otherwise inadequate because it does not permit the same level of participation by all parties, including intervenors. With respect to striking a balance in this regard, we again note that the courts have found legally acceptable informal adjudications of issues considered by the litigants to be equally important to those before the NRC in a high level waste repository licensing action.

Thus, although the NRC's goal to inspire public confidence is reasonable, it should be balanced against other equally important agency goals including effectiveness and efficiency. The NRC's goal should be to provide a fair hearing process; one in which parties who demonstrate standing to participate are provided an opportunity to have their evidence heard by a neutral decisionmaker. The NRC, thereby, will satisfy its statutory obligation, which, in turn, should inspire public confidence.

(3) Additional revisions to the NRC Rules of Practice will further improve the proposed hearing process

The NRC should include several additional revisions as part of the final rule revising NRC hearing processes. The suggested revisions are described below.

First, the NRC should make greater use of atomic safety and licensing boards, and encourage each attorney member of the Atomic Safety and Licensing Board Panel to become qualified as an administrative law judge. Alternatively, section 2.313 could be redrafted to allow specifically for parties to request the appointment of an atomic safety and licensing board or administrative law judge within a reasonable time (e.g., ten days) after the grant of a hearing or intervention. If no such request is made, consent to another presiding officer would be presumed for the purpose of the entire proceeding.

Second, subpart C does not, but should, include a provision regarding evidence similar to proposed subpart G, section 2.711. That is, subpart C should clearly direct the board or presiding officer to admit only reliable, relevant, material, and non-repetitious evidence. Subpart C also should contain provisions for objections (see e.g., section 2.711(f)); offers of proof (see e.g. section 2.711(g)); exhibits (see e.g., section 2.711(h)); receipt of official staff and advisory committee on reactor safeguards documents (see e.g., section 2.711(i), it being understood, however, that the scope of the proceeding is not thereby expanded); official records (see e.g., section 2.711(j)); and official notice (see e.g., section 2.711(k)).

Third, subpart C should be modified to include a specific provision for proposed findings and conclusions by the parties following the conclusion of the hearing (see e.g., section 2.712). The provision should be made generally applicable, although the individual subparts should include separate provisions on timing.

Fourth, subpart C provides no absolute right of appeal to the Commission but allows certain initial decisions to become effective pending Commission review. These provisions are entirely appropriate to avoid undue delays in license issuance, and are consistent with the APA. However, section 2.340(b)(1) indicates that the filing of a petition for Commission review under section 2.340 is a necessary prerequisite to exhaustion of administrative remedies and judicial review. As there may be some question whether the NRC can require this kind of exhaustion of remedies without staying the effectiveness of the initial decision pending administrative review,⁶ the rules should be modified to provide that the filing of a petition under section 2.340 is a prerequisite to judicial review when the initial decision is not effective or has been stayed. When there is no stay or delayed effectiveness pending administrative review, the filing of a stay motion under section 2.341 should be the prerequisite to judicial review, without prejudice to other circumstances that may render the NRC action for which judicial review is sought non-final.

Finally, we recommend that subpart C more explicitly state that the NRC's decision must be based on reliable, probative, and substantial evidence and, except for matters officially noticed, must be based on the record as the exclusive basis for decision.

⁶ See *Darby v. Cisneros*, 509 U.S. 137 (1993); *Career Education, Inc. v. Department of Education*, 6 F.3d 817 (D.C. Cir. 1993).

Attachment 2**NEI RESPONSES TO QUESTIONS POSED BY THE COMMISSION****A. Overall Approach to NRC Hearings.**

As described above, NEI agrees with NRC's expert interpretation of section 189 of the Atomic Energy Act that trial-type hearings are not required, and the industry supports the NRC's overall approach to and revisions of NRC hearing procedures. However, NEI recommends that some modifications be made to the proposed rules in subpart C that would promote a fair, effective, and efficient hearing process consistent with section 5, 7 and 8 of the APA.

NRC also raised the question whether subpart L should be changed to resemble legislative style hearings where the presiding officer or the Commission had the principal responsibility to frame the issues and develop the record. The answer to this question is no. As explained above, NEI believes that adjudicatory hearings under Part 2 should serve the limited purpose of enabling citizens and special interest groups (and applicants and licensees) with an affected interest, and with genuine issues of material fact, to have a fair process before an independent tribunal, separate from NRC Staff, that will consider their evidence, compile a well-defined record for decision, and then reach a sound decision that will facilitate the judicial review that section 189 makes available. Accordingly, it is the interested parties, and not the presiding officer (or atomic safety and licensing board), that must be responsible for proposing the issues and offering sufficient evidence to support their positions. However, in this regard, the industry notes that subpart L hearings normally should be based on the parties' written submissions unless there is good cause to allow oral testimony.

B. Hearing Tracks.

The industry supports the new proposed subparts C and the retention (with some revisions) of subparts G, K, L, and M. NEI generally supports the criteria proposed for selection of subparts or tracks. However, subpart G should be modified to make clear the Commission's determination that trial-type hearing procedures are to be reserved for enforcement cases unless the Commission finds, in its discretion, a need to apply the subpart G procedures in another licensing context. Further, section 2.310(h) should be clarified so that licensees may request use of subpart N in civil penalty cases. Finally, NEI does not believe NRC Staff should have veto power over a licensee's choice to use subpart N in enforcement and civil penalty cases. See 2.310(h)(2).

C. Presiding Officer.

The industry suggests that NRC make greater use of atomic safety and licensing boards or administrative law judges. The industry would not object if the Commission were to preside over a hearing in carefully selected special cases, if time and other Commission responsibilities so permit, but suggests that allowing one or more Commission members to preside would create practical difficulties on review of the initial decision.

D. Discovery.

Because discovery can, in appropriate cases, expedite a proceeding, the industry generally supports the mandatory discovery provisions in proposed sections 2.335, 2.704 and 2.1203, and existing section 2.1303. However, proposed sections 2.335, and 2.704, as drafted, can be read to impose a virtually impossible burden on the parties to disclose all information, including the names of all experts, that are relevant to an admitted contention, wherever in the world it, he, or she may be located, and regardless of whether the information supports or undercuts the party's position or whether the information is intended to be relied by the party in the proceeding. Even more problematic is section 2.336(a)(4), which requires disclosure of "all other documents...that, to the party's knowledge, provide direct support for or opposition to, the application or other proposed action that is subject of the proceeding." This requirement appears to require production of documents irrespective of whether those documents are relevant to an admitted contention. Obviously, the industry strenuously objects to these provisions because, among other infirmities, they would be impossible to administer and would provide literally limitless opportunity for an NRC hearing to become a forum for endless delay.

Especially considering the possibility of sanctions (see proposed sections 2.335(e)), these provisions must be much more carefully circumscribed before they can even be considered as part of the agency process. We suggest that, aside from material in the relevant NRC docket or hearing file (application, safety evaluation, correspondence, etc.) automatic discovery should be limited to material that the party intends to rely upon to support its position in the proceeding, including all materials relied upon or utilized by proposed expert witnesses.

The industry also suggests that the provisions for additional discovery in proposed sections 2.705-2.709 be amended to include special provisions applicable to discovery on matters of expert opinion. In keeping with the discussion above of the proper role of cross-examination, and taking account of the automatic disclosure requirements in proposed section 2.704 (which the industry's comments suggest be amended), discovery by deposition should be limited to pure factual issues. There should be no discovery deposition of experts unless the party-seeking discovery demonstrates, by affidavit of an expert, that the prior disclosures in the proceeding are insufficient to prepare expert rebuttal testimony.

D. Evidence and Cross-Examination.

As discussed in the attached comments, cross-examination should be reserved for genuine issues of pure fact (that is, issues of motive, intent, credibility, and the details of past events). Provided that the bases for an opposing expert's testimony are fully disclosed, the proper way to rebut the opposing expert's testimony is by the filing of rebuttal expert testimony.

E. Time Limitations.

The time periods proposed are generally adequate. In particular, the industry supports the proposition that NRC Staff abide by the same time deadlines as other parties. The industry believes that a 45 day period for filing of petitions to intervene and requests for hearing should be sufficient. In virtually all cases where the application is long and complex, there have been many months of pre-docketing public interactions with the applicant and the filing of extensive application materials. However, because there may be occasions when certain application material has not been publicly disclosed and perhaps other circumstances when 45 days may not be sufficient, the rules should provide for requests to the Commission itself to extend the time for filing for good cause. Such requests should be filed no later than 20 days before the time when petitions would otherwise be due.

The NRC should continue, and if feasible expand, its practice of providing Federal Register notice and issuing press releases of receipt of applications and opportunities for hearing requests. While the industry recognizes that the NRC's Website offers the potential for expanded actual public notice, and we support greater use of this tool to keep interested persons informed, there remain substantial problems with NRC's web-based public data systems. Also, whether or not people actually read Federal Register notices, as a legal matter it remains that notice in the Federal Register is generally deemed to be constructive notice. See 44 U.S.C. § 1507.

F. Requests for Hearing and Contentions.

The industry strongly supports the standards for intervention and hearing requests in section 2.309(a)-(d). In particular, we support the requirement that contentions be included with the original petition. Not only will this expedite the decision regarding whether a hearing is required, but in some circumstances knowledge of the issues sought to be raised will aid in the decision on petitioner's standing. Also, there is no need for an adjudicatory hearing in the absence of standing and genuine material fact issues, regardless of whether the hearing is under subpart C or some other subpart. The industry also believes that the original petition should include the petitioner's position, with supporting argument, regarding what hearing subpart should be applicable.

G. Alternative Dispute Resolution (ADR).

The industry supports the use of alternative dispute resolution if all parties agree. Indeed, subpart N represents a kind of alternative dispute resolution. However, the premise for alternative dispute resolution is that all parties want a fair and prompt resolution of the issues. If past practice is any guide to the future, opponents of new plants may seek to use any type of process provided for purposes of delay. As such, ADR should never be required.

Attachment 3**OTHER ISSUES FOR NRC CONSIDERATION
IN HEARING PROCESS RULEMAKING****A. Case Management.**

The industry supports the setting of firm schedules for the conduct of the proceeding and the provision of the necessary tools to assure that schedules are met. Thus, we support proposed sections 2.332-2.334. The establishment of schedules is especially important at the outset of a hearing opportunity, when the hearing request is granted, when the Commission should set an overall date for completion of the hearing and for issuance of the initial decision. NEI also believes that, to the maximum extent feasible, the Commission should control the scope of the proceeding from the outset by resolving legal and policy issues that are expected to be material but contentious. For this reason, the industry suggests that the housekeeping provision in proposed section 2.308 be implemented so that there is never a referral to the Chief Administrative Judge without an opportunity for the Commission to provide such guidance.

B. Conduct of Subpart L Hearings.

The industry believes that hearings in subpart L proceedings should normally be based on written submissions unless the parties demonstrate that a hearing including oral testimony is necessary.

C. Discretionary Intervention.

NRC proposes to codify the criteria in *Portland General Electric Co. (Pebble Springs Nuclear Plant Units 1 and 2)*, 4 NRC 610 (1976), for allowing discretionary intervention when the standing requirements of section 3.309(d) are not satisfied. See proposed section 2.309(e). The continuation of discretionary intervention under *Pebble Springs* is inconsistent with the purpose of hearings conducted under section 189 of the Atomic Energy Act. First, there is seldom any justification for discretionary intervention when no hearing under Part 2 would otherwise be held. In such cases, the speculative benefit of a hearing is outweighed by the expense and delay associated with an entirely unnecessary hearing. This is especially so given the other opportunities which NRC affords for other public participation in its information gathering and decision making processes.

Second, it is useful to compare *Pebble Springs* with intervention in federal court proceedings under Fed. R. Civ. P. 24. Rule 24 limits discretionary intervention to cases where, in addition to the factors proposed to be used by the NRC, the petitioner has a question of law or fact in common with the main action. Thus, the industry suggests that the NRC limit discretionary intervention to cases where petitioner is a party in another NRC proceeding and that proceeding has an issue that is the same as one admitted in the case in which intervention is sought.

D. Sua Sponte Issues.

In keeping with the purpose of adjudicatory hearings, NRC should not allow presiding officers to raise issues for resolution in the proceeding that are not raised by the parties, except in mandatory uncontested hearings. See *UCS v. AEC*, 499 F. 2d 1069 (D.C. Cir. 1974). Presiding officers have no personal stake or standing in the proceeding, and the practice of allowing presiding officers to raise issues *sua sponte* is inconsistent with their role as impartial decision makers. Moreover, the practice adds an entirely capricious element to the proceeding, since no party has control over what issues are raised. Alternatively, NRC should codify the practice of requiring Commission approval before a *sua sponte* issue can be litigated, and require the presiding officer to explain why other means for resolution (including review by the ACRS or by the Commission itself) will not be satisfactory. See section 2.339(a).

E. Role of States and Indian Tribes.

The industry supports the provisions of section 2.309(d) that a single designated representative of affected state and local governments and affected Indian tribes (as defined in Part 60) be granted party status and participate as a party without taking a position on the admitted issues. However, it should be clarified that the representative must take a position on any contentions that he or she wishes to participate with respect to.

We also support the provisions in section 2.315 with respect to non-party participation in adjudicatory hearings. These provisions are consistent with section 274 of the Atomic Energy Act and current practice. However, NRC should clarify that participation as a party under 2.309 is a prerequisite to seeking judicial review.

F. Description of Hearings

As noted in the letter transmitting the industry's comments, we strongly urge the NRC to give careful consideration to its characterization of the proposed hearing procedure revisions. By characterizing the NRC's proposal for revised hearing procedures as a change from primarily "formal" hearings to "informal" hearings, the NRC is likely to affect substantially the public's perception of the NRC's intent and action. These terms may have become terms of convenience, which is to say, a short hand means of expressing concepts that take considerably more explanation. However, the NRC's use of the term "informal hearings" for the various subparts that do not provide for trial-type procedures undercuts the NRC's credibility. Use of the term is likely to prompt a natural concern from the public that implementation of this rulemaking

initiative will reduce their hearing rights, when, in fact, that is not the case. The NRC must clearly explain to the public that a hearing that does not include all of the features of trial-type proceedings nevertheless can and will be a fair and effective means for the public to participate in the NRC licensing process, (i.e., fully litigate issues deemed appropriate for the subject proceeding). We strongly urge the NRC to develop more accurate terms to describe the proceedings that will result from this rulemaking initiative.

As filed with the NRC today under Public Comments as 885-0526: Proposed Rulemaking -- Changes to Adjudicatory Process. Robert W. Bishop by Bettie Burnett

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