IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 02-72735

CALIFORNIA PUBLIC UTILITIES COMMISSION
and the COUNTY OF SAN LUIS OBISPO,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents, and

PACIFIC GAS & ELECTRIC COMPANY,

Intervenor-Respondent.

NORTHERN CALIFORNIA POWER AGENCY,
Intervernor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR THE FEDERAL RESPONDENTS

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION and THE COUNTY OF SAN LUIS OBISPO, Petitioners, v. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	)	No. 02-72735

BRIEF FOR THE FEDERAL RESPONDENTS

JURISDICTIONAL STATEMENT

This petition for review arises from a final order of the Nuclear Regulatory Commission ("NRC" or "Commission") denying petitions to intervene in a license transfer proceeding. Agency decisions denying intervention are "final orders" for purposes of judicial review. See Alaska v. FERC, 980 F.2d 761, 763 (D.C. Cir. 1992).[1] Petitioners, the California Public Utilities Commission ("CPUC") and the

[1]Orders partially denying intervention are not "final"; judicial review of such orders must await the end of the agency adjudication. See id.; cf. Churchill

(continued...)

County of San Luis Obispo ("the County") (collectively, "Petitioners"), timely filed a petition for review within 60 days of the final NRC order. Thus, the CPUC and the County have properly invoked this Court's jurisdiction under the Hobbs Act and the Atomic Energy Act. See 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(b).

QUESTIONS PRESENTED

1. Whether the CPUC articulated a radiological health or safety interest in the outcome of a license transfer proceeding under the Atomic Energy Act ("AEA") sufficient to confer standing to intervene and obtain an NRC hearing;

2. Whether the County met its burden under the factors specified in 10 C.F.R. section 2.1308(b) to show good cause or otherwise justify its three month late filing of a petition for leave to intervene;

3. Whether the CPUC's and the County's petitions for leave to intervene raised specific issues within the scope of the license transfer proceeding,

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[1](...continued)
County v. Babbitt, 150 F.3d 1072, 1081-82 (9th Cir. 1998). Here, the Commission did allow the CPUC and the County limited participatory rights in the license transfer adjudication (ER 1168, 1173), but as interested government bodies (akin to amici curiae), not as parties. See 10 C.F.R. § 2.715(c). Thus, we agree with the CPUC and the County that they can challenge the Commission's intervention decision now.

with the necessary factual and/or legal support required for admissible issues under 10 C.F.R. section 2.1306.

STATEMENT OF THE CASE

A. Nature of the Case

Pacific Gas and Electric Company ("PG&E") is currently in the midst of a Chapter 11 bankruptcy reorganization proceeding in the United States Bankruptcy Court for the Northern District of California.[2] In connection with its proposed Chapter 11 Plan of Reorganization ("PG&E Plan"), PG&E seeks to transfer both of its operating licenses for the Diablo Canyon Nuclear Power Plant, Units 1 and 2 ("Diablo Canyon"), to two newly planned business entities, Electric Generation, LLC ("Gen"), and Diablo Canyon, LLC ("Nuclear"). The PG&E Plan calls for Nuclear to own Diablo Canyon and lease it to Gen, which will operate the power plant.

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[2]An aspect of that case– concerning the bankruptcy court's authority to override (i.e., preempt) certain California laws– is currently pending before this Court. See Pacific Gas & Electric Co. v. People of the State of California, No. 02-16990 (9th Cir. filed Sept. 30, 2002). As discussed in this brief, there have been no developments in that case or the bankruptcy proceeding below that are material to the NRC license transfer proceeding. However, this pending bankruptcy appeal presents important legal questions regarding the preemption of state and federal health and safety laws under the Bankruptcy Code. The United States has submitted a brief as amicus curiae in that case, to which we refer the Court.

Under the PG&E Plan, Gen will not operate Diablo Canyon as part of a traditional electric utility selling to retail ratepayers with cost-of-service based rates. Instead, Gen will operate Diablo Canyon in the wholesale electricity generation market, selling electricity generated at the plant to the reorganized PG&E under a 12 year contract known as a purchase and sale agreement ("PSA"). The effect of this reorganization would be to deprive the CPUC of all ratemaking authority over the licensee for Diablo Canyon, which would be assumed by the Federal Energy Regulatory Commission ("FERC").

To prevent this loss of rate-regulation authority, the CPUC has vigorously opposed various aspects of the PG&E Plan before the bankruptcy court, before FERC, and before the NRC. The County, too, has opposed the PG&E Plan in multiple forums. Before the NRC, the County and the CPUC argued that the NRC cannot and should not proceed with its consideration of the Diablo Canyon license transfer application until various other decisionmakers take action regarding the PG&E Plan. These actions include bankruptcy court approval or denial of the PG&E Plan, and FERC approval or denial of the rates Gen intends to charge under the PSA.

The FERC and bankruptcy court decisions relate to the transfer of the Diablo Canyon licenses because a lack of approval by the bankruptcy court may

obviate the need for a transfer, and the lack of FERC approval may raise questions about the ability of Gen and Nuclear to meet Diablo Canyon's operating costs. To date, neither the bankruptcy court nor FERC have issued final decisions regarding the PG&E Plan or the PSA. Nevertheless, consistent with longstanding Commission policy, the NRC is currently proceeding with its consideration of the Diablo Canyon license transfer application in parallel with FERC and bankruptcy court proceedings for reasons of regulatory efficiency.

Ultimately, the NRC's consideration of the proposed Diablo Canyon license transfer forms only one strand in a web of interdependent judicial and regulatory approvals necessary to actually transfer ownership and control of the plant from PG&E to Gen and Nuclear. If any one of these approvals does not occur, the license transfer will not occur as proposed. However, if all of the approvals described in the license transfer application do occur, and if the NRC finds Gen and Nuclear financially and technically qualified, Diablo Canyon will be able to be transferred to two new business entities outside of the regulatory control of the CPUC.

This lawsuit involves the adjudicatory phase of the NRC's license transfer review. Both the County and the CPUC petitioned the NRC for leave to intervene in the adjudication and demanded an agency hearing. The CPUC's petition

asserted economic and regulatory interests in the proceeding unrelated to radiological health and safety concerns. The County's petition asserted radiological health and safety interests in the outcome of the proceeding, but it was filed three months past the published deadline. Both petitioners raised issues that challenged the NRC's authority to consider the license transfer application while certain other judicial and regulatory approvals essential to the transaction were still pending. The Commission denied both petitions. Shortly thereafter, the CPUC and the County jointly filed the instant petition for review in this Court.

B. Statutory and Regulatory Framework

1. NRC License Transfer Authority and Criteria

Under the AEA, the NRC is authorized to issue licenses regulating the possession and operation of commercial nuclear power reactors. See 42 U.S.C. §§ 2131, 2132, 2133, AEA § 101, 102, 103. These licenses are inalienable unless the Commission consents in writing to their transfer. 42 U.S.C. § 2234, AEA § 184; 10 C.F.R § 50.80(a). A power reactor licensee must file an application with the Commission prior to any transfer of ownership or control of a power reactor. 10 C.F.R. § 50.80(b).

An application seeking authorization to transfer a power reactor license must contain information establishing the technical and financial qualifications of

the proposed transferee. 10 C.F.R. § 50.80(b); see 10 C.F.R. §§ 50.33, 50.34. For example, the application must describe the transferee's organizational structure and plans for operation, maintenance, surveillance, and testing of plant systems. 10 C.F.R. § 50.34(b)(6). For non-electric utilities (i.e., non-rate regulated entities), the application must also estimate the operating costs of the power plant, identify the source of funds intended to be used in covering those costs, and demonstrate with reasonable assurance the availability of those funds. 10 C.F.R. § 50.33(f)(2).

Where a license transfer applicant's showing of financial qualification turns on securing regulatory approvals from agencies other than the NRC, the NRC considers the license transfer application in parallel with other decisionmakers. See Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-45 (1999). In this way, the NRC can avoid untoward delay in its decisionmaking that might otherwise result from waiting for other regulatory bodies to act. Id.; see generally, Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721 (Dec. 3, 1998) (setting forth the Commission's policy favoring expedited review of license transfer applications). Even if other relevant decisionmakers have not acted, the NRC may provisionally approve the license transfer if the application demonstrates that the transferee is

financially and technically qualified to safely operate the power plant in accordance with applicable regulations. See 10 C.F.R. § 50.80(c). In such cases, the NRC may condition its approval on the transferee obtaining pending approvals in other agencies. Failure to meet these conditions would nullify the NRC's approval, and no license transfer could actually take place.

2. Standards for Intervention in License Transfer Proceedings

The filing of a license transfer application creates an opportunity for an NRC hearing under AEA section 189, but only for persons "whose interest may be affected." See 42 U.S.C. § 2239, AEA § 189.[3] The AEA does not define "interest," thereby leaving to the Commission the authority and responsibility to interpret which interests warrant hearings under AEA section 189. See Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 75-77 (D.C. Cir. 1999). As interpreted by the Commission, AEA section 189 calls for hearings only if they are "'squarely-- genuinely-- focused upon health and safety concerns.'" Id. at 77, quoting

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[3]The Commission's rules for license transfer hearings appear in 10 C.F.R. Part 2, Subpart M (10 C.F.R. § 2.1301 et seq.). The Commission enacted Subpart M in 1998 as part of an effort to render license transfer reviews more efficient. See Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. at 66,721. The Commission has issued a number of formal opinions in license transfer cases, including the current order under review (ER 1148), that apply and construe Subpart M. We point to a number of these decision in the text of this brief.

International Uranium Corp. (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998). Except in uncommon cases (e.g., cases falling within the NRC's limited antitrust powers), economic interests do not trigger NRC hearings. See Envirocare, 194 F.3d at 77-78. Radiological health and safety interests do, if other requirements are met. See id. at 75, 77-78.

Besides establishing a radiological health or safety interest, a hearing petitioner must allege a concrete and particularized injury to that interest. In the license transfer setting, this requires a petitioner to show how the transfer will adversely affect the petitioner's radiological health and safety. See Power Authority of the State of New York (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293-94 (2000). The petitioner must also show that the alleged injury is fairly traceable to the challenged action, and that it is likely to be redressed by a favorable decision. Id. In other words, a petitioner must establish its "standing" to intervene. The Commission frequently looks to judicial standing doctrine in deciding whether particular allegations of injury suffice to trigger an agency hearing.

In addition to establishing standing, a petitioner must also submit at least one admissible "issue" in order to be admitted as a party to a license transfer proceeding. See North Atlantic Energy Service Corp. (Seabrook Station, Unit 1),

CLI-99-6, 49 NRC 201, 214 (1999). To show an admissible issue, a petitioner must:

1. Set forth the factual and/or legal issues that the petitioner seeks to raise;
2. Demonstrate that the issues fall within the scope of the proceeding;
3. Demonstrate that the issues are relevant and material to the findings necessary to a grant of the license transfer application;
4. Show that a genuine dispute exists with the applicant regarding the issues; and
5. Provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which the petitioner intends to rely.

See id. at 215; 10 C.F.R. §§ 2.1306, 2.1308. The scope of admissible issues in a license transfer proceeding is generally limited to issues regarding the financial and technical ability of the proposed transferee to safely operate the power plant in accordance with the Commission's regulations.

C. Statement of Facts

The NRC gave public notice of the PG&E license transfer application in the Federal Register on January 17, 2002, and provided interested parties an opportunity for a hearing. (ER 0005-06) The Commission set a deadline of February 6, 2002, for submitting petitions for leave to intervene in the license transfer proceeding. (ER 0006) The CPUC and the County filed petitions for

leave to intervene in the NRC's license transfer proceeding on February 5, 2002, and May 10, 2002, respectively. (ER 0007, 1094)

1. The CPUC's Petition for Leave to Intervene

After considering the CPUC's lengthy petition for leave to intervene and PG&E's objections to it, the Commission denied the CPUC's petition. (ER 1173) The Commission's decision rested on two separate grounds: (1) the CPUC lacked standing to intervene; and (2) the CPUC failed to submit any admissible issues.

The CPUC's petition began by asserting two related interests in the license transfer proceeding: one related to its role as a regulatory agency with the responsibility for regulating electric corporations, and the other deriving from its "statutory mandate to represent the interests of electric consumers throughout California. . ." (ER 0015) The CPUC's petition did not initially expound on these interests or how they would be injured by the proposed license transfers. Later in the petition, the CPUC specified that the proposed license transfers threatened the elimination of its ratemaking authority and would thus constitute a direct attack on the sovereignty of the State of California. (ER 0054-55) The CPUC further argued that elimination of its ratemaking authority would in turn have negative economic impacts on California ratepayers, which in turn might adversely affect the general health and safety of California citizens. (ER 0054-61)

In holding that the CPUC lacked standing to intervene, the Commission found that the CPUC failed to articulate a valid radiological health or safety interest in the outcome of the license transfer proceeding on behalf of itself or California ratepayers. (ER 1155-56) The Commission further found that "the interests CPUC protects are economic in nature; i.e., ratepayer interests," which are not cognizable under the AEA. (ER 1156) The Commission also found that the CPUC's institutional interest in preserving its regulatory authority was not protected by the AEA, nor was it redressable by the Commission, since it is up to the bankruptcy court and FERC, not the NRC, to determine whether and to what extent the CPUC's ratemaking authority may be preempted by the Bankruptcy Code and relevant FERC statutes and regulations. (ER 1163-64)

The issues raised by the CPUC primarily argued that because certain judicial and regulatory approvals essential to the PG&E Plan had not yet been granted, the NRC should either cease or delay its consideration of the Diablo Canyon license transfer application. For example, the CPUC argued that because the PG&E Plan assumes the preemption of certain California laws, "the Bankruptcy court cannot lawfully approve the [PG&E] Plan as proposed," and that "it would . . . be an extraordinary waste of resources to proceed on this [license transfer] Application pending the Bankruptcy Court's ruling. . ." (ER 0021, 0022)

The CPUC similarly argued that PG&E's plan to have the bankruptcy court compel the transfer of decommissioning funds to Gen and Nuclear without the consent of the CPUC violated the terms of the decommissioning trust agreements, constituted a "void and unlawful act," and would not be in the public interest. (ER 0023-30) The CPUC also argued at length that a proposed source of operating revenue for the transferred Diablo Canyon (the PSA between Gen and the reorganized PG&E) would never win FERC approval because it was based on "illegal, unjust, and unreasonable rates," and that the NRC could not, therefore, conclude that Gen and Nuclear would be financially qualified to operated the plant. (ER 0032-54)

The Commission rejected these claims. It viewed the CPUC's issues as primarily focusing on economic and preemption questions that were pending before FERC and the bankruptcy court. (ER 1158-64) The Commission also noted the CPUC's failure to challenge the ability of Gen and Nuclear to safely own and operate Diablo Canyon as planned in the license transfer application. The Commission thus held that the CPUC's issues fell outside the limited scope of the license transfer proceeding. Id. The Commission acknowledged that the scenario presented in the license application (i.e., PG&E's securing of certain FERC and bankruptcy court approvals) might not actually come to pass, but found

that it would be more efficient to proceed with its consideration of the application in parallel with other decisionmakers than to wait for others to act, in the absence of evidence that FERC or the bankruptcy court had denied transactions essential to PG&E's showing of financial and technical qualifications. (ER 1150-52)

The CPUC rounded out its issues with policy arguments dealing with the benefits of dual state and federal regulation, the likelihood of terrorist attacks in the current threat environment, and the effect of market pressures on safety margins at deregulated electric generation facilities. (ER 0064-69) The Commission held all of these issues inadmissible as either speculative, unsupported, or beyond the limited scope of the license transfer proceeding. (ER 1164-67)

2. The County's Late-Filed Petition for Leave to Intervene

Some months after the CPUC, the County filed its own petition for leave to intervene in the Diablo Canyon license transfer proceeding. The County's petition, filed on May 10, 2002, came over three months after the February 6, 2002, deadline for submitting hearing requests. The Commission denied the County's petition for intervention on two separate grounds: (1) failure to show good cause for or otherwise justify its late filing; and (2) failure to submit any admissible issues.

In its effort to establish good cause for its late filing, the County argued that developments before the bankruptcy court justified its lateness. Specifically, the County pointed to the bankruptcy court's then-recent decision to allow the CPUC to file an alternative plan of reorganization that would not require any transfer of the Diablo Canyon licenses. (ER 1101-03) The County argued that this development raised issues critical to the license transfer proceeding (specifically, whether a license transfer would in fact be needed) and provided good cause for the County's late filing. Id.

In its order denying the County's petition for intervention, the Commission held that the bankruptcy court's decision to allow the CPUC to file an alternative plan of reorganization raised no challenge to the information contained in PG&E's pending license transfer application, nor did it alter the limited financial and technical qualifications issues under NRC consideration. (ER 1171) The Commission emphasized that all of the County's contentions were based on the PG&E license transfer application and could have been raised in a timely fashion, yet the County did not explain why it did not do so. Id. Ultimately, the Commission concluded that the County "ha[d] not established good cause – or, indeed, any cause – for untimely presentation of its issues, all of which the County

could have filed long ago in a timely petition based on PG&E's application. . ." Id.

The County next attempted to show that other factors justified its late filing, including its ability to contribute to the development of a sound record and the lack of other parties in the proceeding who would represent the County's interests. (ER 1103-04) The Commission, after noting that good cause was the most important factor to be weighed in the balance, considered the County's further arguments in support of its late-filing. (ER 1170, 1172) Ultimately, the Commission concluded that admission of the County as a party would only serve to broaden the issues under consideration and delay the proceeding without contributing to the development of a sound record. (ER 1172)

The issues raised by the County, like the CPUC's, focused on the fact that the bankruptcy court had not yet approved the PG&E Plan, which is the sine qua non of implementing the Diablo Canyon license transfer. (ER 1111-13) The County argued that, without knowing for certain whether the bankruptcy court would approve the PG&E Plan, the NRC could not determine whether the Gen and Nuclear would be financially qualified to own and operate Diablo Canyon. (ER 1111-12) The County also argued that it would be a waste of resources for the NRC to consider the license transfer application, only to later have the bankruptcy

court deny the PG&E Plan and render the entire NRC proceeding moot. (ER 1106-08) Finally, the County alleged that the license transfer application did not provide sufficient information to demonstrate compliance with NRC requirements governing the provision of off-site backup power to Diablo Canyon. (ER 1114)

In considering the County's issues, the Commission emphasized its policy of considering license transfer applications in parallel with other decisionmakers rather than staying its own proceedings until others have acted. (ER 1151-52) The Commission also noted that, consistent with its rules of practice governing license transfer proceedings, late-filed petitions for leave to intervene must set forth with particularity the issues sought to be raised, identify prospective witnesses, and summarize their proposed testimony. (ER 1172) The Commission noted that the County's issues amounted to only general allegations without supporting expert testimony or other evidence. Id. Consequently, the Commission held that the County's issues were too vague and unsupported to be admissible. Id.

Although the Commission denied both petitions, it referred the County's and the CPUC's issues to the NRC staff to assist in its consideration of the license transfer application. (ER 1168, 1173) The Commission also permitted the County and the CPUC to participate as interested governmental parties in the event a

hearing was eventually granted to certain other groups, whose petitions for leave to intervene in the license transfer proceeding are still being considered by the Commission. Id. Shortly after being denied full party status in the license transfer proceeding, the CPUC and the County jointly filed the instant petition for review in this Court.

SUMMARY OF THE ARGUMENT

In their Joint Brief filed in this Court, the CPUC and the County offer essentially three arguments against the Commission's decision to reject their request for a hearing. They first argue that the CPUC's interests suffice to confer standing before the NRC. They next argue that the Commission was wrong to dismiss the County's three month late petition. And, finally, both the CPUC and the County maintain that they submitted litigable issues. None of these arguments is persuasive.

1. Only those persons "whose interest may be affected" by the Diablo Canyon license transfer proceeding are entitled to a hearing under AEA section 189. The Commission has consistently interpreted this language as primarily protective of radiological health and safety interests, and has denied standing to petitioners in license transfer proceedings who assert interests unrelated to radiological health and safety (or to other AEA interests). The CPUC's interests

here, which include the preservation of its ratemaking authority and the continued provision of affordable electricity to California ratepayers, are unrelated to radiological health and safety concerns, or any other interest protected by statutes within the NRC's mission or mandate. Therefore, consistent with its established interpretation of the interests protected in adjudicatory proceedings under the AEA, the Commission reasonably concluded that the CPUC lacked standing to intervene and obtain an NRC hearing.

2. Although the Commission acknowledged the County's standing to intervene, its petition was filed more than three months after the published deadline. The Commission's regulations and adjudicatory decisions clearly establish that a late-filed petition, even though it may contain a proper showing of standing, must either show why it is late-- "good cause"-- or offer other compelling reasons that justify admission of the petitioner as a party to the proceeding. Here, the County did not explain why it could not have filed its petition in a timely fashion, nor did it specify how its participation in the proceeding would contribute to the Commission's decisionmaking process.

The County claims that the bankruptcy court's decision to consider an alternative reorganization plan-- one suggested by the CPUC-- justified late intervention. But nothing in the CPUC plan warranted a late challenge to the

license transfer application. None of the issues the County raised at the NRC even related to the CPUC plan. The Commission rightly found that the County could and should have raised all of its license transfer issues at the outset of the proceeding and under the original deadline. Therefore, the Commission reasonably concluded that the County failed to sufficiently justify its late intervention.

3. Even if the Commission had erred on the standing (CPUC) or timeliness (County) questions-- and it did not-- this Court should still uphold the Commission's rejection of the CPUC and County hearing requests on the alternative ground that those requests failed to set out issues meeting the Commission's standards for detailed and specific issue-pleading. These standards, which are clearly set forth in the Commission's regulations and adjudicatory decisions, required the County and the CPUC to show that their issues are within the scope of the license transfer proceeding (i.e., that they are relevant and material to the financial and technical qualifications issues under NRC consideration), and that they are each supported by a specific factual and/or legal basis. The CPUC and the County made no such showing.

The CPUC's issues primarily raise concerns that can only be resolved in other forums (e.g., the bankruptcy court or FERC), or that are otherwise outside

the limited scope of the license transfer proceeding. The County's issues, which must meet a higher pleading standard due to their untimeliness, similarly address matters outside the scope of the license transfer proceeding, and lack factual and/or legal support. Neither the CPUC nor the County raised issues, with underlying expert or factual support, that called for a hearing on the proposed transferee's financial or technical qualifications to run the Diablo Canyon plant safely. Therefore, quite apart from its standing and timeliness rulings, the Commission reasonably concluded that the CPUC's and the County's issues were inadmissible and that no hearing was required.

ARGUMENT

Standard of Review

Under the Administrative Procedure Act, a court may set aside an agency action if it was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law.'" Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1176-77 (9th Cir. 2002), quoting Environmental Protection Info. Center v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2001); 5 U.S.C. § 706. This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency

action if a reasonable basis exists for its decision." Independent Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000).

To the extent this case involves review of Commission statutory interpretations (e.g., which "interests" warrant a hearing under AEA section 189), deference should be given to the Commission's view so long as it reflects a "permissible" construction of a statute the Commission administers. See Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984); Envirocare, 194 F.3d at 75-76. Also, this Court should give "controlling weight" to the NRC's understanding of its own regulations, absent plain error. Bowls v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). See also, A.J.McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 331 (D.C. Cir. 2002); Balelo v. Baldridge, 724 F.2d 753, 759 (9th Cir. 1984).

I. The Commission Reasonably Concluded that the CPUC Lacked Standing to Intervene in the Diablo Canyon License Transfer Proceeding.

To demonstrate standing in a license transfer proceeding under AEA section 189, persons seeking intervention must, inter alia, articulate a valid public health and/or safety interest in the outcome of the proceeding that is related to radiological safety concerns. See pp. 7-9, supra. As the Commission held here (ER 1155-57), the AEA primarily protects radiological health and safety interests;

it does not protect general economic concerns such as competitive injury, the need for power, or the impact of a licensing decision on electricity rates.[4] See generally Envirocare, 194 F.3d at 75, 77-78; Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Virginia Elec. & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 106-07 (1976). The CPUC's petition for leave to intervene failed to establish a valid radiological health or safety interest in the outcome of the Diablo Canyon license transfer proceeding. Nothing in Petitioners's Joint Brief in this Court fills in the gap, nor could it, since the CPUC is bound by what it argued before the NRC. The CPUC therefore lacked standing to intervene and obtain an agency hearing before the Commission.

A. The CPUC's Petition for Leave to Intervene Failed to Articulate a Public Health and Safety Interest Related to Radiological Safety.

The CPUC asserts two interests in the outcome of the license transfer proceeding, one on behalf of itself (preservation of its regulatory authority) and

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[4]Under the National Environmental Policy Act (NEPA), the NRC hearing process also allows hearings on general environmental interests in some licensing proceedings. But such interests are not implicated by NRC consideration of a license transfer application. See Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. at 66,728; 10 C.F.R. § 51.22(c)(21). Therefore, environmental interests under NEPA are not cognizable in license transfer proceedings. In any event, the CPUC and the County raised no NEPA-related environmental interests.

one on behalf of California ratepayers (protection of ratepayers' economic interests). The CPUC's desire to protect its regulatory power is unrelated to radiological health and safety interests, since it has no authority to regulate the radiological health and safety aspects of Diablo Canyon's operation. California ratepayers' interests regarding the need for power and the fairness of electricity rates are similarly unrelated to the radiological safety of Diablo Canyon. Because the CPUC articulated no interest related to radiological health or safety concerns, it failed to demonstrate its standing to intervene and obtain an NRC hearing, and the Commission reasonably denied its petition for intervention.[5]

The CPUC did not include a formal standing argument in its petition for leave to intervene before the NRC. Rather, it discussed seven separate "interests" in the proceeding, none of which raises radiological health or safety concerns. (ER 0054-61) (ER 1156) In its "interests" discussion, the CPUC speaks primarily of an interest in preserving its own regulatory authority for the economic benefit of California's electric ratepayers. Specifically, the CPUC argues that elimination

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[5]To the extent the CPUC claims to represent the interests of California ratepayers as parens patriae in the instant lawsuit against the NRC, the CPUC also lacks standing before this Court. The same principle applies against the County; neither the CPUC nor the County may represent the interests of their citizens against the federal government under the parens patriae doctrine. See Nevada v. Burford, 918 F.2d 854, 858 (9th Cir. 1990), citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

of its regulatory authority would eviscerate its ability to: (1) ensure that rates and charges be set on a non-discriminatory basis; (2) ensure that gains on sale of utility property are shared with ratepayers; and (3) prevent unfair competition and improper corporate transactions with respect to Diablo Canyon. (ER 0056) (ER 0061) (ER 0059-61) The CPUC also argued that elimination of its regulatory authority would threaten the financial viability of Diablo Canyon's continued operation, potentially leading to a reduced electrical generation capacity in the State of California. (ER 0056-59)

The Commission correctly characterized these interests as "economic in nature, i.e., ratepayer interests." (ER 1156) In its petition, the CPUC plainly focused on economic fairness issues associated with the proposed license transfer. The CPUC referred, for example, to PG&E's obligation to "provide electric service to every California customer on a fair and non-discriminatory basis," and to the CPUC's obligation to "assure that ratepayers receive an adequate return on the long-term investment they have paid for through rates" upon the transfer or sale of PG&E's property. (ER 0056, 0061) The CPUC also argued that "[t]he State of California has a strong interest in ensuring that its public utilities remain financially sound and in the position to satisfy their obligations to serve their designated service areas," and that it is the CPUC's duty "to ensure that public

utility generation assets remain dedicated to service for the benefit of California ratepayers. . ." (ER 0057) (ER 0058) Other economic interests asserted by the CPUC included its interest in "preventing improper inter-company transactions," and "misuse of the holding company structure." (ER 0059, 0060)

Although the focus of the CPUC's "interests" discussion was economic, the CPUC also made an unpersuasive attempt to link elimination of its regulatory authority with harm to ratepayers' general public health and safety interests. For example, the CPUC argued that elimination of its regulatory authority, which includes the authority to review certain utility financial transactions, could "jeopardize the public health and welfare" if Diablo Canyon were rendered financially unable to serve ratepayers' electricity demands as a result of a license transfer. (ER 0056-57) The CPUC also argued that, under a California statute intended to prevent utilities from disposing of property in the wake of the state's energy crisis, ratepayers had a public health and safety interest in the maintenance of the CPUC's regulatory authority: "PG&E is using the Bankruptcy Court, the NRC and FERC in an attempt to reverse the California Legislature's recent sovereign determination, during a time of crisis, that it is essential to public health and safety that all electrical generation assets located in California remain dedicated to service for the benefit of the people of California." (ER 0058-59)

None of these asserted "health and safety" interests implicated radiological health and safety, which is the concern of the AEA.

The CPUC could not argue that elimination of its regulatory authority would implicate radiological health and safety concerns because under the AEA the NRC has the exclusive authority to regulate the radiological health and safety aspects of nuclear power plant operation. See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 205-13 (1983).[6] Accord English v. General Electric Co., 496 U.S. 72, 82-84 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249-50 (1984). The CPUC could only argue that elimination of its regulatory authority would have negative economic consequences for Diablo Canyon. This, the CPUC said, would lead to a reduction in electric generation capacity in the State of California, with generic public health and safety consequences for ratepayers (e.g., the lights would go out or the heat would not come on). This "public health and safety" interest plainly does not relate to the radiological risks associated with nuclear power plant operation. Because the CPUC's interests are not associated with radiological

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[6] Pacific Gas & Electric held that the federal government has exclusive control over the radiological safety aspects of nuclear energy generation, whereas states retain their traditional authority over economic questions involving ratemaking and the need for additional generating capacity. See 461 U.S. at 205.

safety concerns, they are not cognizable under the AEA. See Envirocare, 194 F.3d at 75-78.

In short, what the Commission said about the CPUC was correct, namely, that the CPUC lacked standing to intervene because none of its interests is "directly related to. . . radiological harm." (ER 1155) The Commission rightly found that "the essence of CPUC's concern is economics, not safety." (ER 1155, 1156) And the Commission understandably dismissed the petition's passing references to "health," "safety," and "welfare," noting correctly that "bare mentions of health and safety cannot be used to establish standing where the essence of the CPUC's concern is economics, not safety." (ER 1156)

The Commission also correctly rejected arguments by the CPUC suggesting that the PG&E Plan, which envisions the preemption of certain California laws, is a "direct attack on the authority of the State of California, in its sovereign capacity as a government and regulator, to regulate electrical utilities in the interest of the health and safety of the citizens of California." (ER 0055) Even if this accusation were so, as already noted, the elimination of the CPUC's regulatory authority does not implicate radiological health and safety concerns. It would not constitute a cognizable injury under the AEA. Furthermore, the preemption issue is currently

pending in the bankruptcy proceeding,[7] and the Commission correctly reasoned that the Diablo Canyon license transfer proceeding was not the appropriate forum for resolving the CPUC's preemption concerns. (ER 1156-57, 1163-64)

B. The Joint Brief Does Not Challenge the Commission's Conclusion that the CPUC Lacked Standing to Intervene.

The Petitioners's Joint Brief filed before this Court contains no argument at all, indeed not even a claim, that the proposed license transfer would put the CPUC at risk of radiological harm. The CPUC thus fails to challenge the basis for the Commission's finding that the CPUC lacked standing to intervene and obtain an NRC hearing. Instead, the CPUC rests its entire standing argument in the Joint Brief on legal principles that are irrelevant to a standing analysis.

The CPUC essentially argues that because it raised issues related to the financial qualifications of Gen and Nuclear, it has standing to intervene in the Diablo Canyon license transfer proceeding. This argument confuses the scope of litigable issues in license transfer proceedings under AEA section 182(a), 42 U.S.C. section 2232(a), with the standing requirements of AEA section 189. Section 182(a) does not entitle persons without standing to litigate financial

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[7]An important aspect of this preemption issue is before this Court in Pacific Gas and Electric Co. v. People of the State of California, No. 02-16990 (9th Cir. filed Sept. 30, 2002).

qualifications or any other issues in license transfer proceedings, however relevant the issues may be.[8] Only those persons who first demonstrate standing under AEA section 189 (i.e., demonstrate a radiological health or safety interest of their own) are entitled to intervention, provided that they also submit an admissible issue. See FitzPatrick, 52 NRC at 292; Seabrook, 49 NRC at 214.

The Joint Brief contains no valid factual challenge to the Commission's conclusion that the CPUC lacked standing in the Diablo Canyon license transfer proceeding. Nowhere does the Joint Brief attempt to refute the Commission's finding that the CPUC failed to articulate a valid radiological health or safety interest in the proceeding. The CPUC does claim expertise on utility finances (JB 24), but this claim of expertise does not equate to a potential radiological health or safety harm to the CPUC. The absence of a plausible claim of radiological harm dooms the CPUC's claim of entitlement to an NRC hearing.

Failing to articulate a substantive challenge to the Commission's finding that the CPUC lacked standing to obtain an NRC hearing, the Joint Brief implies that the Commission acted unfairly in its consideration of the CPUC's petition:

> The NRC acknowledged that the CPUC addressed safety in the part of its petition devoted to the issues, but would not consider that

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[8]As argued fully below, the CPUC did not actually raise relevant issues within the scope of the NRC license transfer proceeding. See pp. 41-56, infra.

> information because it had not been provided in the section devoted to standing, and the NRC would not 'sift' through the CPUC's filing to determine whether it had standing. However, the NRC did sift through the CPUC's petition to erroneously determine that none of the CPUC's contentions was admissible.

(JB 23) Here the CPUC implies that the Commission applied its pleading requirements in an arbitrary manner in order to find that the CPUC lacked standing to intervene.

The Commission's pleading requirements, which are set forth in its regulations and adjudicatory decisions, place a clear burden upon the CPUC to demonstrate its standing to intervene. See 10 C.F.R. §§ 2.1306, 2.1308. NRC pleading rules, which the courts have upheld,[9] require the CPUC to "come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them." Seabrook, 49 NRC at 219. This burden is greater than that imposed by the general "notice pleading" requirements followed in federal courts under the Federal Rules of Civil Procedure. See id.

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[9]See Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990). Union of Concerned Scientists considered an NRC rule heightening threshold pleading requirements in reactor licensing cases under 10 C.F.R. Part 2, Subpart G (10 C.F.R. § 2.700 et seq.) The Subpart M pleading requirements for license transfer cases are modeled on Subpart G. See Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. at 66,722.

The Commission's comment that it was not required to "sift through the parties' pleadings to uncover and resolve arguments not made by the parties themselves" regarding standing (ER 1157) can't be taken to mean that the Commission failed to fairly consider the CPUC's discussion of its "interests" in the license transfer proceeding. To the contrary, the Commission devoted three pages to its discussion of the CPUC's standing. (ER 1154-57) The Commission fully explained its finding that the CPUC's interests were "economic in nature, i.e., ratepayer interests," unrelated to radiological safety concerns, and not cognizable under AEA section 189. (ER 1156)

In summary, the Joint Brief presents no valid challenge to the Commission's holding that the CPUC lacked standing to intervene in the Diablo Canyon license transfer proceeding. The CPUC's confused legal arguments and unsupported factual assertions provide no basis for its argument that the Commission was arbitrary and capricious in its decisionmaking. The Commission correctly dismissed the CPUC's petition for leave to intervene in the Diablo Canyon license transfer proceeding for lack of standing.

II. The Commission Acted Reasonably in Denying the County's Late-Filed Petition for Leave to Intervene.

The Commission's notice establishing an opportunity for interested parties to intervene in the Diablo Canyon license transfer proceeding set a February 6, 2002, filing deadline for intervention petitions. (ER 0006) The notice clearly stated that untimely petitions could be denied "unless good cause for failure to file on time is established." (ER 0006) See 10 C.F.R. § 2.1308(b). The notice also stated that, in addition to good cause, the Commission would consider the following factors in determining whether to grant or deny a late-filed petition:

> (1) The availability of other means by which the requestor's or petitioner's interest will be protected or represented by other participants in a hearing; and
> (2) The extent to which the issues will be broadened or final action on the application delayed.

Id.; 10 C.F.R. § 2.1308(b)(1), (2). The County's petition for leave to intervene was filed more than three months after the filing deadline, on May 10, 2002.

A. The County Failed to Establish Good Cause for Late-Filing.

Of the late-filing factors found in 10 C.F.R. section 2.1308(b), the Commission has often noted that the "most important" in determining whether to grant or deny a late-filed petition for leave to intervene is "good cause" for lateness. See Power Authority of the State of New York (James A. FitzPatrick

Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 515 (2001); Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n. 10 (1998), pet. for judicial review denied sub nom., National Whistleblower Center v. NRC, 208 F.3d 252 (D.C. Cir. 2000), cert. denied, 531 U.S. 1070 (2001); Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 328-29 (1994).

Consistent with this approach, the Commission here focused on whether the County had "advanced a legitimate reason for the tardy filing of its petition." (ER 1170) Pertinent new information may constitute "good cause" for late filing. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992). But the burden is on the late-filing petitioner to show that (1) the information is genuinely new and could not have been presented earlier; (2) the information is material to the challenged licensing proceeding; and (3) the petitioner acted promptly after learning of the new information. See id.; 10 C.F.R. §§ 2.1308(a)(4), (c).

The County failed to meet these burdens. The County rested its justification for lateness on a then-new development in the PG&E bankruptcy proceeding: a CPUC proposal to reorganize PG&E without transferring the Diablo Canyon

license. The problem with this asserted justification is that the new development was simply not material to the NRC license transfer proceeding. As the Commission held, "PG&E's license transfer application at the NRC is still founded on its own plan, which is independent of the new development in the bankruptcy case." (ER 1171) In other words, the CPUC's bankruptcy court proposal not to transfer the Diablo Canyon licenses was decidedly irrelevant to what the NRC was considering: a reorganization proposal that included transferring the licenses. Thus the introduction of the CPUC's alternative reorganization proposal therefore did not establish good cause for the County's lateness in seeking intervention before the NRC.

The County's own late-filed issues, which are based entirely on the PG&E reorganization plan and the license transfer application, belie any claim that the filing of the CPUC's reorganization plan raised pertinent new information that the County could not have made use of earlier. The County's issues did not rest on the CPUC plan, but simply pointed to alleged defects in the original PG&E Plan and license transfer application. For example, the County argued that the existing application failed to demonstrate Gen and Nuclear's financial qualification to operate Diablo Canyon. (ER 1110-13) The County also argued that the existing application failed to demonstrate compliance with NRC requirements regarding

the provision of offsite power. (ER 1114) The County could easily have sought intervention in a timely fashion to raise these issues. Not one depends upon the existence of the CPUC reorganization plan. The introduction of the CPUC plan did not plausibly explain the County's delay, leading the Commission to conclude that "the County has not established good cause – or, indeed, any cause – for untimely presentation of its issues, all of which the County could have filed long ago in a timely petition based on PG&E's application. . ." (ER 1171)

In the Joint Brief, the County challenges the Commission's finding that "nothing in the County's petition to intervene depends on the CPUC Plan." (ER 1171) The County argues that this finding is "blatantly incorrect," because its petition was "motivated by the very existence of the [alternative reorganization plan] and the fact that it would not require a license transfer." (JB 40) The County's decision to file a late petition may very well have been "motivated" by the introduction of an alternative reorganization plan in the bankruptcy court, but this does not establish good cause for late filing. To establish good cause, the County needed to demonstrate that the specific contentions it sought to raise were based upon previously unavailable information relevant to the license transfer proceeding. The County's late petition does not do this.

In a last-ditch effort to undermine the Commission's finding that it lacked good cause for late filing, the County suggests that the Commission acted inconsistently when it noted in denying several motions to stay the license transfer proceeding that "there have been no developments that suggest that PG&E's Plan cannot be confirmed," (ER 1151) while, at the same time, rejecting the County's late-filed petition despite the existence of the CPUC's alternative reorganization plan. In the County's words, "It is clearly inconsistent for the Commission, on one hand to make a determination about Petitioners' stay requests based on new developments in the bankruptcy proceeding, while, on the other, to dismiss the County's attempt to intervene based on new developments in the bankruptcy proceeding." (JB 39)

There is no inconsistency. In refusing to stay its license transfer review, the Commission found that mere introduction of the CPUC's as-yet-unconfirmed reorganization plan was <u>not</u> a material new development in the bankruptcy proceeding. (ER 1150-52) In holding that the County lacked good cause for its late filing, the Commission relied upon the <u>same factual finding</u>: mere introduction of the CPUC's alternative reorganization plan was <u>not</u> a material new development. (ER 1171) Because introduction of the CPUC plan before the bankruptcy court was immaterial to its license transfer review, the Commission

reasonably and consistently concluded that it neither supported a delay in the NRC license transfer case, nor the County's request for late intervention.

Finally, the Commission's holding that introduction of the CPUC's alternative reorganization plan was irrelevant to the NRC license transfer proceeding is consistent with the Commission's own well-established policy favoring expedited license transfer reviews. As noted above, the Commission does not hold up its license transfer review to await developments in other forums considering related issues or applications. See p. 7, supra. As the Commission has said, such a wait-and-see policy would result in "little more than untoward delay were each regulatory agency to stay its hand simply because of the contingency that one of the others might eventually choose to withhold a necessary permit or approval." Nine Mile Point, 50 NRC at 344, citing Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974). The County has not provided this Court with any grounds to second guess the Commission's decision about how best to use its own resources to accomplish an efficient license transfer process.

B. The County Failed to Otherwise Justify Its Tardiness.

Failing to show good cause for its late filing, the County next addressed the remaining late-filing factors of 10 C.F.R. sections 2.1308(b)(1) and (2). To be

admitted as a party to the license transfer proceeding, the County had to make a compelling showing that these factors outweighed its failure to demonstrate good cause for lateness. The Commission rightly concluded that the County failed to show "strong countervailing reasons that override the lack of good cause," and denied the County's tardy petition. (ER 1172)

In its petition before the Commission, the County argued that its interests could not be adequately represented by other parties seeking intervention, since it was the only petitioner "charged with protecting the health and safety of the public living around Diablo Canyon." (ER 1104) The County also argued that its participation would not broaden the scope of the proceeding because it only sought to raise "issues currently before the NRC." Id. Although not required to do so under 10 C.F.R. section 2.1308(b), the County also asserted that its participation in the license transfer proceeding would aid in development of the record. (ER 1103)

The Commission acknowledged that no other petitioners could adequately represent the County's interests. (ER 1172) However, given that no other parties had been admitted to the proceeding, it also found that "[t]he issues would be broadened by the County's participation, possibly resulting in a delay of the final action by lengthening any potential hearing." (ER 1172) The Commission

rightly discounted the County's assertion that it would contribute to the making of a sound record, because the County failed to identify its prospective witnesses or summarize their possible testimony, as is generally required of late petitioners in NRC licensing proceedings. (ER 1172) See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 159, 165-66 (1993).

In the Joint Brief in this Court, the County argues that the Commission incorrectly weighed the late-filing factors of 10 C.F.R. section 2.1308(b) in reaching this conclusion. (JB 41-44) The County also contends that the Commission failed to address its balancing arguments in the order denying the County's petition for leave to intervene. (JB 42) Essentially, the County argues that the Commission failed to follow its own procedures and ignored the arguments before it, rendering its decision arbitrary and capricious.

Where a late-filed petitioner fails to demonstrate good cause for its tardiness, the petitioner is "bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request." Westinghouse, 39 NRC at 329; see Comanche Peak, Unit 2, 37 NRC at 165; Comanche Peak, Units 1 and 2, 36 NRC at 73. The Commission explicitly applied these principles when weighing the late-filing factors of 10

C.F.R. section 2.1308(b) here, finding the County's arguments for late filing, and found them less than "compelling." (ER 1170-71) The Commission's finding was neither arbitrary nor capricious, and it should be upheld.

III. The Commission Acted Reasonably in Denying Both the CPUC's and the County's Petitions for Failure to Submit any Admissible Issues.

The CPUC's lack of standing and the County's lack of timeliness are, by themselves, sufficient reasons to defeat the County's and the CPUC's petitions for leave to intervene in the license transfer proceeding and to uphold the Commission's denial of a hearing on the issues raised therein. In addition, this Court can uphold the Commission's decision on the ground that the CPUC and the County failed to submit admissible issues for litigation in an NRC hearing.

To be admitted to a party in an NRC license transfer proceeding under 10 C.F.R. Part 2, Subpart M, a petitioner for leave to intervene must submit at least one admissible "issue." For issues to be found admissible, petitioners must "provide a concise statement of the alleged facts or expert opinion," Subpart M says, "together with references to the sources and documents on which [they] intend[] to rely." 10 C.F.R. § 2.1306(b)(2)(iii).

These pleading requirements are, by design, strict. See Union of Concerned Scientists, 920 F.2d at 52-53. NRC rules do not permit the type of "notice

pleading" followed in federal courts under the Federal Rules of Civil Procedure, nor "the filing of a vague, unparticularized issue," nor the submission of "general assertions or conclusions." FitzPatrick, 52 NRC at 295; Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000); GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000). "Specificity, in short, is the hallmark of Subpart M." Millstone, 52 NRC at 132.

Admissible issues under Subpart M must not only be specific, but they must also fall within the scope of the license transfer proceeding. 10 C.F.R. § 2.1306(b)(2). In other words, the proffered issues must be relevant to the financial and technical qualifications findings that the NRC must make to approve a license transfer. See id.; Millstone, 52 NRC at 131-32. License transfer hearings do not include issues dealing with broad operational safety concerns that will remain the same whether or not the license is transferred, such as the adequacy of a plant's ongoing safety-related programs. See Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 169 (2000); FitzPatrick, 52 NRC at 310-11; Oyster Creek, 52 NRC at 213, 214.

A. The CPUC's Issues

In the Joint Brief in this Court, the CPUC categorizes its issues before the NRC as relating to: (1) financial qualification; (2) decommissioning funding; (3) California's regulatory responsibilities; and (4) public safety and welfare. We address each of these four categories in turn.

1. The CPUC's Financial Qualifications Issues were Outside the Scope of the Diablo Canyon License Transfer Proceeding.

The CPUC failed to raise a single financial qualifications issue challenging the ability of Gen to safely operate Diablo Canyon under the financial projections PG&E submitted in the license transfer application. Instead, the CPUC merely speculated that FERC would not approve the financial proposals necessary to ensure safe operation of Diablo Canyon. These issues raise concerns that only FERC can resolve, and are therefore outside the limited scope of the license transfer proceeding. See 10 C.F.R. § 2.1308(c).

By regulation, the scope of the Commission's financial qualifications review is limited to a determination whether the application demonstrates with reasonable assurance that the proposed transferee will have the funds necessary to safely operate the nuclear power plant at issue. See 10 C.F.R. § 50.80(b), 50.33(f)(2); Streamlined Hearing Process for NRC Approval of License Transfers,

63 Fed. Reg. at 66,724. The fact that FERC has not yet approved certain transactions proposed in the license transfer application is not fatal to the application, since absolute certainty regarding PG&E's financial proposals is not required. See Seabrook, 49 NRC at 221-22; 10 C.F.R. §§ 50.80(b), 50.33(f)(2). Rather, the Commission's regulations only require that the license transfer application demonstrate with "reasonable assurance" that the proposed transferee will have the funds necessary to safely operate the power plant at issue. Id.

The CPUC did not argue that the financial plan in the license transfer application failed to show reasonable assurance of adequate funding. Rather, as the CPUC acknowledges in the Joint Brief, it argued only that the financial plan was "highly unlikely to be approved by FERC. . ." (JB 26) Specifically, the CPUC argued that the proposed PSA[10] between Gen and the reorganized PG&E contained an invalid "benchmark analysis" and an insufficient "market power analysis."[11] (ER 0040-49) (ER 0049-51) The CPUC also argued that only cost-

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[10]The PSA (Purchase and Sale Agreement) is a proposed long term contract for the sale of power generated at Diablo Canyon. The license transfer application relies in part on the revenues from the PSA to show reasonable assurance that Gen will have the funds necessary to cover operating costs at Diablo Canyon. The rates proposed in the PSA require FERC approval, which has not yet been granted.

[11]For a more detailed summary of the CPUC's financial qualifications issues, see footnote 39 of the Commission's Memorandum and Order, CLI-02-16.

(continued...)

based rates may be accepted as reasonable for Diablo Canyon, and that the proposed PSA was "fatally tainted by self-dealing." (ER 0051-52) (ER 0036) The CPUC relied on extensive citations to FERC decisions to support these arguments. Id.

It is understandable that the CPUC's submission to the Commission focused on FERC (not NRC) precedent, for the CPUC's financial qualifications issues related to matters that only FERC could resolve. Such issues are beyond the scope of an NRC license transfer proceeding:

> NRC's role in evaluation of the transferee's financial qualifications is to decide whether the Plan as proposed, including the PSA, will meet our financial qualifications regulations. CPUC has made no allegation that the Plan will not do so. CPUC asks, in essence, for a revision of the PSA, a matter not within NRC's jurisdiction. FERC is the appropriate forum for addressing this issue and the matter is currently before that agency.

(ER 1160) (emphasis in original)

The fatal flaw in the CPUC's financial qualifications argument was its failure to allege, with adequate support, that the PG&E Plan, as proposed, would yield inadequate funds for the safe operation of Diablo Canyon. The Commission, as it said here, conditions its license transfer approvals on an

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[11](...continued)
(ER 1159)

applicant's obtaining the necessary outside approvals. (ER 1160-61, 1162) Thus, it is insufficient to argue, as the CPUC did, merely that FERC will not approve certain aspects of the PG&E Plan. What the Commission considers is whether the plan, if it gains the necessary approvals, will yield funds adequate for safe operation. The CPUC's petition to intervene offered no issues on this point. The Commission's regulations clearly state, in any event, that the Commission will deny petitions that pertain solely to matters outside its jurisdiction. See 10 C.F.R. § 2.1308(c).

In the Joint Brief, the CPUC incorrectly argues that the Commission's rejection of its financial qualifications issues is "clearly contrary to law" under Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1451 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985). Union of Concerned Scientists is not on point. That case held that the NRC may not use its rulemaking powers to categorically exclude issues from consideration in operating licensing hearings that are material and relevant to the Commission's operating license review. See 735 F.2d at 1451. The court in Union of Concerned Scientists emphasized that "the only central requirement is that there be an opportunity to dispute issues raised. . . under the relevant decisionmaking criteria," and that "the NRC could summarily dismiss any claim that did not raise genuine issues of material fact. . ." Id. at 1448-49

(emphasis added). Here, the Commission has not categorically excluded financial qualifications issues from consideration in license transfer proceedings. To the contrary, the Commission has repeatedly stated that financial qualifications issues are at the heart of its license transfer reviews, and it has frequently admitted and adjudicated such issues. See, e.g., FitzPatrick, 53 NRC at 518-19. In this case, the Commission has merely excluded particular financial qualifications issues raised by the CPUC for failure to meet NRC standards for admissible issues. See 10 C.F.R. § 2.1306(b).

2. The CPUC's Decommissioning Trust Issues were Outside the Scope of the Diablo Canyon License Transfer Proceeding.

The CPUC failed to raise a single decommissioning trust issue that would challenge the ability of Gen to safely operate and shut down Diablo Canyon under the financial projections found in the license transfer application. The CPUC did not argue that the application failed to show with reasonable assurance that proposed decommissioning funding would be insufficient to ensure the protection of the public from radiological risks. Instead, the CPUC speculated that certain bankruptcy court approvals anticipated by the license transfer application would not come to pass, thus casting doubt on the availability of decommissioning funds for Diablo Canyon in the event of a license transfer. The CPUC raised issues that

only the bankruptcy court has the power to address; such issues are therefore beyond the scope of the license transfer proceeding. See 10 C.F.R. § 2.1308(c).

As the Commission noted, PG&E currently has a Nuclear Decommissioning Trust set aside for the eventual decommissioning of Diablo Canyon. (ER 1161) To satisfy NRC decommissioning financial assurance requirements for the proposed license transfer, PG&E intends to transfer the beneficial interest in the Nuclear Decommissioning Trust to Gen through PG&E's bankruptcy proceedings. (ER 1161) The CPUC's petition for leave to intervene acknowledged PG&E's plan to compel the transfer of these funds through the bankruptcy process, but argued that such a transfer was not possible because the "the funds contained in the Trust are not subject to creditors' claims. . . and are therefore outside the purview of the Bankruptcy Court." (ER 0025-26) The CPUC also argued that the NRC has no authority to independently authorize the transfer of the Nuclear Decommissioning Trust funds, and that such a transfer could only be accomplished by the consent of the CPUC. (ER 0024-25, 0026-28)

After considering all of these arguments, the Commission reasonably found that the CPUC's primary focus was on "whether PG&E should be permitted to transfer the beneficial interests in the trust fund to a non-CPUC regulated entity and who has the authority to permit such transfers." (ER 1162) The Commission

correctly held that the CPUC's arguments regarding the bankruptcy court's authority to transfer the beneficial interest in the Nuclear Decommissioning Trust over its objections were beyond the NRC's power to decide:

> As with its financial qualifications issue, CPUC does not assert that, if the license transfer application were approved as proposed by PG&E, the transferee would not meet the Commission's decommissioning funding requirements. CPUC's concerns about maintaining its regulatory authority over the decommissioning trusts are not within the NRC's area of expertise and are more appropriately resolved by the bankruptcy court and FERC.

(ER 1162) Because the CPUC's decommissioning funding issue raised concerns outside the scope of the Commission's license transfer review, the Commission reasonably declined to admit it. This ruling was consistent with the Commission's regulations and precedents. See 10 C.F.R. § 2.1308(c); Nine Mile Point, 50 NRC at 343-44; Millstone, 52 NRC at 133 n. 2.

In the Joint Brief, the CPUC does not challenge the Commission's holding that the bankruptcy court, not the NRC, is the proper forum for determining whether the beneficial interest in the Nuclear Decommissioning Trust can be transferred without the CPUC's consent. However, the CPUC for the first time raises an issue about the identity and reliability of the decommissioning trust fund managers in the event a license transfer is authorized. (JB 30) The CPUC's attempt to raise a substantive argument in this Court that was not raised before the

NRC is contrary to law, and the issue must be rejected. See High Country Resources v. FERC, 255 F.3d 741, 745-46 (9th Cir. 2001); Reid v. Engen, 765 F.2d 1457, 1460 (9th Cir. 1985); County of Rockland v. NRC, 709 F.2d 766, 773-74 (2d. Cir. 1983), cert. denied, 464 U.S. 993 (1983).

The CPUC cannot fairly claim that its petition for leave to intervene before the NRC raised any issue regarding the identity of the decommissioning trust fund managers. The CPUC's petition devoted one paragraph to its concern that the proposed license transferee, after receiving the beneficial interest in the Nuclear Decommissioning Trust, would have a "strong financial incentive to delay performing the decommissioning as long as possible, in order to make as much money for itself, using ratepayer funds." (ER 0030) The CPUC's failued to provide any factual basis for its speculation, but in any case the argument does not at all reveal a concern about the identity of the decommissioning trust fund managers; the CPUC merely speculated that the trust beneficiary would delay decommissioning as long as possible. Id. Even if the CPUC had raised an issue regarding the identity of the trust fund managers before the NRC, which it did not, the CPUC's petition for leave to intervene fails to provide adequate factual, documentary, or expert support for such an argument, rendering it inadmissible under the NRC's detailed pleading requirements. See 10 C.F.R. § 2.1306(b).

The CPUC includes its issue regarding the identity of the decommissioning trust beneficiary as part of a larger argument that a transfer of trust assets or benefits would not be in the "public interest." (ER 0028-30) The Commission rejected this and other so-called "public interest" arguments as vague, speculative, and insufficient under its pleading requirements for admissible issues. (ER 1163) The Commission has consistently rejected broad "public interest" arguments on similar grounds in other licensing proceedings. See, e.g., Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 149 (2001). Because the Commission's decision is supported by both the record and its own precedents, it is neither arbitrary nor capricious.

3. The CPUC's Regulatory Responsibilities Issues were Outside the Scope of the Diablo Canyon License Transfer Proceeding.

The CPUC complains that the PG&E license transfer proposal would eliminate its regulatory authority if approved. But this complaint does not remotely bear on the financial or technical qualifications of Gen to operate Diablo Canyon. Furthermore, the Commission has no jurisdiction to determine whether or to what extent the CPUC's existing ratemaking authority may be preempted by the Bankruptcy Code or relevant FERC statutes and regulations. Therefore, the

CPUC's regulatory responsibilities issues are outside the scope of the license transfer proceeding.

In denying the admissibility of the CPUC's issues concerning the state agency's own regulatory power, the Commission rejected arguments that maintenance of the CPUC's authority was necessary to ensure the safe operation of Diablo Canyon:

> [T]here is no basis for CPUC's argument that its oversight is necessary for the protection of public health and safety with respect to radiological risks. This role is reserved to the NRC.

(ER 1164) The clear weight of legal authority supports this finding; by law the NRC is the nation's exclusive public guardian of nuclear reactor safety in the private sector. See Pacific Gas and Electric, 461 U.S. at 205-13. The Commission also noted that it did not have jurisdiction to determine whether or to what extent the Bankruptcy Code might preempt the CPUC's regulatory authority:

> [I]ssues regarding preemption of certain California laws must be resolved by the bankruptcy court, for PG&E's Plan requires either approvals by CPUC that it is loath to give or a court decision to allow PG&E to implement its plan notwithstanding CPUC's opposition. These are not matters for the NRC.

(ER 1164)

In the Joint Brief in this Court, the CPUC argues that the Commission has "explicitly established a link between financial qualification and public health and

safety," and that the CPUC "is clearly the expert agency to ensure financial qualification on a day-to-day basis." (JB 32) But, with all due respect to the CPUC's important rate-regulation role, the CPUC does not have any authority to regulate the radiological safety aspects of nuclear power plant operation, whether or not related to financial conditions. Furthermore, the CPUC's expertise on financial matters does not entitle it to obtain a hearing in contravention of NRC pleading standards, which require the CPUC to raise issues within the limited scope of the license transfer proceeding. In the end, the CPUC's "regulatory responsibilities" issues present no valid challenge to the technical qualifications of Gen or the financial proposals contained in the license transfer application, and they are therefore beyond the scope of the license transfer proceeding.

4. The CPUC's Public Safety and Welfare Issues were Vague, Speculative, and Outside the Scope of the Diablo Canyon License Transfer Proceeding.

In its petition for leave to intervene, the CPUC raised several speculative issues regarding "public safety and welfare." (ER 0064-69) In the Joint Brief, the CPUC challenges the Commission's denial of only two of these issues. The first asserts that operation of Diablo Canyon in the free market will create pressures to cut corners on safety, while the second asserts that elimination of an independent safety oversight committee will have adverse health and safety impacts. Neither

assertion meets the Commission's standards for admissible issues in license transfer proceedings.

If the proposed license transfer is authorized, Gen will sell power generated at Diablo Canyon to the reorganized PG&E under a 12-year contract at rates well above market price.[12] (ER 0065-67) (JB 32) The CPUC speculates that the revenues stemming from such rates will "not necessarily be applied towards plant maintenance and safety." (ER 0066) (JB 32) Rather, the CPUC says, the transferee will "follow the industry trend" by downsizing its workforce and increasing its use of overtime, thereby negatively affecting safety and reliability at Diablo Canyon. Id.

The CPUC provides absolutely no support for these allegations in either its petition for leave to intervene or the Joint Brief. The CPUC refers to no specific facts in support of its argument, but only to "its long experience as an expert regulatory agency." (JB 33) The Commission correctly held that the CPUC's conclusory assertions failed to meet its detailed pleading standards under 10 C.F.R. section 2.1306:

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[12]NRC regulations allow "non-electric utilities" (i.e., non-rate regulated entities) to operate nuclear power reactors in the open market, so long as they demonstrate the necessary financial and technical qualifications. See 10 C.F.R. §§ 50.2, 50.33(f), 50.34, 50.80(b).

> The challenge regarding the cost-cutting that CPUC predicts is insufficient, as it is mere guess, unrooted in factual information, and it does not specifically dispute any information in the license transfer application. CPUC has provided no support other than conjecture for its thesis that the transferee will subordinate safety to profits.

(ER 1165) The Commission's rejection of the CPUC's speculative "market pressures" arguments is consistent with its holdings in other license license transfer proceedings. See, e.g., Oyster Creek, 51 NRC at 209.

The CPUC's arguments regarding elimination of the Diablo Canyon Independent Safety Committee are also without merit. There is no nexus between existence of this committee and the validity of the technical or financial qualifications showings made in the Diablo Canyon license transfer application. There is no NRC requirement that the committee exist in order for a license transfer to be approved. The continuance or discontinuance of a non-NRC safety committee lies outside the scope of an NRC license transfer proceeding. The Commission denied admission of this issue consistent with its established policy.

B. The County's Issues

In the Joint Brief, the County categorizes its issues before the NRC as relating to: (1) financial qualifications; (2) adequacy of provisions for ensuring the availability of offsite power; and (3) the need for a stay until the bankruptcy

proceeding is completed. We show why in each of these categories the County's issues were not admissible below.

1. The County's Financial Qualifications Issues Lacked an Adequate Factual Basis and were Outside the Scope of the License Transfer Proceeding.

Like the CPUC, the County raised primarily legal challenges to PG&E's financial plans, arguing that revenue projections in the application hadn't been approved by the bankruptcy court or FERC, thereby casting doubt on the transferee's financial qualifications. (ER 1111-13) As argued above, the Commission has no authority to resolve legal questions currently pending before other decisionmakers. Such arguments raise issues outside the scope of the license transfer proceeding. Thus, the Commission reasonably found them inadmissible.

Contrary to its assertions in the Joint Brief, the County did not present any admissible factual challenge to the adequacy of PG&E's financial plans in the Diablo Canyon license transfer application. (JB 46) As a late-filed petitioner, the County's burden to plead admissible issues increases significantly. As the Commission held, under NRC practice late-filing petitioners are required to "set out with as much particularity as possible the precise issues [they] plan[] to cover,

identify [their] prospective witnesses, and summarize their proposed testimony."[13] (ER 1172) Comanche Peak, Unit 2, 37 NRC at 166. As the Commission noted, the County failed to do so:

> The County merely states that, in the interest of saving time, it has not had its experts prepare supporting affidavits, but its experts have allegedly performed a review of the application and support the County's issues. In its Reply, the County continues to insist that it will bring the 'appropriate expertise' to bear with respect to its contentions 'at the appropriate time.'

(ER 1172) Dealing with a late-filed petitioner, the Commission correctly found that the appropriate time for supporting its arguments had "come and gone." Id. Given the County's three-month late filing and its decision to ignore the Commission's weighty pleading requirements for late-filed petitions, denial of the County's financial qualifications issues was reasonable.

2. The County's Offsite Power Issues Lacked an Adequate Factual Basis and were Outside the Scope of the License Transfer Proceeding.

The County offered a conclusory argument regarding offsite power in its late-filed petition:

> The Application. . . does not provide sufficient information to demonstrate compliance with the applicable requirements, based on

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[13]The County's citation to less demanding pleading standards in the Joint Brief are irrelevant, since those standards apply only to timely petitions for leave to intervene. (JB 48)

> the lack of reliable detail on the financial strength of E-Trans[14] and assets which will be available for E trans to maintain transmission lines and facilities necessary to reliably supply off-site power to Diablo Canyon.

(ER 1114) The NRC does not ordinarily review transmission asset owners' financial qualifications in a license transfer review, see 10 C.F.R. §§ 50.80(b), 50.33, and the County's argument provides no basis for delving into E-Trans' finances. The County offered no expert, documentary, or factual basis for its assertion that financial information in the application was unreliable, nor did it identify witnesses who would testify regarding this issue or summarize their proposed testimony. As noted above, "notice pleading" does not suffice in NRC cases. NRC regulations and case precedent are clear in requiring specificity and support as prerequisites to triggering the hearing process. See pp. 42-43, supra.

The Joint Brief suggests that uncertainties in the bankruptcy proceeding cast doubt upon the reliability of financial information relevant to the County's offsite power issue. (JB 50) This argument, for reasons noted above, raises issues beyond the scope of the license transfer proceeding. See pp. 7, 38-39, supra. The Commission's decision to proceed with its consideration of the license transfer

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[14]E-Trans is a proposed new business entity under the PG&E Plan that will own PG&E's existing transmission assets if the PG&E Plan is approved by the bankruptcy court.

application in parallel with other decisionmakers was consistent with its established policy and entirely reasonable.

3. The Commission's Denial of the County's Request to Stay the License Transfer Proceeding was Reasonable.

As did several other petitioners, the County sought a stay of the license transfer proceeding until the bankruptcy proceeding is concluded. (ER 1114) The Commission fully addressed these stay requests after requesting briefing on the progress of bankruptcy proceedings. (ER 1150-51) The Commission concluded that no developments in the bankruptcy proceeding suggested that it was inappropriate or unnecessary to continue with the NRC's consideration of the license transfer application, and denied the stay requests. (ER 1151)

In reaching this conclusion, the Commission found that the PG&E Plan might be confirmed by the end of 2002. (ER 1151) Confirmation of the PG&E Plan has not occurred. The County therefore argues that the Commission's decision to deny its stay motion rested on faulty premises and must be reversed. (JB 50-51) The County is wrong: the Commission's denial of the County's stay motion was based on the lack of developments in the bankruptcy proceeding with a material bearing on the financial and technical qualifications issues under consideration in the Diablo Canyon license transfer proceeding. (ER 1151) To

date, there still have been no bankruptcy developments that warrant holding the NRC license transfer proceeding in abeyance; a delay in the bankruptcy court's final determination regarding the confirmation of the PG&E Plan does not undermine the basis for the Commission's refusal to hold up its review.

Finally, the County's challenge to the Commission's use of agency resources in conducting its hearing processes is beyond the limited scope of an NRC license transfer review. For reasons discussed earlier in this brief, the Commission has made a reasoned policy decision to move forward expeditiously with license transfer reviews, notwithstanding the possibility of delays or inaction in other forums. See pp. 7, 38-39, supra. This Court has been given no grounds to review or second guess the Commission's decision about how to spend its own resources in license transfer proceedings, and the Commission's refusal to admit the County's issues was neither arbitrary nor capricious.

CONCLUSION

The Commission reasonably denied the CPUC's request for a hearing on the ground that the CPUC relied for standing on economic interests that do not trigger hearing rights under AEA section 189, and on the alternative ground that the CPUC failed to submit a single admissible issue for litigation. The Commission reasonably denied the County's request for a hearing as inexcusably late and, in

the alternative, for failure to submit a single admissible issue for litigation. The Commission's decision was in accordance with its own rules of practice and well-established policies on the conduct of license transfer proceedings; it fully addressed all of the arguments presented by the County and the CPUC in their respective petitions for leave to intervene; and it was neither arbitrary nor capricious.

For the foregoing reasons, the County's and the CPUC's Joint Petition for Review should be denied.

Respectfully submitted,

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January 27, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION and THE COUNTY OF SAN LUIS OBISPO, Petitioners, v. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	)	No. 02-72735

STATEMENT OF RELATED CASES

The following related cases are pending in the Bankruptcy Court in the Northern District of California and before this Court:

In re Pacific Gas and Electric Co., Case No. 01-30923 DM (Bankr. N.D. Cal. filed Apr. 6, 2001)

Pacific Gas and Electric Co. v. People of the State of California, Docket No. 02-16990 (9th Cir. filed Sept. 30, 2002)

Dated at Rockville, Maryland, this 27th day of January, 2003.

Jared K. Heck
Counsel for Respondent

Revised FORM 8

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

Case No. 02-72735

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ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

STATUTES

42 U.S.C. § 2239, AEA § 189 . . . . . Addendum 1

REGULATIONS

10 C.F.R. Part 2, Subpart M (10 C.F.R. § 2.1300 et seq.) . . . . . .Addendum 2

10 C.F.R. § 50.33 . . . . . .Addendum 3

10 C.F.R. § 50.34 . . . . . .Addendum 4

10 C.F.R. § 50.80 . . . . . .Addendum 5

FEDERAL REGISTER ISSUANCES

Streamlined Hearing Process for NRC Approval of License Transfers,
63 Fed. Reg. 66,721-30 (Dec. 3, 1998) . . . . . Addendum 6

ADDENDUM 1
42 U.S.C. § 2239, AEA § 189

convenience and necessity or the production program of the Commission may, in the judgment of the Commission, require, or until a license for the operation of the facility shall become effective. Just compensation shall be paid for the use of the facility.

Sec. 189. Hearings and Judicial Review.

42 USC 2239. Hearings and judicial review.

a. (1)(A) In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.[234]

Federal Register. Publication.

(B)(i) Not less than 180 days before the date schedules for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185b., the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the

[234]Public Law 87-615 (76 Stat. 409)(1962), sec. 2, amended this section. Before amendment it read:
SEC. 189. HEARINGS AND JUDICIAL REVIEW.--

a. In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 103 or 104b. for a license for a facility, and on any application under section 104c. for a license for a testing facility.

Public Law 85-256 (71 Stat. 576)(1957), sec. 7, had previously amended sec. 189a. by adding the last sentence thereof.

Public Law 102-486 (106 Stat. 3120) added a subparagraph designator (A), to Sec. 189a(1) and added a new subsection (B)(i).

specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).[235]

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

Notice publication.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

[235]Public Law 102-486 (106 Stat. 3121), Oct. 24, 1992 amends Sec. 189a(2) of the Atomic Energy Act of 1954 (42 USC 2239 (a)(2)) is amended by inserting "or any amendment to a combined construction and operating license" after "any amendment to an operating license" each time it occurs.

*Note: Sections 185b. and 189a.(1)(b) of the Atomic Energy Act of 1954, as added by sections 2801 and 2802 of this Act, shall apply to all proceedings involving a combined license for which an application was filed after May 8, 1991, under such sections.

Regulations establishing standards, criteria, and procedures.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.[236]

42 USC 2239(b).

b. The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, United States Code, and chapter 7 of title 5, United States Code:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act.

(4) Any final determination under section 1701(c) relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.[237]

Sec. 190. Licensee Incident Reports.

42 USC 2240.

No report by any licensee of any incident arising out of or in connection with a licensed activity made pursuant to any requirement of the Commission shall be admitted as evidence in any suit or action for damages growing out of any matter mentioned in such report.[238]

Sec. 191. Atomic Safety and Licensing Board.

5 USC 556.
5 USC 557.
42 USC 2241.
80 Stat. 386.
80 Stat. 387.
Atomic Safety and Licensing Board

a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other

[236]Public Law 97-415 (96 Stat. 2067)(1983), sec. 12 amended sec. 189 by inserting (1) after subsec. (a) designation and by adding at end thereof new paragraph (2)(A)(B)(C).

[237]Public Law 104-134, Title III, Ch 1, Subch A, § 3116(c), 110 Stat. 1321-349; April 26, 1996. Substituted subsec. (b) for one which read:

(b) Any final order entered in any proceeding of the kind specified in subsection (a) above or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.

[238]Sec. 190 was added by Public Law 87-206 (75 Stat. 475)(1961), sec. 16.

ADDENDUM 2
10 C.F.R. PART 2, SUBPART M

[Code of Federal Regulations]
[Title 10, Volume 1]
[Revised as of January 1, 2001]
From the U.S. Government Printing Office via GPO Access
[CITE: 10CFR2]

[Page 122-142]

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS-

Subpart M--Public Notification, Availability of Documents and Records, Hearing Reque

Source: 63 FR 66730, Dec. 3, 1998, unless otherwise noted.

Sec. 2.1300 Scope of **subpart M**.

This **subpart** governs requests for, and procedures for conducting, hearings on any 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. This **subpart** is to provide the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

Sec. 2.1301 Public notice of receipt of a license transfer application.

(a) The Commission will notice the receipt of each application for direct or indirect transfer of a specific NRC license by placing a copy of the application at the NRC Web site, http://www.nrc.gov.

(b) The Commission will also publish in the Federal Register a notice of receipt of an application for approval of a license transfer involving 10 CFR part 50 and part 52 licenses, major fuel cycle facility licenses issued under part 70, or part 72 licenses. This notice constitutes the notice required by Sec. 2.105 with respect to all matters related to the application requiring NRC approval.

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(c) Periodic lists of applications received may be obtained upon request addressed to the NRC Public Document Room, US Nuclear Regulatory Commission, Washington, DC 20555-0001.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

Sec. 2.1302 Notice of withdrawal of an application.

The Commission will notice the withdrawal of an application by publishing the notice of withdrawal in the same manner as the notice of receipt of the application was published under Sec. 2.1301.

Sec. 2.1303 Availability of documents.

Unless exempt from disclosure under part 9 of this chapter, the following documents pertaining to each application for a license transfer requiring Commission approval will be placed at the NRC Web site, http://www.nrc.gov, when available:

(a) The license transfer application and any associated requests;

(b) Commission correspondence with the applicant or licensee related to the application;

(c) Federal Register notices;

(d) The NRC staff Safety Evaluation Report (SER).
(e) Any NRC staff order which acts on the license transfer application; and
(f) If a hearing is held, the hearing record and decision.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

Sec. 2.1304 Hearing procedures.

The procedures in this **subpart** will constitute the exclusive basis for hearings on license transfer applications for all NRC specific licenses.

Sec. 2.1305 Written comments.

(a) As an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding license transfer applications. The Commission will consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record.
(b) These comments should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.
(c) The Commission will provide the applicant with a copy of the comments. Any response the applicant chooses to make to the comments must be submitted within 10 days of service of the comments on the applicant. Such responses do not constitute part of the decisional record.

Sec. 2.1306 Hearing request or intervention petition.

(a) Any person whose interest may be affected by the Commission's action on the application may request a hearing or petition for leave to intervene on a license application for approval of a direct or indirect transfer of a specific license.
(b) Hearing requests and intervention petitions must--
(1) State the name, address, and telephone number of the requestor or petitioner;
(2) Set forth the issues sought to be raised and
(i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,
(ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,
(iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and
(iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact;
(3) Specify both the facts pertaining to the petitioner's interest and how the interest may be affected, with particular reference to the factors in Sec. 2.1308(a);
(4) Be served on both the applicant and the NRC Office of the Secretary by any of the methods for service specified in Sec. 2.1313.

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(c) Hearing requests and intervention petitions will be considered timely only if filed not later than:
(1) 20 days after notice of receipt is published in the Federal Register, for those applications published in the Federal Register;
(2) 45 days after notice of receipt is placed at the NRC Web site,

http://www.nrc.gov, for all other applications; or
(3) Such other time as may be provided by the Commission.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

Sec. 2.1307 Answers and replies.

(a) Unless otherwise specified by the Commission, an answer to a hearing request or intervention petition may be filed within 10 days after the request or petition has been served.
(b) Unless otherwise specified by the Commission, a reply to an answer may be filed within 5 days after service of that answer.
(c) Answers and replies should address the factors in Sec. 2.1308.

Sec. 2.1308 Commission action on a hearing request or intervention petition.

(a) In considering a hearing request or intervention petition on an application for a transfer of an NRC license, the Commission will consider:
(1) The nature of the Petitioner's alleged interest;
(2) Whether that interest will be affected by an approval or denial of the application for transfer;
(3) The possible effect of an order granting the request for license transfer on that interest, including whether the relief requested is within the Commission's authority, and, if so, whether granting the relief requested would redress the alleged injury; and
(4) Whether the issues sought to be litigated are--
(i) Within the scope of the proceeding;
(ii) Relevant to the findings the Commission must make to act on the application for license transfer;
(iii) Appropriate for litigation in the proceeding; and
(iv) Adequately supported by the statements, allegations, and documentation required by Sec. 2.1306(b)(2) (iii) and (iv).
(b) Untimely hearing requests or intervention petitions may be denied unless good cause for failure to file on time is established. In reviewing untimely requests or petitions, the Commission will also consider:
(1) The availability of other means by which the requestor's or petitioner's interest will be protected or represented by other participants in a hearing; and
(2) The extent to which the issues will be broadened or final action on the application delayed.
(c) The Commission will deny a request or petition to the extent it pertains solely to matters outside its jurisdiction.
(d)(1) After consideration of the factors covered by paragraphs (a) through (c) of this section, the Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the Federal Register and served on the parties to the hearing.
(2) Hearings under this **subpart** will be oral hearings, unless, within 15 days of the service of the notice or order granting a hearing, the parties unanimously agree and file a joint motion requesting a hearing consisting of written comments. No motion to hold a hearing consisting of written comments will be entertained absent unanimous consent of all parties.
(3) A denial of a request for hearing and a denial of any petition to intervene will set forth the reasons for the denial.

Sec. 2.1309 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

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testimony consistent with the schedule provisions of Sec. 2.1321.
(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;
(3) Instructions to the Presiding Officer to certify promptly the completed hearing record to the Commission without a recommended or preliminary decision.

Sec. 2.1310 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 Sec. 2.1321.
(d) State any other instructions the Commission deems appropriate.

Sec. 2.1311 Conditions in a notice or order.

(a) A notice or order granting a hearing or permitting intervention shall--
(1) Restrict 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.

Sec. 2.1312 Authority of the Secretary.

The Secretary or the Assistant Secretary may rule on procedural matters relating to proceedings conducted by the Commission itself under this **subpart** to the same extent they can do so under Sec. 2.772 for proceedings under **subpart** G.

Sec. 2.1313 Filing and service.

(a) Hearing requests, intervention petitions, answers, replies and accompanying documents must be served as described in paragraph (b) of this section by delivery, facsimile transmission, e-mail or other means that will ensure receipt by close of business on the due date for filing. Any participant filing hearing requests, intervention petitions, replies and accompanying documents should include information on mail and delivery addresses, e-mail addresses, and facsimile numbers in their initial filings which may be used by the Commission, Presiding Officer

and other parties for serving documents on the participant.

(b) All filings must be served upon the applicant; the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; and participants if any. If service to the Secretary is by delivery or by mail the filings should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff. E-mail filings may be sent to the Secretary at the following e-mail address: SECY@NRC.GOV. Facsimile transmission filings may be filed with the Secretary using the following number: 301-415-1101.

(c) Service is completed by:

(1) Delivering the paper to the person; or leaving it in her or his office with someone in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the recipient has no office or it is closed, leaving it at her or his usual place of residence with some occupant of suitable age and discretion;

(2) Depositing it in the United States mail, properly stamped and addressed; or

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(3) Any other manner authorized by law, when service cannot be made as provided in paragraphs (c) (1) or (2) of this section.

(4) For facsimile transmission, sending copies to the facsimile machine of the person being served;

(5) For e-mail, sending the filing in electronic form attached to an e-mail message directed to the person being served.

(d) Proof of service, stating the name and address of the person served and the manner and date of service, shall be shown, and may be made by--

(1) Written acknowledgment of the person served or an authorized representative; or

(2) The certificate or affidavit of the person making the service.

(e) The Commission may make special provisions for service when circumstances warrant.

Sec. 2.1314 Computation of time.

(a) In computing time, the first day of a designated time period is not included and the last day is included. If the last day is a Saturday, Sunday or legal holiday at the place where the required action is to be accomplished, the time period will end on the next day which is not a Saturday, Sunday or legal holiday.

(b) In time periods of 7 days or less, Saturdays, Sundays and holidays are not counted.

(c) Whenever an action is required within a prescribed period following service of a paper, 3 days shall be added to the prescribed period if service is by regular mail.

Sec. 2.1315 Generic determination regarding license amendments to reflect transfers.

(a) Unless otherwise determined by the Commission with regard to a specific application, the Commission has determined that any amendment to the license of a utilization facility or the license of an Independent Spent Fuel Storage Installation which does no more than conform the license to reflect the transfer action, involves respectively, ``no significant hazards consideration'' or ``no generic issue as to whether the health and safety of the public will be significantly affected.''

(b) Where administrative license amendments are necessary to reflect an approved transfer, such amendments will be included in the order that approves the transfer. Any challenge to the administrative license

amendment is limited to the question of whether the license amendment accurately reflects the approved transfer.

Sec. 2.1316 Authority and role of NRC staff.

(a) During the pendency of any hearing under this **subpart**, consistent with the NRC staff's findings in its Safety Evaluation Report (SER), the staff is expected to promptly issue approval or denial of license transfer requests. Notice of such action shall be promptly transmitted to the Presiding Officer and parties to the proceeding.

(b) Except as otherwise directed in accordance with Sec. 2.1309(a)(7), the NRC staff is not required to be a party to proceedings under this **subpart** but will offer into evidence its SER associated with the transfer application and provide one or more sponsoring witnesses.

(c) If the NRC staff desires to participate as a party, the staff shall notify the Presiding Officer and the parties and shall thereupon be deemed to be a party with all the rights and responsibilities of a party.

Sec. 2.1317 Hearing docket.

For each hearing, the Secretary will maintain a docket which will include the hearing transcript, exhibits and all papers filed or issued in connection with the hearing. This file will be made available to all parties in accordance with the provisions of Sec. 2.1303 and will constitute the only discovery in proceedings under this **subpart**.

Sec. 2.1318 Acceptance of hearing documents.

(a) Each document filed or issued must be clearly legible and bear the docket number, license application number, and hearing title.

(b) Each document shall be filed in one original and signed by the participant or its authorized representative, with the address and date of signature indicated. The signature is a representation that the document is submitted with full authority, the person signing

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knows its contents and that, to the best of their knowledge, the statements made in it are true.

(c) A document not meeting the requirements of this section may be returned with an explanation for nonacceptance and, if so, will not be docketed.

Sec. 2.1319 Presiding Officer.

(a) The Commission will ordinarily be the Presiding Officer at a hearing under this part. However, the Commission may provide in a hearing notice that one or more Commissioners, or any other person permitted by law, will preside.

(b) A participant may submit a written motion for the disqualification of any person presiding. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. If the Presiding Officer does not grant the motion or the person does not disqualify himself and the Presiding Officer or such other person is not the Commission or a Commissioner, the Commission will decide the matter.

(c) If any person presiding deems himself or herself disqualified, he or she shall withdraw by notice on the record after notifying the Commission.

(d) If a Presiding Officer becomes unavailable, the Commission will designate a replacement.

(e) Any motion concerning the designation of a replacement Presiding

Officer shall be made within 5 days after the designation.

(f) Unless otherwise ordered by the Commission, the jurisdiction of a Presiding Officer other than the Commission commences as designated in the hearing notice and terminates upon certification of the hearing record to the Commission, or when the Presiding Officer is disqualified.

Sec. 2.1320 Responsibility and power of the Presiding Officer in an oral hearing.

(a) The Presiding Officer in any oral hearing shall conduct a fair hearing, develop a record that will contribute to informed decisionmaking, and, within the framework of the Commission's orders, have the power necessary to achieve these ends, including the power to:

(1) Take action to avoid unnecessary delay and maintain order;

(2) Dispose of procedural requests;

(3) Question participants and witnesses, and entertain suggestions as to questions which may be asked of participants and witnesses.

(4) Order consolidation of participants;

(5) Establish the order of presentation;

(6) Hold conferences before or during the hearing;

(7) Establish time limits;

(8) Limit the number of witnesses; and

(9) Strike or reject duplicative, unreliable, immaterial, or irrelevant presentations.

(b) Where the Commission itself does not preside:

(1) The Presiding Officer may certify questions or refer rulings to the Commission for decision;

(2) Any hearing order may be modified by the Commission; and

(3) The Presiding Officer will certify the completed hearing record to the Commission, which may then issue its decision on the hearing or provide that additional testimony be presented.

Sec. 2.1321 Participation and schedule for submission in a hearing consisting of written comments.

Unless otherwise limited by this **subpart** or by the Commission, participants in a hearing consisting of written comments may submit:

(a) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials shall be filed within 30 days of the date of the Commission's Notice granting a hearing pursuant to Sec. 2.1308(d)(1), unless the Commission or Presiding Officer directs otherwise.

(b) Written responses, rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants, and proposed written questions for the Presiding Officer to consider for submittal to persons sponsoring testimony submitted under paragraph (a) of this section. These materials shall to filed

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within 20 days of the filing of the materials submitted under paragraph (a) of this section, unless the Commission or Presiding Officer directs otherwise. Proposed written questions directed to rebuttal testimony for the Presiding Officer to consider for submittal to persons offering such testimony shall be filed within 7 days of the filing of the rebuttal testimony.

(c) Written concluding statements of position on the issues. These materials shall be filed within 20 days of the filing of the materials submitted under paragraph (b) of this section, unless the Commission or the Presiding Officer directs otherwise.

Sec. 2.1322 Participation and schedule for submissions in an oral hearing.

(a) Unless otherwise limited by this **subpart** or by the Commission, participants in an oral hearing may submit and sponsor in the hearings:

(1) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials shall be filed within 30 days of the date of the Commission's notice granting a hearing pursuant to Sec. 2.1308(d)(1), unless the Commission or Presiding Officer directs otherwise.

(2)(i) Written responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants;

(ii) Proposed questions for the Presiding Officer to consider for propounding to persons sponsoring testimony.

(3) These materials must be filed within 20 days of the filing of the materials submitted under paragraph (a)(1) of this section, unless the Commission or Presiding Officer directs otherwise.

(4) Proposed questions directed to rebuttal testimony for the Presiding Officer to consider for propounding to persons offering such testimony shall be filed within 7 days of the filing of the rebuttal testimony.

(b) The oral hearing should commence within 65 days of the date of the Commission's notice granting a hearing unless the Commission or Presiding Officer directs otherwise. Ordinarily, questioning in the oral hearing will be conducted by the Presiding Officer, using either the Presiding Officer's questions or questions submitted by the participants or a combination of both.

(c) Written post-hearing statements of position on the issues addressed in the oral hearing may be submitted within 20 days of the close of the oral hearing.

(d) The Commission, on its own motion, or in response to a request from a Presiding Officer other than the Commission, may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under **subpart** G of this part on specific and substantial disputes of fact, necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing. The staff will be a party in any such formal hearing. Neither the Commission nor the Presiding Officer will entertain motions from the parties that request such special procedures or formal hearings.

Sec. 2.1323 Presentation of testimony in an oral hearing.

(a) All direct testimony in an oral hearing shall be filed no later than 15 days before the hearing or as otherwise ordered or allowed pursuant to the provisions of Sec. 2.1322.

(b) Written testimony will be received into evidence in exhibit form.

(c) Participants may designate and present their own witnesses to the Presiding Officer.

(d) Testimony for the NRC staff will be presented only by persons designated by the Executive Director for Operations for that purpose.

(e) Participants and witnesses will be questioned orally or in writing and only by the Presiding Officer. Questions may be addressed to individuals or to panels of participants or witnesses.

(f) The Presiding Officer may accept written testimony from a person unable to appear at the hearing, and may request him or her to respond to questions.

(g) No subpoenas will be granted at the request of participants for attendance and testimony of participants or witnesses or the production of evidence.

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Sec. 2.1324 Appearance in an oral hearing.

(a) A participant may appear in a hearing on her or his own behalf

or be represented by an authorized representative.
(b) A person appearing shall file a written notice stating her or his name, address and telephone number, and if an authorized representative, the basis of her or his eligibility and the name and address of the participant on whose behalf she or he appears.
(c) A person may be excluded from a hearing for disorderly, dilatory or contemptuous conduct, provided he or she is informed of the grounds and given an opportunity to respond.

Sec. 2.1325 Motions and requests.

(a) Motions and requests shall be addressed to the Presiding Officer, and, if written, also filed with the Secretary and served on other participants.
(b) Other participants may respond to the motion or request. Responses to written motions or requests shall be filed within 5 days after service unless the Commission or Presiding Officer directs otherwise.
(c) The Presiding Officer may entertain motions for extension of time and changes in schedule in accordance with paragraphs (a) and (b) of this section.
(d) When the Commission does not preside, in response to a motion or request, the Presiding Officer may refer a ruling or certify a question to the Commission for decision and notify the participants.
(e) Unless otherwise ordered by the Commission, a motion or request, or the certification of a question or referral of a ruling, shall not stay or extend any aspect of the hearing.

Sec. 2.1326 Burden of proof.

The applicant or the proponent of an order has the burden of proof.

Sec. 2.1327 Application for a stay of the effectiveness of NRC staff action on license transfer.

(a) Any application for a stay of the effectiveness of the NRC staff's order on the license transfer application shall be filed with the Commission within 5 days of the issuance of the notice of staff action pursuant to Sec. 2.1316(a).
(b) An application for a stay must be no longer than 10 pages, exclusive of affidavits, and must contain:
(1) A concise summary of the action which is requested to be stayed; and
(2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section.
(c) Within 10 days after service of an application for a stay under this section, any participant may file an answer supporting or opposing the granting of a stay. Answers must be no longer than 10 pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section, as appropriate. No further replies to answers will be entertained.
(d) In determining whether to grant or deny an application for a stay, the Commission will consider:
(1) Whether the requestor will be irreparably injured unless a stay is granted;
(2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
(3) Whether the granting of a stay would harm other participants; and
(4) Where the public interest lies.

Sec. 2.1328 Default.

When a participant fails to act within a specified time, the

Presiding Officer may consider that participant in default, issue an appropriate ruling and proceed without further notice to the defaulting participant.

Sec. 2.1329 Waiver of a rule or regulation.

(a) A participant may petition that a Commission rule or regulation be waived with respect to the license transfer application under consideration.

(b) The sole ground for a waiver shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.

(c) Waiver petitions shall specify why application of the rule or regulation would not serve the purposes for which it was adopted and shall be supported by affidavits to the extent applicable.

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(d) Other participants may, within 10 days, file a response to a waiver petition.

(e) When the Commission does not preside, the Presiding Officer will certify the waiver petition to the Commission, which, in response, will grant or deny the waiver or direct any further proceedings.

Sec. 2.1330 Reporter and transcript for an oral hearing.

(a) A reporter designated by the Commission will record an oral hearing and prepare the official hearing transcript.

(b) Except for any portions that must be protected from disclosure in accordance with law and policy as reflected in 10 CFR 2.790, transcripts will be placed at the NRC Web site, http://www.nrc.gov, and copies may be purchased from the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(c) Corrections of the official transcript may be made only as specified by the Secretary.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

Sec. 2.1331 Commission action.

(a) Upon completion of a hearing, the Commission will issue a written opinion including its decision on the license transfer application and the reasons for the decision.

(b) The decision on issues designated for hearing pursuant to Sec. 2.1308 will be based on the record developed at hearing.

ADDENDUM 3
10 C.F.R. § 50.33

[Code of Federal Regulations]
[Title 10, Volume 1]
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[Page 682-684]

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 50--DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES--Table of Content.

Sec. 50.33 Contents of applications; general information.

Each application shall state:

(a) Name of applicant;

(b) Address of applicant;

(c) Description of business or occupation of applicant;

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

(e) The class of license applied for, the use to which the facility will be put, the period of time for which the license is sought, and a list of other licenses, except operator's licenses, issued or applied for in connection with the proposed facility.

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in Sec. 50.21(b) or Sec. 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

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(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial

license.

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

(g) If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ) \3\, as well as the plans of State governments wholly or partially within the ingestion pathway EPZ.\4\ Generally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to the local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

\3\ Emergency Planning Zones (EPZs) are discussed in NUREG-0396, EPA 520/1-78-016, ''Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light-Water Nuclear Power Plants,'' December 1978.

\4\ If the State and local emergency response plans have been previously provided to the NRC for inclusion in the facility docket, the applicant need only provide the appropriate reference to meet this requirement.

(h) If the applicant proposes to construct or alter a production or utilization facility, the application shall state the earliest and latest dates for completion of the construction or alteration.

(i) If the proposed activity is the generation and distribution of electric energy under a class 103 license, a list of the names and addresses of such regulatory agencies as may have jurisdiction over the rates and services incident to the proposed activity, and a list of trade and news publications which circulate in the area where the proposed activity will be conducted and which are considered appropriate to give reasonable notice of the application to those municipalities, private utilities, public bodies, and cooperatives, which might have a potential interest in the facility.

(j) If the application contains Restricted Data or other defense information, it shall be prepared in such manner that all Restricted Data and other defense information are separated from the unclassified information.

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(k)(1) For an application for an operating license for a production or utilization facility, information in the form of a report, as described in Sec. 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

(2) On or before July 26, 1990, each holder of an operating license for a production or utilization facility in effect on July 27, 1990, shall submit information in the form of a report as described in Sec. 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

[21 FR 355, Jan. 19, 1956, as amended at 35 FR 19660, Dec. 29, 1970; 38 FR 3956, Feb. 9, 1973; 45 FR 55408, Aug. 19, 1980; 49 FR 35752, Sept. 12, 1984; 53 FR 24049, June 27, 1988]

ADDENDUM 4
10 C.F.R. § 50.34

[Code of Federal Regulations]
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[Page 685-696]

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 50--DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES--Table of Content.

Sec. 50.34 Contents of applications; technical information.

(a) Preliminary safety analysis report. Each application for a construction permit shall include a preliminary safety analysis report. The minimum information \5\ to be included shall consist of the following:

\5\ The applicant may provide information required by this paragraph in the form of a discussion, with specific references, of similarities to and differences from, facilities of similar design for which applications have previously been filed with the Commission.

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(1) Stationary power reactor applicants for a construction permit pursuant to this part, or a design certification or combined license pursuant to part 52 of this chapter who apply on or after January 10, 1997, shall comply with paragraph (a)(1)(ii) of this section.

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All other applicants for a construction permit pursuant to this part or a design certification or combined license pursuant to part 52 of this chapter, shall comply with paragraph (a)(1)(i) of this section.

(i) A description and safety assessment of the site on which the facility is to be located, with appropriate attention to features affecting facility design. Special attention should be directed to the site evaluation factors identified in part 100 of this chapter. The assessment must contain an analysis and evaluation of the major structures, systems and components of the facility which bear significantly on the acceptability of the site under the site evaluation factors identified in part 100 of this chapter, assuming that the facility will be operated at the ultimate power level which is contemplated by the applicant. With respect to operation at the projected initial power level, the applicant is required to submit information prescribed in paragraphs (a)(2) through (a)(8) of this section, as well as the information required by this paragraph, in support of the application for a construction permit, or a design approval.

(ii) A description and safety assessment of the site and a safety assessment of the facility. It is expected that reactors will reflect through their design, construction and operation an extremely low probability for accidents that could result in the release of significant quantities of radioactive fission products. The following power reactor design characteristics and proposed operation will be taken into consideration by the Commission:

(A) Intended use of the reactor including the proposed maximum power level and the nature and inventory of contained radioactive materials;

(B) The extent to which generally accepted engineering standards are applied to the design of the reactor;

(C) The extent to which the reactor incorporates unique, unusual or

enhanced safety features having a significant bearing on the probability or consequences of accidental release of radioactive materials;

(D) The safety features that are to be engineered into the facility and those barriers that must be breached as a result of an accident before a release of radioactive material to the environment can occur. Special attention must be directed to plant design features intended to mitigate the radiological consequences of accidents. In performing this assessment, an applicant shall assume a fission product release \6\ from the core into the containment assuming that the facility is operated at the ultimate power level contemplated. The applicant shall perform an evaluation and analysis of the postulated fission product release, using the expected demonstrable containment leak rate and any fission product cleanup systems intended to mitigate the consequences of the accidents, together with applicable site characteristics, including site meteorology, to evaluate the offsite radiological consequences. Site characteristics must comply with part 100 of this chapter. The evaluation must determine that:

\6\ The fission product release assumed for this evaluation should be based upon a major accident, hypothesized for purposes of site analysis or postulated from considerations of possible accidental events. Such accidents have generally been assumed to result in substantial meltdown of the core with subsequent release into the containment of appreciable quantities of fission products.

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(1) An individual located at any point on the boundary of the exclusion area for any 2 hour period following the onset of the postulated fission product release, would not receive a radiation dose in excess of 25 rem \7\ total effective dose equivalent (TEDE).

\7\ A whole body dose of 25 rem has been stated to correspond numerically to the once in a lifetime accidental or emergency dose for radiation workers which, according to NCRP recommendations at the time could be disregarded in the determination of their radiation exposure status (see NBS Handbook 69 dated June 5, 1959). However, its use is not intended to imply that this number constitutes an acceptable limit for an emergency dose to the public under accident conditions. Rather, this dose value has been set forth in this section as a reference value, which can be used in the evaluation of plant design features with respect to postulated reactor accidents, in order to assure that such designs provide assurance of low risk of public exposure to radiation, in the event of such accidents.

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(2) An individual located at any point on the outer boundary of the low population zone, who is exposed to the radioactive cloud resulting from the postulated fission product release (during the entire period of its passage) would not receive a radiation dose in excess of 25 rem total effective dose equivalent (TEDE);

(E) With respect to operation at the projected initial power level, the applicant is required to submit information prescribed in paragraphs (a)(2) through (a)(8) of this section, as well as the information required by this paragraph (a)(1)(i), in support of the application for a construction permit, or a design approval.

(2) A summary description and discussion of the facility, with special attention to design and operating characteristics, unusual or novel design features, and principal safety considerations.

(3) The preliminary design of the facility including:

(i) The principal design criteria for the facility. \8\ appendix A,

General Design Criteria for Nuclear Power Plants, establishes minimum requirements for the principal design criteria for water-cooled nuclear power plants similar in design and location to plants for which construction permits have previously been issued by the Commission and provides guidance to applicants for construction permits in establishing principal design criteria for other types of nuclear power units;

\8\ General design criteria for chemical processing facilities are being developed.

(ii) The design bases and the relation of the design bases to the principal design criteria;

(iii) Information relative to materials of construction, general arrangement, and approximate dimensions, sufficient to provide reasonable assurance that the final design will conform to the design bases with adequate margin for safety.

(4) A preliminary analysis and evaluation of the design and performance of structures, systems, and components of the facility with the objective of assessing the risk to public health and safety resulting from operation of the facility and including determination of (i) the margins of safety during normal operations and transient conditions anticipated during the life of the facility, and (ii) the adequacy of structures, systems, and components provided for the prevention of accidents and the mitigation of the consequences of accidents. Analysis and evaluation of ECCS cooling performance following postulated loss-of-coolant accidents shall be performed in accordance with the requirements of Sec. 50.46 of this part for facilities for which construction permits may be issued after December 28, 1974.

(5) An identification and justification for the selection of those variables, conditions, or other items which are determined as the result of preliminary safety analysis and evaluation to be probable subjects of technical specifications for the facility, with special attention given to those items which may significantly influence the final design: Provided, however, That this requirement is not applicable to an application for a construction permit filed prior to January 16, 1969.

(6) A preliminary plan for the applicant's organization, training of personnel, and conduct of operations.

(7) A description of the quality assurance program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' sets forth the requirements for quality assurance programs for nuclear power plants and fuel reprocessing plants. The description of the quality assurance program for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of appendix B will be satisfied.

(8) An identification of those structures, systems, or components of the facility, if any, which require research and development to confirm the adequacy of their design; and identification and description of the research and development program which will be conducted to resolve any safety questions associated with such structures, systems or components; and a

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schedule of the research and development program showing that such safety questions will be resolved at or before the latest date stated in the application for completion of construction of the facility.

(9) The technical qualifications of the applicant to engage in the proposed activities in accordance with the regulations in this chapter.

(10) A discussion of the applicant's preliminary plans for coping with emergencies. Appendix E sets forth items which shall be included in these plans.

(11) On or after February 5, 1979, applicants who apply for construction permits for nuclear power plants to be built on multiunit sites shall identify potential hazards to the structures, systems and components important to safety of operating nuclear facilities from construction activities. A discussion shall also be included of any managerial and administrative controls that will be used during construction to assure the safety of the operating unit.

(12) On or after January 10, 1997, stationary power reactor applicants who apply for a construction permit pursuant to this part, or a design certification or combined license pursuant to part 52 of this chapter, as partial conformance to General Design Criterion 2 of appendix A to this part, shall comply with the earthquake engineering criteria in appendix S to this part.

(b) Final safety analysis report. Each application for a license to operate a facility shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:

(1) All current information, such as the results of environmental and meteorological monitoring programs, which has been developed since issuance of the construction permit, relating to site evaluation factors identified in part 100 of this chapter.

(2) A description and analysis of the structures, systems, and components of the facility, with emphasis upon performance requirements, the bases, with technical justification therefor, upon which such requirements have been established, and the evaluations required to show that safety functions will be accomplished. The description shall be sufficient to permit understanding of the system designs and their relationship to safety evaluations.

(i) For nuclear reactors, such items as the reactor core, reactor coolant system, instrumentation and control systems, electrical systems, containment system, other engineered safety features, auxiliary and emergency systems, power conversion systems, radioactive waste handling systems, and fuel handling systems shall be discussed insofar as they are pertinent.

(ii) For facilities other than nuclear reactors, such items as the chemical, physical, metallurgical, or nuclear process to be performed, instrumentation and control systems, ventilation and filter systems, electrical systems, auxiliary and emergency systems, and radioactive waste handling systems shall be discussed insofar as they are pertinent.

(3) The kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter.

(4) A final analysis and evaluation of the design and performance of structures, systems, and components with the objective stated in paragraph (a)(4) of this section and taking into account any pertinent information developed since the submittal of the preliminary safety analysis report. Analysis and evaluation of ECCS cooling performance following postulated loss-of-coolant accidents shall be performed in accordance with the requirements of Sec. 50.46 for facilities for which a license to operate may be issued after December 28, 1974.

(5) A description and evaluation of the results of the applicant's programs, including research and development, if any, to demonstrate that any safety questions identified at the construction permit stage have been resolved.

(6) The following information concerning facility operation:

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(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements.

(ii) Managerial and administrative controls to be used to assure safe operation. Appendix B, ''Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,'' sets forth the requirements for such controls for nuclear power plants and fuel reprocessing plants. The information on the controls to be used for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of appendix B will be satisfied.

(iii) Plans for preoperational testing and initial operations.

(iv) Plans for conduct of normal operations, including maintenance, surveillance, and periodic testing of structures, systems, and components.

(v) Plans for coping with emergencies, which shall include the items specified in appendix E.

(vi) Proposed technical specifications prepared in accordance with the requirements of Sec. 50.36.

(vii) On or after February 5, 1979, applicants who apply for operating licenses for nuclear power plants to be operated on multiunit sites shall include an evaluation of the potential hazards to the structures, systems, and components important to safety of operating units resulting from construction activities, as well as a description of the managerial and administrative controls to be used to provide assurance that the limiting conditions for operation are not exceeded as a result of construction activities at the multiunit sites.

(7) The technical qualifications of the applicant to engage in the proposed activities in accordance with the regulations in this chapter.

(8) A description and plans for implementation of an operator requalification program. The operator requalification program must as a minimum, meet the requirements for those programs contained in Sec. 55.59 of part 55 of this chapter.

(9) A description of protection provided against pressurized thermal shock events, including projected values of the reference temperature for reactor vessel beltline materials as defined in Sec. 50.61 (b)(1) and (b)(2).

(10) On or after January 10, 1997, stationary power reactor applicants who apply for an operating license pursuant to this part, or a design certification or combined license pursuant to part 52 of this chapter, as partial conformance to General Design Criterion 2 of appendix A to this part, shall comply with the earthquake engineering criteria of appendix S to this part. However, for those operating license applicants and holders whose construction permit was issued prior to January 10, 1997, the earthquake engineering criteria in section VI of appendix A to part 100 of this chapter continues to apply.

(11) On or after January 10, 1997, stationary power reactor applicants who apply for an operating license pursuant to this part, or a combined license pursuant to part 52 of this chapter, shall provide a description and safety assessment of the site and of the facility as in Sec. 50.34(a)(1)(ii) of this part. However, for either an operating license applicant or holder whose construction permit was issued prior to January 10, 1997, the reactor site criteria in part 100 of this chapter and the seismic and geologic siting criteria in appendix A to part 100 of this chapter continues to apply.

(c) Each application for a license to operate a production or utilization facility must include a physical security plan. The plan must describe how the applicant will meet the requirements of part 73 (and part 11 of this chapter, if applicable, including the identification and description of jobs as required by Sec. 11.11(a), at the proposed facility). The plan must list tests, inspections, audits, and other means to be used to demonstrate compliance with the requirements of 10 CFR parts 11 and 73, if applicable.

(d) Safeguards contingency plan. Each application for a license to operate a production or utilization facility that will be subject to Secs. 73.50, 73.55, or Sec. 73.60 of this chapter must include a licensee safeguards contingency plan in accordance with the criteria set forth in appendix C to 10 CFR part 73. The safeguards contingency plan shall include plans for dealing with threats, thefts, and radiological

sabotage, as defined in

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part 73 of this chapter, relating to the special nuclear material and nuclear facilities licensed under this chapter and in the applicant's possession and control. Each application for such a license shall include the first four categories of information contained in the applicant's safeguards contingency plan. (The first four categories of information as set forth in appendix C to 10 CFR part 73 are Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix. The fifth category of information, Procedures, does not have to be submitted for approval.) \9\

\9\ A physical security plan that contains all the information required in both Sec. 73.55 and appendix C to part 73 satisfies the requirement for a contingency plan.

(e) Each applicant for a license to operate a production or utilization facility, who prepares a physical security plan, a safeguards contingency plan, or a guard qualification and training plan, shall protect the plans and other related Safeguards Information against unauthorized disclosure in accordance with the requirements of Sec. 73.21 of this chapter, as appropriate.

(f) Additional TMI-related requirements. In addition to the requirements of paragraph (a) of this section, each applicant for a light-water-reactor construction permit or manufacturing license whose application was pending as of February 16, 1982 shall meet the requirements in paragraphs (f) (1) through (3) of this section. This rule applies only to the pending applications by Duke Power Company (Perkins Nuclear Station Units 1, 2 and 3), Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), Puget Sound Power & Light Company (Skagit/Hanford Nuclear Power Project, Units 1 and 2), and Offshore Power Systems (License to Manufacture Floating Nuclear Plants). The number of units that will be specified in the manufacturing license, if issued, will be that number whose start of manufacture, as defined in the license application, can practically begin within a ten-year period commencing on the date of issuance of the manufacturing license, but in no event will that number be in excess of ten. The manufacturing license will require the plant design to be updated no later than five years after its approval. Paragraphs (f)(1)(xii), (2)(ix), and (3)(v) of this section, pertaining to hydrogen control measures, must be met by all applicants covered by this rule. However, the Commission may decide to impose additional requirements and the issue of whether compliance with these provisions, together with 10 CFR 50.44 and Criterion 50 of appendix A to 10 CFR part 50, is sufficient for issuance of the manufacturing license may be considered in the manufacturing license proceeding.

(1) To satisfy the following requirements, the application shall provide sufficient information to describe the nature of the studies, how they are to be conducted, estimated submittal dates, and a program to ensure that the results of such studies are factored into the final design of the facility. All studies shall be completed no later than two years following issuance of the construction permit or manufacturing license. \10\

\10\ Alphanumeric designations correspond to the related action plan items in NUREG 0718 and NUREG 0660, ''NRC Action Plan Developed as a Result of the TMI-2 Accident.'' They are provided herein for information only.

(i) Perform a plant/site specific probabilistic risk assessment, the aim of which is to seek such improvements in the reliability of core and containment heat removal systems as are significant and practical and do not impact excessively on the plant. (II.B.8)

(ii) Perform an evaluation of the proposed auxiliary feedwater system (AFWS), to include (applicable to PWR's only) (II.E.1.1):

(A) A simplified AFWS reliability analysis using event-tree and fault-tree logic techniques.

(B) A design review of AFWS.

(C) An evaluation of AFWS flow design bases and criteria.

(iii) Perform an evaluation of the potential for and impact of reactor coolant pump seal damage following small-break LOCA with loss of offsite power.

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If damage cannot be precluded, provide an analysis of the limiting small-break loss-of-coolant accident with subsequent reactor coolant pump seal damage. (II.K.2.16 and II.K.3.25)

(iv) Perform an analysis of the probability of a small-break loss-of-coolant accident (LOCA) caused by a stuck-open power-operated relief valve (PORV). If this probability is a significant contributor to the probability of small-break LOCA's from all causes, provide a description and evaluation of the effect on small-break LOCA probability of an automatic PORV isolation system that would operate when the reactor coolant system pressure falls after the PORV has opened. (Applicable to PWR's only). (II.K.3.2)

(v) Perform an evaluation of the safety effectiveness of providing for separation of high pressure coolant injection (HPCI) and reactor core isolation cooling (RCIC) system initiation levels so that the RCIC system initiates at a higher water level than the HPCI system, and of providing that both systems restart on low water level. (For plants with high pressure core spray systems in lieu of high pressure coolant injection systems, substitute the words, ''high pressure core spray'' for ''high pressure coolant injection'' and ''HPCS'' for ''HPCI'') (Applicable to BWR's only). (II.K.3.13)

(vi) Perform a study to identify practicable system modifications that would reduce challenges and failures of relief valves, without compromising the performance of the valves or other systems. (Applicable to BWR's only). (II.K.3.16)

(vii) Perform a feasibility and risk assessment study to determine the optimum automatic depressurization system (ADS) design modifications that would eliminate the need for manual activation to ensure adequate core cooling. (Applicable to BWR's only). (II.K.3.18)

(viii) Perform a study of the effect on all core-cooling modes under accident conditions of designing the core spray and low pressure coolant injection systems to ensure that the systems will automatically restart on loss of water level, after having been manually stopped, if an initiation signal is still present. (Applicable to BWR's only). (II.K.3.21)

(ix) Perform a study to determine the need for additional space cooling to ensure reliable long-term operation of the reactor core isolation cooling (RCIC) and high-pressure coolant injection (HPCI) systems, following a complete loss of offsite power to the plant for at least two (2) hours. (For plants with high pressure core spray systems in lieu of high pressure coolant injection systems, substitute the words, ''high pressure core spray'' for ''high pressure coolant injection'' and ''HPCS'' for ''HPCI'') (Applicable to BWR's only). (II.K.3.24)

(x) Perform a study to ensure that the Automatic Depressurization System, valves, accumulators, and associated equipment and instrumentation will be capable of performing their intended functions during and following an accident situation, taking no credit for non-

safety related equipment or instrumentation, and accounting for normal expected air (or nitrogen) leakage through valves. (Applicable to BWR's only). (II.K.3.28)

(xi) Provide an evaluation of depressurization methods, other than by full actuation of the automatic depressurization system, that would reduce the possibility of exceeding vessel integrity limits during rapid cooldown. (Applicable to BWR's only) (II.K.3.45)

(xii) Perform an evaluation of alternative hydrogen control systems that would satisfy the requirements of paragraph (f)(2)(ix) of this section. As a minimum include consideration of a hydrogen ignition and post-accident inerting system. The evaluation shall include:

(A) A comparison of costs and benefits of the alternative systems considered.

(B) For the selected system, analyses and test data to verify compliance with the requirements of (f)(2)(ix) of this section.

(C) For the selected system, preliminary design descriptions of equipment, function, and layout.

(2) To satisfy the following requirements, the application shall provide sufficient information to demonstrate that the required actions will be satisfactorily completed by the operating

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license stage. This information is of the type customarily required to satisfy 10 CFR 50.35(a)(2) or to address unresolved generic safety issues.

(i) Provide simulator capability that correctly models the control room and includes the capability to simulate small-break LOCA's. (Applicable to construction permit applicants only) (I.A.4.2.)

(ii) Establish a program, to begin during construction and follow into operation, for integrating and expanding current efforts to improve plant procedures. The scope of the program shall include emergency procedures, reliability analyses, human factors engineering, crisis management, operator training, and coordination with INPO and other industry efforts. (Applicable to construction permit applicants only) (I.C.9)

(iii) Provide, for Commission review, a control room design that reflects state-of-the-art human factor principles prior to committing to fabrication or revision of fabricated control room panels and layouts. (I.D.1)

(iv) Provide a plant safety parameter display console that will display to operators a minimum set of parameters defining the safety status of the plant, capable of displaying a full range of important plant parameters and data trends on demand, and capable of indicating when process limits are being approached or exceeded. (I.D.2)

(v) Provide for automatic indication of the bypassed and operable status of safety systems. (I.D.3)

(vi) Provide the capability of high point venting of noncondensible gases from the reactor coolant system, and other systems that may be required to maintain adequate core cooling. Systems to achieve this capability shall be capable of being operated from the control room and their operation shall not lead to an unacceptable increase in the probability of loss-of-coolant accident or an unacceptable challenge to containment integrity. (II.B.1)

(vii) Perform radiation and shielding design reviews of spaces around systems that may, as a result of an accident, contain accident source term \11\ radioactive materials, and design as necessary to permit adequate access to important areas and to protect safety equipment from the radiation environment. (II.B.2)

\11\ The fission product release assumed for these calculations should be based upon a major accident, hypothesized for purposes of site analysis or postulated from considerations of possible accidental events, that would result in potential hazards not exceeded by those

from any accident considered credible. Such accidents have generally been assumed to result in substantial meltdown of the core with subsequent release of appreciable quantities of fission products.

(viii) Provide a capability to promptly obtain and analyze samples from the reactor coolant system and containment that may contain accident source term \11\ radioactive materials without radiation exposures to any individual exceeding 5 rems to the whole body or 50 rems to the extremities. Materials to be analyzed and quantified include certain radionuclides that are indicators of the degree of core damage (e.g., noble gases, radioiodines and cesiums, and nonvolatile isotopes), hydrogen in the containment atmosphere, dissolved gases, chloride, and boron concentrations. (II.B.3)

(ix) Provide a system for hydrogen control that can safely accommodate hydrogen generated by the equivalent of a 100% fuel-clad metal water reaction. Preliminary design information on the tentatively preferred system option of those being evaluated in paragraph (f)(1)(xii) of this section is sufficient at the construction permit stage. The hydrogen control system and associated systems shall provide, with reasonable assurance, that: (II.B.8)

(A) Uniformly distributed hydrogen concentrations in the containment do not exceed 10% during and following an accident that releases an equivalent amount of hydrogen as would be generated from a 100% fuel clad metal-water reaction, or that the post-accident atmosphere will not support hydrogen combustion.

(B) Combustible concentrations of hydrogen will not collect in areas where unintended combustion or detonation could cause loss of containment integrity or loss of appropriate mitigating features.

(C) Equipment necessary for achieving and maintaining safe shutdown of

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the plant and maintaining containment integrity will perform its safety function during and after being exposed to the environmental conditions attendant with the release of hydrogen generated by the equivalent of a 100% fuel-clad metal water reaction including the environmental conditions created by activation of the hydrogen control system.

(D) If the method chosen for hydrogen control is a post-accident inerting system, inadvertent actuation of the system can be safely accommodated during plant operation.

(x) Provide a test program and associated model development and conduct tests to qualify reactor coolant system relief and safety valves and, for PWR's, PORV block valves, for all fluid conditions expected under operating conditions, transients and accidents. Consideration of anticipated transients without scram (ATWS) conditions shall be included in the test program. Actual testing under ATWS conditions need not be carried out until subsequent phases of the test program are developed. (II.D.1)

(xi) Provide direct indication of relief and safety valve position (open or closed) in the control room. (II.D.3)

(xii) Provide automatic and manual auxiliary feedwater (AFW) system initiation, and provide auxiliary feedwater system flow indication in the control room. (Applicable to PWR's only) (II.E.1.2)

(xiii) Provide pressurizer heater power supply and associated motive and control power interfaces sufficient to establish and maintain natural circulation in hot standby conditions with only onsite power available. (Applicable to PWR's only) (II.E.3.1)

(xiv) Provide containment isolation systems that: (II.E.4.2)

(A) Ensure all non-essential systems are isolated automatically by the containment isolation system,

(B) For each non-essential penetration (except instrument lines) have two isolation barriers in series,

(C) Do not result in reopening of the containment isolation valves

on resetting of the isolation signal,

(D) Utilize a containment set point pressure for initiating containment isolation as low as is compatible with normal operation,

(E) Include automatic closing on a high radiation signal for all systems that provide a path to the environs.

(xv) Provide a capability for containment purging/venting designed to minimize the purging time consistent with ALARA principles for occupational exposure. Provide and demonstrate high assurance that the purge system will reliably isolate under accident conditions. (II.E.4.4)

(xvi) Establish a design criterion for the allowable number of actuation cycles of the emergency core cooling system and reactor protection system consistent with the expected occurrence rates of severe overcooling events (considering both anticipated transients and accidents). (Applicable to B&W designs only). (II.E.5.1)

(xvii) Provide instrumentation to measure, record and readout in the control room: (A) containment pressure, (B) containment water level, (C) containment hydrogen concentration, (D) containment radiation intensity (high level), and (E) noble gas effluents at all potential, accident release points. Provide for continuous sampling of radioactive iodines and particulates in gaseous effluents from all potential accident release points, and for onsite capability to analyze and measure these samples. (II.F.1)

(xviii) Provide instruments that provide in the control room an unambiguous indication of inadequate core cooling, such as primary coolant saturation meters in PWR's, and a suitable combination of signals from indicators of coolant level in the reactor vessel and in-core thermocouples in PWR's and BWR's. (II.F.2)

(xix) Provide instrumentation adequate for monitoring plant conditions following an accident that includes core damage. (II.F.3)

(xx) Provide power supplies for pressurizer relief valves, block valves, and level indicators such that: (A) Level indicators are powered from vital buses; (B) motive and control power connections to the emergency power sources are through devices qualified in accordance with requirements applicable to systems important to safety and (C)

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electric power is provided from emergency power sources. (Applicable to PWR's only). (II.G.1)

(xxi) Design auxiliary heat removal systems such that necessary automatic and manual actions can be taken to ensure proper functioning when the main feedwater system is not operable. (Applicable to BWR's only). (II.K.1.22)

(xxii) Perform a failure modes and effects analysis of the integrated control system (ICS) to include consideration of failures and effects of input and output signals to the ICS. (Applicable to B&W-designed plants only). (II.K.2.9)

(xxiii) Provide, as part of the reactor protection system, an anticipatory reactor trip that would be actuated on loss of main feedwater and on turbine trip. (Applicable to B&W-designed plants only). (II.K.2.10)

(xxiv) Provide the capability to record reactor vessel water level in one location on recorders that meet normal post-accident recording requirements. (Applicable to BWR's only). (II.K.3.23)

(xxv) Provide an onsite Technical Support Center, an onsite Operational Support Center, and, for construction permit applications only, a nearsite Emergency Operations Facility. (III.A.1.2).

(xxvi) Provide for leakage control and detection in the design of systems outside containment that contain (or might contain) accident source term \11\ radioactive materials following an accident. Applicants shall submit a leakage control program, including an initial test program, a schedule for re-testing these systems, and the actions to be taken for minimizing leakage from such systems. The goal is to minimize potential exposures to workers and public, and to provide reasonable assurance that excessive leakage will not prevent the use of systems

needed in an emergency. (III.D.1.1)

(xxvii) Provide for monitoring of inplant radiation and airborne radioactivity as appropriate for a broad range of routine and accident conditions. (III.D.3.3)

(xxviii) Evaluate potential pathways for radioactivity and radiation that may lead to control room habitability problems under accident conditions resulting in an accident source term \11\ release, and make necessary design provisions to preclude such problems. (III.D.3.4)

(3) To satisfy the following requirements, the application shall provide sufficient information to demonstrate that the requirement has been met. This information is of the type customarily required to satisfy paragraph (a)(1) of this section or to address the applicant's technical qualifications and management structure and competence.

(i) Provide administrative procedures for evaluating operating, design and construction experience and for ensuring that applicable important industry experiences will be provided in a timely manner to those designing and constructing the plant. (I.C.5)

(ii) Ensure that the quality assurance (QA) list required by Criterion II, app. B, 10 CFR part 50 includes all structures, systems, and components important to safety. (I.F.1)

(iii) Establish a quality assurance (QA) program based on consideration of: (A) Ensuring independence of the organization performing checking functions from the organization responsible for performing the functions; (B) performing quality assurance/quality control functions at construction sites to the maximum feasible extent; (C) including QA personnel in the documented review of and concurrence in quality related procedures associated with design, construction and installation; (D) establishing criteria for determining QA programmatic requirements; (E) establishing qualification requirements for QA and QC personnel; (F) sizing the QA staff commensurate with its duties and responsibilities; (G) establishing procedures for maintenance of ''as-built'' documentation; and (H) providing a QA role in design and analysis activities. (I.F.2)

(iv) Provide one or more dedicated containment penetrations, equivalent in size to a single 3-foot diameter opening, in order not to preclude future installation of systems to prevent containment failure, such as a filtered vented containment system. (II.B.8)

(v) Provide preliminary design information at a level of detail consistent with that normally required at the construction permit stage of review sufficient to demonstrate that: (II.B.8)

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(A)(1) Containment integrity will be maintained (i.e., for steel containments by meeting the requirements of the ASME Boiler and Pressure Vessel Code, Section III, Division 1, Subsubarticle NE-3220, Service Level C Limits, except that evaluation of instability is not required, considering pressure and dead load alone. For concrete containments by meeting the requirements of the ASME Boiler Pressure Vessel Code, Section III, Division 2 Subsubarticle CC-3720, Factored Load Category, considering pressure and dead load alone) during an accident that releases hydrogen generated from 100% fuel clad metal-water reaction accompanied by either hydrogen burning or the added pressure from post-accident inerting assuming carbon dioxide is the inerting agent. As a minimum, the specific code requirements set forth above appropriate for each type of containment will be met for a combination of dead load and an internal pressure of 45 psig. Modest deviations from these criteria will be considered by the staff, if good cause is shown by an applicant. Systems necessary to ensure containment integrity shall also be demonstrated to perform their function under these conditions.

(2) Subarticle NE-3220, Division 1, and subarticle CC-3720, Division 2, of section III of the July 1, 1980 ASME Boiler and Pressure Vessel Code, which are referenced in paragraphs (f)(3)(v)(A)(1) and (f)(3)(v)(B)(1) of this section, were approved for incorporation by reference by the Director of the Office of the Federal Register. A

notice of any changes made to the material incorporated by reference will be published in the Federal Register. Copies of the ASME Boiler and Pressure Vessel Code may be purchased from the American Society of Mechanical Engineers, United Engineering Center, 345 East 47th St., New York, NY 10017. It is also available for inspection at the NRC Library, 11545 Rockville Pike, Rockville, Maryland 20852-2738.

(B)(1) Containment structure loadings produced by an inadvertent full actuation of a post-accident inerting hydrogen control system (assuming carbon dioxide), but not including seismic or design basis accident loadings will not produce stresses in steel containments in excess of the limits set forth in the ASME Boiler and Pressure Vessel Code, Section III, Division 1, Subsubarticle NE-3220, Service Level A Limits, except that evaluation of instability is not required (for concrete containments the loadings specified above will not produce strains in the containment liner in excess of the limits set forth in the ASME Boiler and Pressure Vessel Code, Section III, Division 2, Subsubarticle CC-3720, Service Load Category, (2) The containment has the capability to safely withstand pressure tests at 1.10 and 1.15 times (for steel and concrete containments, respectively) the pressure calculated to result from carbon dioxide inerting.

(vi) For plant designs with external hydrogen recombiners, provide redundant dedicated containment penetrations so that, assuming a single failure, the recombiner systems can be connected to the containment atmosphere. (II.E.4.1)

(vii) Provide a description of the management plan for design and construction activities, to include: (A) The organizational and management structure singularly responsible for direction of design and construction of the proposed plant; (B) technical resources director by the applicant; (C) details of the interaction of design and construction within the applicant's organization and the manner by which the applicant will ensure close integration of the architect engineer and the nuclear steam supply vendor; (D) proposed procedures for handling the transition to operation; (E) the degree of top level management oversight and technical control to be exercised by the applicant during design and construction, including the preparation and implementation of procedures necessary to guide the effort. (II.J.3.1)

(g) Conformance with the Standard Review Plan (SRP). (1)(i) Applications for light water cooled nuclear power plant operating licenses docketed after May 17, 1982 shall include an evaluation of the facility against the Standard Review Plan (SRP) in effect on May 17, 1982 or the SRP revision in effect six months prior to the docket date of the application, whichever is later.

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(ii) Applications for light water cooled nuclear power plant construction permits, manufacturing licenses, and preliminary or final design approvals for standard plants docketed after May 17, 1982 shall include an evaluation of the facility against the SRP in effect on May 17, 1982 or the SRP revision in effect six months prior to the docket date of the application, whichever is later.

(2) The evaluation required by this section shall include an identification and description of all differences in design features, analytical techniques, and procedural measures proposed for a facility and those corresponding features, techniques, and measures given in the SRP acceptance criteria. Where such a difference exists, the evaluation shall discuss how the alternative proposed provides an acceptable method of complying with those rules or regulations of Commission, or portions thereof, that underlie the corresponding SRP acceptance criteria.

(3) The SRP was issued to establish criteria that the NRC staff intends to use in evaluating whether an applicant/licensee meets the Commission's regulations. The SRP is not a substitute for the regulations, and compliance is not a requirement. Applicants shall identify differences from the SRP acceptance criteria and evaluate how the proposed alternatives to the SRP criteria provide an acceptable

method of complying with the Commission's regulations.

[33 FR 18612, Dec. 17, 1968]

Editorial Note: For additional Federal Register citations affecting Sec. 50.34, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

ADDENDUM 5
10 C.F.R. § 50.80

[Code of Federal Regulations]
[Title 10, Volume 1]
[Revised as of January 1, 2001]
From the U.S. Government Printing Office via GPO Access
[CITE: 10CFR50.80]

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 50--DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES--Table of Content.

Sec. 50.80 Transfer of licenses.

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

(b) An application for transfer of a license shall include as much of the information described in Secs. 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and, if the license to be issued is a class 103 construction permit or initial operating license, the information required by Sec. 50.33a. The Commission may require additional information such as data respecting proposed safeguards against hazards from radioactive materials and the applicant's qualifications to protect against such hazards. The application shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license, and an agreement to limit access to Restricted Data pursuant to Sec. 50.37. The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person's right (subject to the licensing requirements of the Act and these regulations) to possession of the facility involved.

(c) After appropriate notice to interested persons, including the existing licensee, and observance of such procedures as may be required by the Act or regulations or orders of the Commission, the Commission will approve an application for the transfer of a license, if the Commission determines:

(1) That the proposed transferee is qualified to be the holder of the license; and

(2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

[26 FR 9546, Oct. 10, 1961, as amended at 35 FR 19661, Dec. 29, 1970; 38 FR 3956, Feb. 9, 1973; 65 FR 44660, July 19, 2000]

ADDENDUM 6
STREAMLINED HEARING PROCESS FOR NRC APPROVAL OF LICENSE TRANSFERS
63 FED. REG. 66,721-30

RULES and REGULATIONS

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 51

RIN 3150-AG09

Streamlined Hearing Process for NRC Approval of License Transfers

Thursday, December 3, 1998

*66721 AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to provide specific uniform procedures and rules of practice for handling requests for hearings associated with license transfer applications involving material and reactor licenses as well as licenses issued under the regulations governing the independent storage of spent nuclear fuel and high-level radioactive waste. Conforming amendments are also made to certain other parts of the Commission's regulations. These new provisions provide for public participation and opportunity for an informal hearing on matters relating to license transfers, specify procedures for filing and docketing applications for license transfers, and assign appropriate authorities for issuance of administrative amendments to reflect approved license transfers. This rulemaking also adds a categorical exclusion that permits processing of transfer applications without preparation of Environmental Assessments.

EFFECTIVE DATE: December 3, 1998.

FOR FURTHER INFORMATION CONTACT: James A. Fitzgerald, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, telephone (301) 415-1607, e-mail JAF @nrc.gov, or Leo Slaggie, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone (301) 415-1605 (TDD), e-mail ELS@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 11, 1998 (63 FR 48644), the NRC published in the Federal Register a proposed rule that would amend NRC's regulations by adding to 10 CFR Part 2, the NRC's Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, a subpart M, which would establish uniform informal procedures for handling requests for hearings associated with license transfer applications. This initiative is part of a broad effort to improve the effectiveness of the agency's programs and processes.

A number of categories of NRC licensees, but in particular the electric power industry, have undergone and will continue to undergo significant transformations as a result of changes to the economic and regulatory environment in which they operate.

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Electric utilities in particular are now operating in an environment which is increasingly characterized by restructuring and organizational change. In recent years, the Commission has seen a significant increase in the number of requests for transfers of NRC licenses. The number of requests related to reactor licenses has increased from a historical average of 2-3 per year to more than 20 requests in fiscal year 1997. With the restructuring that the energy industry is undergoing, the Commission expects this high rate of requests for approval of license transfers to continue. Because of the need for expeditious decisionmaking from all agencies, including the Commission, for these kinds of transactions, timely and effective resolution of requests for transfers on the part of the Commission is essential.

In general, license transfers do not involve any technical changes to plant operations. Rather, they involve changes in ownership or partial ownership of facilities at a corporate level. Section 184 of the Atomic Energy Act of 1954, as amended (AEA), specifies, however, that:

[N]o license granted hereunder * * * shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through *66722 transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing. (42 U.S.C. 2234; 10 CFR 30.34 (b), 40.46, 50.80, 72.50)

Transfers falling within the foregoing provision include indirect transfers which might entail, for example, the establishment of a holding company over an existing licensee, as well as direct transfers, such as transfer of an ownership interest held by a non-operating, minority owner, and the complete transfer of the ownership and operating authority of a single or majority owner. Although other requirements of the Commission's licensing provisions may also be addressed to the extent relevant to the particular transfer action, typical NRC staff review of such applications consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations. These financial capabilities are important over the long term, but have no direct or immediate impact on the requirements for day-to-day operations at a licensed facility. The same is generally true of applications involving the transfer of materials licenses.

Notwithstanding the nature of the issues relevant to a decision on whether to consent to a license transfer, past Commission practice has generally involved the use of formal hearing procedures under the provisions of 10 CFR Part 2, Subpart G, for license transfers other than those for materials licenses, which have used the informal hearing procedures provided by 10 CFR Part 2, Subpart L. However, license transfers do not, as a general proposition, involve the type of technical issues with immediate impact on the actual operation of the facilities that might benefit from review by a multi-member, multi-disciplined Atomic Safety and Licensing Board historically used by the Commission in hearings on initial licensing or license amendments that substantially affect the technical operations. It is a matter suitable for reasonable discussion whether such complex hearing procedures provide the best means of reaching decisions on such technical issues, but, be they the best or not, they clearly are not required and are not the most efficient means for resolving the issues encountered in license transfers. Accordingly, the Commission has determined that requests for hearings on applications for license transfers should be handled by a separate Subpart of 10 CFR Part 2. This new Subpart M establishes an efficient and appropriate informal process for handling hearing requests associated with transfer applications commensurate with the nature of the issues involved and the rights of all parties.

The basic requirement for an opportunity for a hearing on a license transfer is found in Section 189.a of the Atomic Energy Act of 1954, as amended (AEA), which provides that:

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[I]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. (42 U.S.C. 2239(1).)

The Commission believes that AEA sections 184 and 189 give the Commission the flexibility to fashion procedures which provide for a fair process to consider any issues raised concerning license transfers while still proceeding in an expedited manner. In 1983, a reviewing court held that Section 189.a of the Atomic Energy Act did not require that a hearing on a materials license amendment be conducted "on the record." City of West Chicago v. U.S. Nuclear Regulatory Commission, 701 F.2d 632, 641-45 (7th Cir. 1983). There, the court declined to read Section 189.a as requiring formal trial-type hearings, in the absence of clear Congressional "intent to trigger the formal on-the-record hearing provisions of the APA." Id. at 641. The Commission has also taken the position in court that Section 189.a does not require formal hearings in reactor licensing proceedings. En Banc Brief for Respondents dated August 30, 1991 (filed in the U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1381, Nuclear Information and Resource Service v. NRC, at pp. 32-38). However, the court did not find it necessary to decide the question. Nuclear Information Resource Services v. NRC, 969 F.2d 1169, 1180 (D.C. Cir. 1992).

To promote uniformity, the hearing procedures established in the final rule apply to all license transfers which require prior NRC approval. The Commission has added to the final rule, as appropriate, additional language to make explicit that the new procedures apply to transfers of licenses issued under 10 CFR Part 72 for independent storage of spent nuclear fuel and high level radioactive waste. The procedures are designed to provide for public participation in the event of requests for a hearing under these provisions, while at the same time providing an efficient process that recognizes the time- sensitivity normally present in transfer cases.

II. Comments and Commission Responses

The Commission received sixteen letters of comment from interested persons. Commenters included private corporations who hold or plan to acquire NRC licenses for nuclear facilities, the Nuclear Energy Institute, private counsel representing electric utilities and nuclear plant operating companies, a licensed nuclear power plant operator employed at a nuclear power station, the president of Local 369 of the Utility Workers Union of America representing workers at a nuclear power station, a citizens group, and an individual member of the public. Twelve of the Commenters expressed strong support for the proposed rule and provided specific comments and suggestions on particular provisions. Two Commenters, the individual member of the public and the citizens group, indicated strong but general opposition to the proposed Subpart M hearing process.

A review of the comments, not necessarily in the order received, and the Commission's responses follows:

Comments from individuals:

Comment 1. Mr. Marvin Lewis, a member of the public, opposed the adoption of informal procedures for hearings on license transfer applications. Mr. Lewis's brief comment expressed concern that under the proposed procedures there will be no record upon which findings of fact and conclusions of law may rest and that "general findings" will suffice to support a license transfer.

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Commission response. The Commission believes the commenter has not fully understood the proposal. While the procedures do not allow discovery as such, there will be an extensive record consisting of the hearing transcript, exhibits, and all papers filed or issued in connection with the hearing. See § 2.1317. The Presiding Officer will certify the completed hearing record to the Commission, which will then issue its decision on the issues raised in the hearing or request additional testimony and/or documentary evidence if it finds that additional evidentiary presentations are needed for a decision on the merits. See § 2.1320. The Commission does not understand Mr. Lewis's reference to "general findings" in the context of this rulemaking. Before approving a license transfer the Commission must find that the transfer is in accordance with the provisions of *66723 the Atomic Energy Act (42 U.S.C. 2234). This finding will necessarily address the specifics of the transfer in question. Nothing in the rule alters the nature of the findings needed to support approval of a license transfer.

Comment 2. The Ohio Citizens for Responsible Energy ("OCRE") generally opposed the proposed rule. OCRE characterizes the Subpart M informal procedures as "a pro forma exercise" that in OCRE's view will not be adequate to deal with the complex inquiry thatcould arise in a license transfer proceeding. OCRE also objects to shortened filing times and to the requirement that common interests be represented by a single party. OCRE sees such provisions as "attempts to make life difficult for intervenors."

Commission response. For the reasons given in the notice of proposed rulemaking, the Commission believes that the Subpart M procedures will be both efficient and effective in dealing with the issues that license transfer application proceedings typically involve. They are not "pro forma" but in fact provide ample opportunity for the parties to raise appropriate issues and build a sound evidentiary record for decision. At the same time, the Commission recognizes that issues might arise that could require additional procedures. Therefore the rule explicitly provides that the Commission may use additional procedures or even convene a formal hearing "on specific and substantial disputes of fact necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing." See § 2.1322(d). The rule thus provides sufficient flexibility to cope with extraordinary or unusual cases. For typical cases, however, a "streamlined hearing process" providing faster decision-making without loss of quality is a desirable objective. The shortened filing times and other provisions to which OCRE objects are steps which make this streamlining possible. They are not selective attempts to burden intervenors. The Commission believes that all parties to a license transfer application proceeding will benefit from the use of the Subpart M procedures.

Comment 3. Mr. David Leonardi, a licensed reactor operator, submitted a two-part comment "directed more to what is missing in the proposed rule rather than to what it contains." First, Mr. Leonardi questioned the Commission's statement in the notice of proposed rulemaking that license transfers in general "do not involve . . . significant changes in personnel of consequence to the continued reasonable assurance of public health and safety." Mr. Leonardi called this "a dangerous assumption" and expressed his view that "significant losses of critical personnel must be anticipated and factored into the transfer decision." He suggested that the proposed rule "must require the applicant to submit a critical staff retention plan."

Second, with regard to the placement in the Public Document Room of documents pertaining to each license transfer application, § 2.1303, Mr. Leonardi commented that he finds the Public Document Room difficult to use. He indicated his preference for "a separate section on the NRC web site for each proposed license transfer where all relevant documents and correspondence may be accessed."

Commission response. Mr. Leonardi is correct that if a significant loss and replacement of critical plant personnel can be anticipated as the result of a particular license transfer this might well be a reason not to approve the transfer or

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to condition the transfer on the maintenance of adequate technical qualifications. However, the Commission does not regard this observation as a reason for modifying this proposed rule, which deals with hearing procedures rather than with the substantive findings that must be made to support approval of a license transfer application. The commenter does not assert that the Subpart M procedures cannot deal adequately with the issue of technical qualifications of the applicant for license transfer, and the Commission perceives no potential inadequacy in this regard. The Commission continues to believe that personnel retention issues and technical qualifications of the applicant do not involve the type of technical questions bearing on the actual operation of a facility that may benefit from different hearing procedures. As for the commenter's suggestion that the rule should incorporate a requirement for a critical staff retention plan to be submitted by the applicant for the license transfer, the Commission finds that Subpart M, which deals primarily with hearing procedures, is not an appropriate place for such a substantive requirement. If, in a particular license transfer case, a need is identified for submission of a critical staff retention plan in order to address the applicant's technical qualifications, this matter can readily be addressed in the hearing process and can ultimately result in a condition on license transfer approval.

Turning to the matter of availability of license transfer application documents on the NRC web site, the Commission notes that the NRC is in the process of developing a new and comprehensive Agencywide Documents Access and Management System ("ADAMS"). Documents filed in a license transfer case after ADAMS becomes operational, probably in the second half of 1999, will be placed in the ADAMS public library. The public will be able to find relevant documents by using general search criteria such as docket numbers, case names, and subject topics. The details of how ADAMS will operate have yet to be fully worked out, but the Commission believes that this system will prove responsive to the commenter's concern. In the meantime, the Commission notes that the NRC Public Document Room licensing files have worked quite well in the past and been readily available to members of the public who wish to obtain extensive information on pending licensing actions.

Comment 4. A comment by the president of Local 369, Utility Workers Union of America, representing 197 workers at a nuclear power station, acknowledged the need to streamline the hearing process but identified what the commenter perceived as potential problems with the proposed Subpart M procedures. In particular, the commenter was concerned about the Commission's expectation that the procedures will result in the issuance of a final Commission decision on a license transfer application within about six to eight months of notice of receipt of the application. The commenter said that "a process that proceeds too rapidly could compromise the Union's and the NRC's ability to obtain critical information about the license transferee." The Commission of course agrees that what the commenter calls "a rush to approval" could fail to obtain adequate information about the transferee's experience and ability to manage the plant safely. The Commission notes, however, that the expectation of completing license transfer proceedings in six to eight months applies to "routine cases." (63 FR 48646, col. 2.) Subpart M itself does not specify or limit the substantive questions which must be addressed in license transfer proceedings. If difficult issues arise in unusual cases, they will be dealt with as sound decisionmaking requires, even if this requires a greater time commitment than routine cases. The Commission's aim in adopting the Subpart M procedures is to provide an efficient and effective hearing process and a structure for compiling a decision record in a timely manner, not a hurried one.

The commenter also expressed concern that the Union not be denied the opportunity to participate in license transfer hearings. The new Subpart M ***66724** does not alter the Commission's usual requirement for standing to intervene in a proceeding that a person show an interest which may be affected by the outcome of the proceeding. By showing an interest (within the "zone of interests" of the relevant statutes) which may be affected by the Commission's action on an application for license transfer, any person or organization may participate as of right. See § 2.1306(a). Under current agency

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case law, the Commission may also allow discretionary intervention to a person who does not meet standing requirements, where there is reason to believe the person's participation will make a valuable contribution to the proceeding and where a consideration of the other criteria on discretionary intervention shows that such intervention is warranted.

Comments by or onbehalf of members of the nuclear energy industry:

Comment 5. The Nuclear Energy Institute ("NEI"), an organization representing utilities licensed to operate commercial nuclear power plants in the United States, nuclear materials licensees, and other organizations and individuals involved in the nuclear industry, submitted a comment on behalf of its members. NEI supports as a "very positive development" the use of informal rather than formal trial-type procedures for consideration of license transfer applications. NEI suggests the goals of the rule can be furthered by the following proposed clarification: "Where the proposed change only involves a transfer of ownership of all or a portion of the facility, both NRC staff review and the Subpart M proceeding should be limited solely to the capability of the transferee to meet financial qualifications and decommissioning funding requirements." Several comments by individual members of the nuclear energy industry or their representatives endorsed the comments of NEI.

Commission response. The Commission does not accept NEI's proposed clarification. The Commission observed in the Notice of Proposed Rulemaking that "typical staff review consists largely of assuring that the ultimately licensed entity has the capability to meet financial qualification and decommissioning funding aspects of NRC regulations," (63 FR 48644, col. 3. (emphasis added)). But financial qualification and decommissioning funding are not the sole issues that may bear on a license transfer approval, even when the transfer will change only the ownership of all or part of a facility and will not directly affect management or operation. Section 103d of the Atomic Energy Act, 42 U.S.C. 2133, for example, places certain restrictions on foreign ownership, control, or domination of certain licenses. Consideration of the question whether a proposed license transfer is consistent with this provision of the Act would require a broader scope for the proceeding than the limited one NEI recommends. Generally, the Commission believes it is desirable to focus its Subpart M rulemaking solely on procedures rather than attempting in this rulemaking to describe and enumerate the substantive issues that license transfers may involve.

Comment 6. The Southern California Edison Company ("SCE") stated its strong support for the proposed rule. SCE supported the comments submitted by the Nuclear Energy Institute, which the Commission has already addressed in the response to Comment 5, supra. SCE also offered suggestions for "minor enhancements" to the proposed rule, which the Commission addresses in its response to this comment.

Commission response. Change (1) suggested by SCE is that the rule should give the Presiding Officer, in addition to the power to "strike or reject duplicative or irrelevant presentations," § 2.1320(a)(9), the responsibility and power to strike or reject unreliable or immaterial presentations. As the commenter points out, this change would make Subpart M similar in this regard to 10 CFR Part 2, Subpart L, Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings, which gives the presiding officer the power to strike portions of a presentation that are "cumulative, irrelevant, immaterial, or unreliable." (10 CFR 2.1233(e)). The Commission agrees that unreliable and immaterial presentations detract from the value of the record and should be subject to exclusion in the sound discretion of the Presiding Officer. Therefore the Commission accepts this suggestion and has revised § 2.1320(a)(9) accordingly in the final rule.

Change (2) suggested by SCE deals with responses to papers served by mail. SCE notes that proposed § 2.1314(c) provides for three additional days to respond to papers served pursuant to § 2.1307 by regular mail. SCE suggests that three additional days for mail service should be allowed for all responses to service of a paper, not just

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those made pursuant to § 2.1307. The Commission accepts this suggestion and has revised § 2.1314(c) accordingly in the final rule.

Change (3) suggested by SCE is that proposed § 2.1331(b) be clarified to make plain that the Commission may consider other information on the docket when it decides matters that were not designated as issues for the hearing. The Commission agrees and has adopted the language proposed by SCE for § 2.1331(b) in the final rule: "The decision on issues designated for hearing pursuant to § 2.1308(d)(1) will be based on the record developed at the hearing."

Comment 7. Florida Power & Light Company ("FPL") submitted a comment endorsing the comments of the Nuclear Energy Institute, which the Commission has already addressed in the context of its response to comment 5, supra. FPL concurred with the Commission's findings in support of the proposed Subpart M and offered the following additional suggestions:

(1) FPL suggested that the Commission should extend the informal hearing process to all NRC adjudicatory proceedings.

Commission response. Although the suggestion goes well beyond the scope of the proposed rule, the Commission notes elsewhere in this notice that it has argued in court that section 189a of the Atomic Energy Act does not require formal hearings, and the Commission has directed the staff to seek legislation that supports greater use of informal procedures. The Commission has also asked the staff to advise the Commission on ways to enhance the Commission's ability to use informal procedures in any proceeding in which formal procedures are currently used.

(2) FPL supported close Commission oversight of the Presiding Officer but believed that the Commissioners should not personally be involved, as the proposed Subpart M envisions, in developing the evidentiary record in license transfer application proceedings.

Commission response. Under the proposed rule the Commission "will ordinarily be the Presiding Officer at a hearing," but the Commission "may provide * * * that one or more Commissioners, or any other person permitted by law, may preside." See § 2.1319. The Commission believes this language provides sufficient flexibility to deal with the commenter's concerns, should the Commission perceive that its direct involvement in Subpart M hearings is in some cases unduly burdensome or impractical for the Commission.

(3) FPL stated its belief that allowing all parties to make oral presentations in every license transfer proceeding "could defeat the underlying purpose of the proposed rule: to streamline license transfer proceedings." Comments by several other members of the nuclear ***66725** energy industry or their representatives questioned the proposed rule's provision that hearings shall be oral unless all parties agree to a hearing on written submissions. These Commenters recognized the Commission's intention to avoid delays caused by a need to consider a party's request that a hearing be oral; that is, the Commission intends to avoid needless nonsubstantive "litigation" over the form (oral or written) of the litigation on the merits-- but noted that there are alternative ways to avoid these delays. Two Commenters suggested that the Commission could provide that hearings will be on written submissions unless any party requests an oral hearing.

Commission response. Under the proposed Subpart M oral hearings are the "default choice" in that it provides for oral presentations unless all parties agree to a written hearing. Under the proposed scheme if the parties take no action the hearing will be oral, and only unanimous action of the parties in favor of a written hearing will cause oral procedures to be supplanted. The Commenters' suggested alternative that the hearing be written unless a party requests an oral hearing would turn this

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around and make a written hearing the default choice. The Commission prefers to retain the approach taken in the proposed rule. The Commission believes that oral presentations with the structure established by Subpart M may allow for the compilation of a better record because the Presiding Officer can more readily ask follow-up or clarifying questions. A strictly written hearing is likely to prove more cumbersome in this regard. Furthermore, members of the public attending oral proceedings will be able to follow the hearing more readily than by combing through extensive written materials in the Public Document Room as they would be required to do in a written hearing context. Accordingly, the Commission does not accept the commenter's proposed alternative.

(4) FPL noted its support of Commission action to ensure timely completion of license transfer proceedings but recommended "that the final rule specifically require automatic Commission review in the event that any of the schedular "milestones" are exceeded by a Presiding Officer."

Commission response. Although the Commission intends to monitor these proceedings carefully and will be fully prepared to step in to address schedular problems when necessary, the Commission is not prepared to require by regulation, and bind itself to, a review of every instance in which a Presiding Officer exercises discretion to enlarge the time provided in the rule for filings or other actions. In view of the Commission's recent Policy Statement on Conduct of Adjudicatory Proceedings, 48 NRC 18 (1998), (63 FR 41872; August 5, 1998), the Commission is confident that persons serving as Presiding Officers will be highly sensitive to the need for expeditious completion of adjudicatory proceedings, consistent with considerations of fairness and the production of an adequate record, and will countenance delays only for compelling reasons. The Commission of course retains discretion to take such action in individual proceedings as it deems necessary to assure timeliness and adherence to all other Commission requirements that govern the hearing process.

Comment 8. Texas Utilities Electric Company ("TU Electric") expressed support for the proposed rule. TU Electric also offered many of the suggestions put forward in the comments already described. In addition, TU Electric expressed concern that the reference in proposed § 2.1330(b) to 10 CFR 2.790, which is in Subpart G, might convey an implication that other Subpart G procedures also apply in Subpart M proceedings.

Commission response. To allay the commenter's concern, the Commission has modified § 2.1330(b) in the final rule by replacing the language "under 10 CFR 2.790" with the language "in accordance with law and policy as reflected in 10 CFR 2.790 . . ." The intent of this modification is to remove any possible implication that Subpart G is intended to apply to license transfer actions.

Comment 9. AmerGen Energy Company, LLC ("AmerGen") commented that it favored the proposed rule and urged its prompt adoption. AmerGen also suggested that the Commission should apply the proposed Subpart M procedures, at the request of an applicant, in any license transfer application proceedings that may be undertaken before the final Subpart M becomes effective. In AmerGen's opinion, the NRC has authority under the Atomic Energy Act and the Administrative Procedure Act to use the Subpart M procedures on a case-by-case basis, prior to finalization of the rule, so long as the Commission provides fair notice to the potential parties.

Commission response. For reasons discussed elsewhere in this notice, the Commission is making this rule effective upon publication, pursuant to the provisions of the Administrative Procedure Act for immediate effectiveness. 5 U.S.C. 553(d)(1) and 553(d)(3). Any applications received but not yet noticed as of the effective date of this rule will be subject to Subpart M procedures. In the case of license transfer applications, if any, that have been noticed and for which proceedings are pending as of the date of this notice of final rulemaking, affected applicants or parties to such proceedings who wish to avail themselves of the new procedures may file motions with

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the Presiding Officer in those proceedings, requesting that Subpart M procedures be applied as appropriate to the remainder of the pending proceeding.

Comment 10. Morgan, Lewis, & Bockius, a private law firm commenting on behalf of Alliant Utilities--IES Utilities and STP Nuclear Operating Company, endorsed the comments of NEI (see Comment 5, supra) in support of the rule. The commenter also made several suggestions for changes.

Commission response. The changes suggested by this commenter are similar to suggestions made in other comments described and responded to in the preceding discussion.

Comment 11. Shaw, Pittman, Potts & Trowbridge ("Shaw Pittman"), a private law firm commenting on behalf of itself and several utilities, strongly supported the proposed rule. Shaw Pittman believed, however, that several aspects of the rule require "clarification and refinement." These aspects, together with the Commission's response, are as follows:

(1) Shaw Pittman expressed concern "that the rule does not identify the circumstances that would permit the NRC Staff to delay the approval or denial of a license transfer request pending any requested hearing." The commenter noted that proposed § 2.1316(a) says that during the pendency of a hearing under Subpart M "the staff is expected to promptly issue approval or denial of license transfer requests." The commenter believed that the final rule or its statement of consideration "should describe the circumstances or the factors that the NRC Staff are to consider in deciding whether to postpone approval or denial of a transfer pending a requested hearing."

Commission response. The Commission does not accept this suggestion. As noted previously (see response to Comment 5), the scope and focus of the Subpart M rulemaking are on procedures for the conduct of hearings, rather than the substantive questions involved in approval of license transfer applications. The Commission is confident that the present language of § 2.1316(a) adequately conveys to the NRC staff that staff action on license transfer requests ***66726** should not be delayed except for sound reasons. The Commission relies on the staff, subject to Commission oversight, to exercise good judgment in this regard. As the rule indicates, the Commission believes that staff approval or denial can usually be issued promptly, but it would be unwise for the Commission at this point to attempt to anticipate all the circumstances that might warrant delay in the staff's review or action on the application.

(2) Shaw Pittman commented that the Commission "should clarify the evidentiary value of written position statements and oral presentations allowed under the present rule." The commenter would have the rule specify that the Commission cannot base a decision on "written position statements and oral presentations, in and of themselves." The commenter would require parties to document and support their positions by written testimony with supporting affidavits.

Commission response. The Commission does not believe that extensive clarification is necessary. Setting out evidentiary requirements in more detail could be at variance with the Commission's intention to move away from time-consuming formality in its hearing processes. In making a decision based on the record produced in a Subpart M proceeding, the Commission will of course take proper account of the evidentiary value of the record material. Written statements of position and oral arguments will be treated as such statements and arguments are treated in the NRC's formal adjudications under Subpart G and informal proceedings under Subpart L, i.e. as arguments and positions of the parties but not as facts. Factual assertions unsupported by affidavits, expert testimony, or other appropriate evidentiary submissions are less likely to carry weight than assertions with proper evidentiary support.

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(3) Shaw Pittman urged the Commission to revise the proposed rule expressly to allow parties to submit proposed questions to the Presiding Officer within seven days of the filing of rebuttal testimony. The commenter noted that under the proposed rule, rebuttal testimony and proposed questions for the Presiding officer to ask witnesses in the Presiding Officer's examination are to be filed at the same time. See § 2.1321(b) and § 2.1322(a)(2). Thus, there is no explicit provision for proposing questions directed to the rebuttal testimony itself, although the Presiding Officer has the discretion to provide for such questions. The commenter believed that the timeframe of the rule would reasonably allow for this additional filing without extending the date for commencement of the oral hearing beyond 65 days after the date of the Commission's notice granting a hearing.

Commission response. The Commission finds the commenter's point well- taken and has placed language in the final rule to authorize proposed questions directed to rebuttal testimony to be filed within seven days of the filing of the rebuttal testimony.

(4) Shaw Pittman finds confusing the language of proposed 10 CFR 2.1323(a) that "[a]ll direct testimony in an oral hearing shall be filed no later than 15 days before the hearing.* * *" The commenter believes this language "could arguably be read to allow the filing of direct testimony subsequent to the 30 day deadline provided for by proposed 10 CFR 2.1322(a)(1)."

Commission response. The Commission does not see any reason for confusion. To be timely the filings in question must be made within 30 days after the date of the Commission's notice granting a hearing [§ 2.1322(a)] but in any event no later than 15 days before the hearing [§ 2.1323(a)]. There is no potential contradiction between the two provisions. Rather than being an unnecessary provision, as the commenter asserts, § 2.1323(a) assures that parties will receive filings in adequate time to prepare for the oral hearing.

(5) Shaw-Pittman asked that the Commission clarify in its promulgation of the final rule the extent to which license transfer applications filed before the effective date of the rule will be subject to the new Subpart M procedures. The commenter favored making the new rule immediately effective and applying the Subpart M procedures to pending applications.

Commission response. See the Commission's response to Comment 9.

Comment 12. GPU Nuclear stated its strong support for the rule and recommended that the new procedures be applied as soon as possible.

Commission response. See the Commission's response to Comment 9.

Comment 13. Duke Energy Company ("Duke"), represented by Winston & Strawn, supported the proposed rule but expressed concern about the elimination of cross-examination by parties under Subpart M. Duke stated that "the final rule should retain provisions allowing the parties to present recommended questions to the presiding officer." Duke commented that the final rule "should define with greater precision the types of issues appropriate for review * * *" and suggested limiting the proceedings to issues associated with financial qualifications and decommissioning funding. Duke also commented that the final rule should explicitly grant parties to a contested license transfer hearing the right to appeal an adverse decision by the Commission. Duke suggested that the informal, legislative-style hearing process should be extended to other NRC adjudicatory proceedings.

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Commission response. The proposed Subpart M rule provides for parties to submit proposed questions to the Presiding Officer. This will allow the parties to suggest what they believe to be appropriate questions for the witnesses but will allow the Presiding Officer better control of the examination of witnesses. This provision should effectively eliminate the need for objections and interruptions during witness examination. For these reasons the Commission has retained the proposed procedure in the final rule. The Commission rejects the commenter's suggestion that the rule should define and limit the issues appropriate for review, for reasons already discussed in previousresponses to similar comments. The Commission also sees no point in addressing statutory appeal rights in the final rule. A party's right to judicial review of an adverse decision is set out in Section 189b. of the Atomic Energy Act in conjunction with Chapter 158 of title 28, United States Code, and the Administrative Procedure Act. Extension of the proposed procedures for license transfer applications to other types of NRC proceedings is beyond the scope of this rulemaking, but, as noted in more detail in response to an earlier comment, the Commission is taking steps to expand the use of similar procedures in other proceedings.

Comment 14. PECO Nuclear noted its view that the proposed rule is "a positive step." The commenter suggested several minor changes in words and punctuation needed to clarify the text of the rule.

Commission response. The Commission has incorporated in the final rule the commenter's suggested minor changes, which do not affect the substance of the rule.

Comment 15. Wisconsin Electric Power Company supported the Commission's proposed rule and suggested certain "clarifications and refinements."

Commission response. The commenter's suggestions do not differ in substance from suggestions made by other commenters that the Commission has responded to above.

Other Comments. ***66727**

Members of the NRC staff in Office of Nuclear Materials Safety and Safeguards submitted a comment asking that it be made clear that the proposed Subpart M applies to license transfers under 10 CFR Part 72 and that applications for transfers under Part 72 be noticed in the Federal Register pursuant to § 2.1301(b).

Commission response. The proposed rules were intended to apply to all license transfer applications, including those filed under Part 72. To make this clear, the Commission has included explicit references to Part 72 in this statement of consideration for the final rule. The Commission has also modified § 2.1301(b) to list transfer applications under Part 72 as one of the class of applications that will be noticed in the Federal Register.

III. Description of Final Rule

The procedures adopted in this rulemaking cover any direct or indirect license transfer for which NRC approval is required pursuant to the regulatory provisions under which the license was issued. NRC regulations and the Atomic Energy Act require approval of any transfer of control of a license. See AEA, Sec. 184, 42 U.S.C. 2234. This includes those transfers that require license amendments and those that do not. It should be recognized that not all license transfers will require license amendments. For example, the total acquisition of a licensee, without a change in the name of the licensee, (e.g., through the creation of a holding company which acquires the existing licensee but which, beyond ownership of the licensee, does not otherwise affect activities for which a license is required), would require NRC approval, but would not

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necessarily require any changes in the NRC license for the facilities owned by the licensee.

These procedures do not expand or change the circumstances under which NRC approval of a transfer is necessary nor do they change the circumstances under which a license amendment would be required to reflect an approved transfer. Amendments to licenses are required only to the extent that ownership or operating authority of a licensee, as reflected in the license itself, is changed by a transfer. A discussion of the process for issuing amendments associated with an approved transfer, when necessary, is provided below.

The procedures, similar to those used by the Commission in cases involving export licensing hearings under 10 CFR Part 110, provide for an informal type hearing for license transfers. These procedures provide opportunities for meaningful public participation while minimizing areas where a formal adjudicatory process could introduce delays without any commensurate benefitto the substance of the Commission's decisionmaking.

The Commission will either elect to develop an evidentiary record and render a final decision itself, or will appoint a Presiding Officer who will be responsible for collecting evidence and developing a record for submission to the Commission. For such proceedings, the Commission may appoint a Presiding Officer from the Atomic Safety and Licensing Board Panel (ASLBP), although the proposed regulations do not restrict the sources from which the Commission may select.

It should be noted that the regulations do not require the NRC staff to participate in the proceedings as a formal party unless the Commission directs the use of Subpart G procedures or otherwise directs the staff to participate as a party. The Commission expects, nevertheless, that, in most cases, the NRC staff will participate to the extent that it will offer into evidence staff's Safety Evaluation Report that supports its conclusions on whether to initially grant or deny the requested license transfer and provide one or more appropriate sponsoring witnesses. Greater NRC staff involvement may be directed by the Commission on its own initiative or at the staff's choosing, as circumstances warrant.

One aspect of the rule designed to improve efficiency is the decision to require oral hearings on all transfers where a hearing is to be held under Subpart M, with very limited exceptions. It has been the Commission's experience in Subpart L proceedings that intervenors are particularly interested in having the opportunity to make oral presentations or arguments for inclusion in the record. Even though such requests are rarely granted, [FN1] intervenors can and do introduce the issue of whether to have oral presentations in individual proceedings. Rather than have the issue of oral presentations become a point of contention in individual proceedings (which could introduce unnecessary delays in completing the record) the rule resolves this concern by ensuring that all parties have the opportunity to present oral testimony. The question of whether cross examination of witnesses should be allowed has also led to arguments in Subpart L proceedings. [FN2] The Commission has addressed this area of potential dispute by providing in Subpart M for questioning of witnesses only by the Presiding Officer. Although only the Presiding Officer may question witnesses, the rule specifically provides parties the opportunity to present recommended questions to the Presiding Officer.

FN1 Curators of the University of Missouri, CLI-95-1, 41 NRC 71 120 (1995).

FN2 Id.

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Another aspect of the rule intended to improve the efficiency of the adjudicatory process is that, while it does not provide for any separate discovery, it does require that a Hearing Docket containing all relevant documents and correspondence be established and be made available at the Commission's Public Document Room. This approach is in keeping with establishment of a case file as described in the Commission's recent Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12 (63 FR 41872; August 5, 1998).

Finally, to improve the efficiency of the adjudicatory process the rule imposes schedular milestones for the filing of testimony and responses and for the commencement of oral hearings. Subject to the Presiding Officer's scheduling adjustments in particular proceedings, the procedures require initial testimony, statements of position on the issues, and responsive testimony to be filed within 50 days of the Commission's decision to grant a request for a hearing. The hearing will commence in just over two months from the Commission's decision to hold a hearing. Assuming that the NRC staff is able to complete its technical review and take initial action on the transfer application within three to four months of its notice of receipt of the application, these procedures are expected to result in the issuance of a final Commission decision on the license transfer within about six to eight months of the notice of receipt of the application in routine cases. Complex cases requiring more extensive review or the use of different hearing procedures may take more time.

Administrative License Amendments Associated With License Transfers

As discussed above, not all license transfers require license amendments. Only when the license specifically has references to entities or persons that no longer are accurate following the approved transfer will a situation exist that requires amendments to the license. Such amendments are essentially administrative in nature. That is, in determining whether to approve such amendments, the only issue is whether the license amendment accurately reflects the approved transfer. Substantive issues regarding requests for a hearing on the appropriateness of the ***66728** transfer itself may only be considered using the procedures in this rule. The Commission has previously noted that issuance of such an administrative amendment, following the review and approval of the transfer itself, "presents no safety questions and clearly involves no significant hazards considerations." Long Island Lighting Company, supra, 35 NRC at 77, n.6.

Safety Evaluation Reports (SERs) prepared in connection with previous license transfers confirm that such transfers do not, as a general matter, have significant impacts on the public health and safety. Accordingly, the new regulations provide that conforming amendments to the license may be issued by the NRC staff at any time after the staff has reviewed and approved the proposed transfer, notwithstanding the pendency of any hearing under the proposed Subpart M. As is done currently, NRC staff approval of a transfer application will take the form of an order. Such order will also identify any license amendment issued.

The Commission, through this rulemaking, is making a generic finding that, for purposes of 10 CFR 50.58(b)(5), 50.91 and 50.92, and 72.46 and 72.50, administrative amendments which do no more than reflect an approved transfer and do not directly affect actual operating methods and actual operation of the facility do not involve a "significant hazards consideration" or a "genuine issue consideration," respectively, and do not require that a hearing opportunity be provided prior to issuance. It must be emphasized that any post-effectiveness hearing on such administrative amendments will be limited to the question of whether the amendment accurately reflects the approved transfer. The Commission does note, however, that it retains the authority, as a matter of discretion, to direct completion of hearings prior to issuance of the transfer approval and any required amendments in individual cases and to direct the use

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of other hearing procedures, if the Commission believes it is in the interest of public health and safety to do so.

Environmental Issues

The NRC staff has completed many Environmental Assessments related to license transfers. These assessments have uniformly demonstrated that there are no significant environmental effects from license transfers. Indeed, as the Commission has noted previously, amendments effectuating an approved transfer present no safety questions and involve no significant hazards considerations. [FN3] Accordingly, the Commission has determined that a new categorical exclusion should be added to 10 CFR Part 51 which will obviate the need for the NRC staff to continue to conduct individual Environmental Assessments in each transfer case.

FN3 Long Island Lighting Company, supra, 35 NRC at 77, n. 6.

Limitation to License Transfers

The Commission wishes to emphasize that the proposed rules address only license transfers and associated administrative amendments to reflect transfers. Requests for license amendments that involve changes in actual operations or requirements directly involving health and safety-related activities will continue to be subject to the amendment processes currently in use in Parts 50 and 72, including the requirement for individualized findings under 10 CFR 50.58, 50.91 and 50.92 that address the necessity for pre- effectiveness hearings.

Basis for Immediate Effectiveness

The Commission has determined that this rule should become immediately effective upon publication. The Administrative Procedure Act relieves the agency of the requirement that publication of a substantive rule be made not less than thirty days before its effective date in the case of "a substantive rule which...relieves a restriction" or "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(1) and 553(d)(3). The purpose of the thirty-day waiting period "is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect." Omnipoint Corp. v. F.C.C., 78 F. 3d 620 (D.C. Cir. 1996). The rule deals primarily with procedures that will be used in future hearings on applications for license transfers. The rule adds no burden to the conduct of activities regulated by the NRC. Thus there is no need for NRC licensees or anyone else "to adjust their behavior" to achieve compliance with the rule. Moreover, comments by persons most likely to be affected by the rule (potential applicants) appear to favor the rule and its prompt implementation. The Commission therefore finds there is good cause to make this rule immediately effective. Alternatively, the Commission notes that the rule in effect "relieves a restriction" in that the hearing process established by Subpart M should be less burdensome for parties to license transfer proceedings than the procedures which the Commission has previously by practice applied. Thus the Commission's decision to dispense with the thirty day waiting period is also supported by 5 U.S.C. 553(d)(1) .

Finding of No Significant Environmental Impact and Categorical Exclusion

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The Commission has determined under the National Environmental Policy Act (NEPA) of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule falls within the categorical exclusion appearing at 10 CFR 51.22 (c)(1) for which neither an Environmental Assessment nor an Environmental Impact Statement is required.

Further, under its procedures for implementing NEPA, the Commission may exclude from preparation of an environmental impact statement, or an environmental assessment, a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in NRC proceedings. In this rulemaking, the Commission finds that the approval of a direct or indirect license transfer, as well as any required administrative license amendments to reflect the approved transfer, comprises a category of actions which do not individually or cumulatively have a significant effect on the human environment. Actions in this category are similar in that, under the AEA and Commission regulations, transfers of licenses (and associated administrative amendments to licenses) will not in and of themselves permit the licensee to operate the facility in any manner different from that which has previously been permitted under the existing license. Thus, the transfer will usually not raise issues of environmental impact that differ from those considered in initial licensing of a facility. In addition, the denial of a transfer would also have in and of itself no impact on the environment, since the licensee would still be authorized to operate the facility in accordance with the existing license.

Environment assessments that have been conducted regarding numerous license transfers under existing regulations have not demonstrated the existence of a major federal action significantly affecting the environment. Further, the final rule does not apply to any request for an amendment that would directly affect the actual operation of a facility. Amendments that directly affect the actual operation of a facility would be subject to consideration pursuant to the existing license amendment processes, including the requirements in 10 CFR Part 2, ***66729** Subpart G or L as appropriate and applicable environmental review requirements of 10 CFR Part 51.

Paperwork Reduction Act Statement

The final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et. seq.). Existing requirements for 10 CFR Part 51 were approved by the Office of Management and Budget, approval number 3150-0021.

Public Protection Notification

If an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

To determine whether the amendments to 10 CFR Part 2 contained in this final rule were appropriate, the Commission considered the following options:

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1. The No-Action Alternative

This alternative was not deemed acceptable for the following reasons. First, this option would leave reactor transfers subject to past practice which generally involved hearings using multi-member, multi-disciplined licensing boards, even though such transfers do not involve the type of complex technical questions for which multi-member boards of diverse background may provide a useful technical pool of experience.

Second, the formal adjudicatory hearing process would needlessly add formality and resource burdens to the development of a record for reaching a decision on applications for transfer approval without any commensurate benefit to the public health and safety or the common defense and security.

Third, the current process for materials licensees under 10 CFR Part 2, Subpart L, while not utilizing the multi-member licensing boards, does not necessarily result in uniform treatment of all license transfer requests, and provides at least the potential for more formal hearings. Even if the requests for more formal procedures are not granted in typical materials cases, the process of receiving motions for more formal procedures, allowing responses from all parties to those requests, and the need for parties' responses to those requests, and the need for the Presiding Officer to consider and rule on such requests introduces issues and litigation on matters not involving the merits of the particular application and thus introduces the potential for delays in materials license transfer proceedings, without clear benefit to the public health and safety or the common defense and security.

2. Use 10 CFR Part 2, Subpart G for All License Transfers

While assuring uniformity for all license transfer requests, this option would not result in an expeditious process that would avoid the use of multi-member licensing boards, which is unnecessary given the nature of typical transfer applications. It would also result in added formality and resources being devoted to materials license transfers on the part of all parties to the hearing, without any resulting benefit to public health and safety.

3. Use of 10 CFR Part 2, Subpart L for All License Transfers

This option was considered as viable to achieve uniformity and to avoid the need for multi-member licensing boards for conducting requested hearings. Subpart L provides for paper hearings unless oral presentations are ordered by the Presiding Officer. Further, Subpart L allows the Presiding Officer the option of recommending to the Commission that more formal procedures be used. Even though such requests are rarely granted, as a practical matter there are delays in the proceeding while parties petition the Presiding Officer and/or the Commission to have oral hearings and to use additional procedures, such as cross-examination and formal discovery. Such discretion in structuring individual hearings is appropriate where the breadth of potential actions and licensees (covering essentially all amendments for a wide variety of materials licensees) is governed by a single hearing process. This flexibility, however, inevitably leads to delays as each party to the hearings proposes and presents arguments to the Presiding Officer concerning how the hearing should be structured.

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4. Use of a New Subpart M for all License Transfers

In the case of license transfer applications the Commission is concerned with only one type of approval, so the Commission has the ability to resolve through rulemaking many of these procedural points concerning the conduct of the hearing. The resolution of these issues will allow the parties in license transfer proceedings to move expeditiously to examination of the substantive issues in the proceeding. The Subpart M process, similar to a legislative-type hearing, will also result in the record promptly reaching the Commission, where a final agency determination can be made. The rule dictates that oral hearings be held on each application for which a hearing request is granted unless the parties unanimously agree to forgo the oral hearing. This will remove the potential for a delay while parties petition the Presiding Officer for an oral hearing. Further, the rule provides that the Presiding Officer will conduct all questioning of witnesses, and there are no provisions for formal discovery, although docket files with relevant materials will be publicly available. The rule resolves several areas of frequent dispute in subpart L proceedings and was seen, therefore, as being more appropriate for license transfer proceedings where a timely decision is important to the public interest. These efficiencies can be achieved without any negative effect on substantive decisonmaking or the rights of all parties to present relevant witnesses, written testimony, and oral arguments, which should result in a high quality record on substantive issues for use by the Commission in reaching a decision on contested issues.

5. Conclusion.

Based on the foregoing considerations, the Commission has decided to adopt Subpart M and the attendant conforming amendments to provide the procedures for actions on license transfer applications. This constitutes the NRC's regulatory analysis.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule does not change any requirements for submittal of license transfer requests to NRC, rather, the procedures designate how NRC will handle requests for hearings on applications for license transfers. Most requested hearings on license transfer applications involve reactor licensees which are large organizations which do not fall within the definition of a small business found in section 3 of the Small Business Action, 15 U.S.C. 632, or within the Small Business Standards set forth in 13 CFR Part 121 or in the size standards adopted by the NRC (10 CFR 2.810). Based on the historically low number of requests for hearings involving materials licensees, it is not expected that this rule will have any significant economic impact on a substantial number of small businesses.*66730

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109 and 72.62, does not apply to this proposed rule and a backfit analysis is not required, because these amendments do not involve any provisions that would impose backfits as defined in either 10 CFR 50.109 or 72.62. The rule does not constitute a backfit under either of these sections because it does not propose a change to or additions to requirements for existing

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structures, systems, components, procedures, organizations or designs associated with the construction or operation of a facility under Part 50 or 72.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Parts 2 and 51:

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10143(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Section 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION and THE COUNTY OF SAN LUIS OBISPO, Petitioners, v. U.S. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	)	No. 02-72735

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Federal Respondents have been served by first class mail this 27th day of January, 2003, upon the following:

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