RESPONSES TO COMMENTS NOT ADDRESSED IN THE STATEMENT OF CONSIDERATIONS FOR CHANGES TO THE ADJUDICATORY PROCESS: FINAL RULE

December 17, 2003

On April 16, 2001, the Commission published a Proposed Rule for "Changes to the Adjudicatory Process." 66 FR 19610. The comment period, following an extension, closed on September 14, 2001. 66 FR 27045, May 16, 2001. The Commission received more than 1,400 comments in response to the proposed rule.

The Statement of Considerations (SOC) for the Final Rule on Changes to the Adjudicatory Process addresses all significant comments received in response to the Commission questions posited in the SOC for the Proposed Rule, as well as any comments which resulted in changes to the rule as proposed. All additional comments are addressed here in this attachment. Because many comments were similar in nature, the comments have been consolidated where appropriate.

Comment:

In proposed § 2.101(g)(2), revised pages of an application should be required to be clearly labeled as such with each page listing the revision number.
(1158f2)

Commission Response:

The Commission does not agree that such detail is necessary in the final rule. The commenter has failed to provide any evidence that this long-standing language has resulted in any difficulties, and thus, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.102 needs to be revised to reflect the Commission's abdication of any meaningful anti-trust review. This section gives the false impression that NRC engages in meaningful anti-trust review. (1158g)

Commission Response:

The Atomic Energy Act requires the NRC to conduct a prelicensing antitrust review of applicants for certain nuclear power facilities. The Commission's regulations, including 2.102, appropriately implement that statutory requirement. Accordingly, the Commission declines to adopt this suggestion.

Comment:

Section 2.107 should make clear that recovery of fees and costs are available to the non-moving party when the interests of justice so require. The second sentence implies that there could be a Presiding Officer who shall dismiss an application before there ever was a notice of hearing, how can this be? (1158h)

Commission Response:

In the American judicial system, the general rule is that each party bears their own costs. There is no statutory provision in the AEA or in the 1974 Energy Reorganization Act providing the NRC with the authority to direct that a party pay the fees and costs of another party. With respect to the commenter's inquiry on the second sentence of this section, the Commission notes that dismissal may occur in an instance where an application has been received by the NRC and is being processed to determine whether it is acceptable for docketing (*see*, *e.g.*, § 2.101(a)(3)), but the notice of hearing has not yet been published. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.108 should allow for dismissal of an application if it fails to meet requirements for information and documentation in 60 days. (1158i)

Commission Response:

The Commission continues to believe that the NRC staff should have some discretion whether to dismiss an incomplete application or hold it in abeyance while an applicant takes additional action to make it acceptable for docketing. The comment provides no basis for automatic rejection of an application under the circumstances noted. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Subpart C should be modified to include proposed findings and conclusions filed by parties following the hearing. This should be generally applicable to all subparts, but individual subparts should include separate provisions on timing. (1213v)

Commission Response:

The Commission does not believe that Subpart C should require the filing of proposed findings of fact and conclusions of law in every hearing track under Part 2. Some of the hearing tracks, such as Subpart N, were specifically developed to provide a quick, relatively simple hearing procedure that would result in relatively quick decisions (ideally, a decision made from the bench immediately at the conclusion of the hearing). To require the filing of findings of fact and conclusions of law for all hearings, would be inconsistent with the Commission's view that hearing procedures should be tailored to the type of proceeding and the nature of the issues to be resolved. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.301 does not properly track the requirements of Chapter 5 of the APA. (1158j2).

Commission Response:

The Commission does not understand the basis for the commenter's assertion that § 2.301 improperly tracks Chapter 5 of the Administrative Procedure Act (APA). On the

contrary, § 2.301 is consistent with the APA provisions embodied at 5 U.S.C. 554(a)(4) of the APA.

Comment:

Section 2.302 should be revised to accommodate the least electronically equipped person. (1158k1)

Commission Response:

The Commission agrees that, given the fact that electronic services such as e-mail and facsimile may not yet be widely used at home by many members of the public, the Commission's requirements should accommodate persons who do not have ready access to these electronic services. However, no change to the proposed rule is necessary, inasmuch as the proposed rule already provides a variety of filing options other than filing by electronic means - including filing by hand delivery, private delivery services (*e.g.*, Federal Express), or ordinary U.S. mail.

Comment:

Section 2.302 should state that filing be identical with certification of service. (1158k2)

Commission Response:

The thrust and intent of this comment are unclear. If the commenter is proposing that no separate, proof of service under § 2.302(b) is necessary when mailing documents, the Commission disagrees. On the other hand, if the commenter is proposing that filing be considered complete upon deposit in the mail, the Commission agrees and § 2.302(c) so provides.

Comment:

Section 2.303 should require a docket file to be maintained at each NRC regional office, and for high level waste (HLW), the regulation should require a docket file to be maintained at local public libraries convenient to every rail and highway route, as well as local public libraries across the state of storage. (1158l)

Commission Response:

The Commission believes that the commenter's proposal is unnecessary, due to the accessibility of these documents electronically, and the availability of the documents from the NRC's PDR or by mail if the person is on the service list. Indeed, electronic availability of the documents by a person who has ready access at home to the Internet provides greater practical accessability and convenience than if the documents were maintained at a local PDR. The Commission sees no significant benefit to such a proposal that would offset the expenses associated with maintaining and updating such a large number of paper copies at numerous locations throughout the U.S. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.304 should state the paper size required and define "bound" and "good unglossed paper." (1158m)

Commission Response:

This level of detail is unnecessary as the regulation deals with concepts of legibility, reproducibility, and standard method of binding with which most individuals are cognizant. Parties who are unsure of the requirements can clarify the details with the presiding officer. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.304(c) should track the Federal Rules of Civil Procedure (FRCP) and state "capacity or authority." (1158n)

Commission Response:

Section 2.302(c) provides greater detail than the Federal Rules of Civil Procedure on the matter of attesting a filer's capacity and/or authority. No reason was presented by the commenter for not providing such detail, and therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

Why does § 2.304(d) require 3 documents instead of one paper or electronic version? (1158o)

Commission Response:

This section maintains the longstanding requirement for paper copies in order to provide for timely handling, docketing and internal distribution of documents submitted to the NRC. Electronic filing without additional paper copies is not currently acceptable due to the lack of a written signature. The NRC is currently addressing the issue of electronic filing in a separate rulemaking effort.

Comment:

Section 2.304(f) should either require parties to use all paper or provide electronic access and computers to all parties. (1158p)

Commission Response:

The commenter provides no basis for why a party must always use paper filings or electronic filings rather than selecting the form most convenient to the party under the circumstances at the time of each filing. The Commission has not identified any compelling policy reason for prohibiting parties who have the capability to file documents electronically with the Commission and other parties who have the capability to receive documents electronically from doing so, simply because other parties are unable to transmit and/or receive documents electronically. Paper copies will be required to be served on parties who are unable to receive documents electronically, and parties who are unable to transmit documents electronically will be able to file and serve documents via mail or other delivery services. Furthermore, the

Commission is prohibited by statute from providing financial assistance to intervenors, which precludes providing financial compensation to intervenors for Internet service provider (ISP) access and computers. For these reasons, the Commission declines to adopt the commenter's proposal.

Comment:

Section 2.304(g) should provide for notice of and reasonable time to cure any defect. This section should state that "any document that substantially fails to conform" so that form is not elevated over substance when remedy is as dire as striking a pleading. (1158q)

Commission Response:

The commenter appears to suggest that Commission refusal of acceptance for filing is necessarily the same as "striking a pleading." This is not so; § 2.304(g) specifically deals with the interaction between the filer and the Commission for purposes of accepting a document for *docketing*. By contrast, the consideration (and potential striking) of a document which fails to comply with § 2.304 is a power of the presiding officer under, *inter alia*, § 2.319. There may be circumstances where improper filing for failure to comply with one of the provisions of § 2.304 (*e.g.*, the double-spacing requirement in § 2.304(b)) necessitates the return of a document for re-filing, but the presiding officer nonetheless decides to proceed with consideration of the improperly-filed document upon a finding that service to all parties was appropriately made. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.306 should be amplified such that where simultaneous electronic filings are required, all parties must serve the filing by 5pm eastern time. Violations should result in sanctions. (1073r)

Commission Response:

The Commission believes that this proposal is based upon the commenter's view that parties in time zones west of the east coast (the time zone in which the NRC headquarters is located) should not have additional time for filing, as compared to parties located on the east coast. While it is perhaps a laudable goal that all parties would have precisely the same time to make filings, the Commission notes that as a practical matter, it is not the absolute time for filing which is relevant, but the number of working hours available for each party in each time zone to prepare a document. Furthermore, in most proceedings, the parties (other than the NRC staff) are located in the same time zone and, therefore, have the same number of working hours to prepare a document to be filed. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.306 should provide for deadline of 12 noon for simultaneous filing to eliminate gamesmanship by e-mail or faxes at 4:45 pm which force the opponent to lose a day. (1158r)

Commission Response:

The time limits established by the Commission were based upon the assumption that documents are filed at the end of the working day. Therefore, the concept of "gamesmanship" in waiting until the end of the day to file a document is not relevant. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The Commission should control the scope of the proceeding, thus, § 2.308 should be implemented such that there is never a referral to the administrative judge without an opportunity for the Commission to provide guidance. (1213m2)

Commission Response:

The comment appears to be based upon the assumptions that: (1) referral by the Secretary directly to Chief Administrative Judge necessarily results in a lack of Commission guidance with respect to the scope of the proceeding; and (2) specific Commission guidance on each proceeding's scope is always necessary. These assumptions are untrue. The Commission has provided general guidance to licensing boards and presiding officers on the conduct of proceedings in the form of a policy statement. *See Policy on the Conduct of Adjudicatory Proceedings* (63 FR 41872; August 5, 1998). In addition, fairly detailed guidance on a proceeding's scope and scheduling is provided in the requirements on requests for hearing/petitions to intervene in § 2.309, and the requirements in §§ 2.333, 2.334, and 2.335, with which the licensing board and presiding officer are bound to comply. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The rule should allow at least 45 days before filing of request for hearing, and 30 - 45 days for the submittal of contentions, with allowance for additional contentions based upon new information contained in the hearing file submitted by licensee or by NRC staff, with no special justification needed for such supplementation. (1216e, 1218).

Commission Response:

The Commission does not agree with this proposal. The Commission has long employed a five-part balancing test (§ 2.714(a) in existing regulations) for determining whether late-filed contentions may be admitted. The commenter did not provide any rationale explaining why the current criteria for late-filed contentions are inappropriate, or any facts showing that application of the criteria leads to unacceptable results. Accordingly, the Commission is retaining the current five-part criteria for late-filed contentions (and filings) in § 2.309(c).

Comment:

A 45-day period for filing of requests for hearing/petitions to intervene is adequate, because in virtually all cases where the

application is long and complex, there have been many months of interaction between the applicant and the NRC. However, to accommodate those cases where the application material has not been disclosed or other circumstances, the rule should provide for filing with the Commission of requests to extend the time of filing for good cause. Such requests for an extension of time to file should be submitted no later than 20 days before the time when petitions would otherwise be due. (1213i)

Commission Response:

The Commission recognizes that there may be circumstances where a person interested in submitting a request for hearing/petition to intervene may have good cause for not meeting the final rule's 60-day deadline following notice. However, § 2.309(c) addresses non-timely filings, including late-filed requests for hearing/petitions to intervene. The Commission does not see any advantage in creating a new procedure and criteria for addressing in advance of the otherwise applicable filing deadline requests for delayed filing of requests for hearing/petitions to intervene, separate from the procedures and criteria in § 2.309(c). Providing such an opportunity, without also cutting-off further requests for consideration of late-filed requests under § 2.309(c) - a course which the commenter did not propose and the Commission would be averse to adopt - would merely increase the opportunity for interposing delay in the hearing. In any event, the Commission believes that the additional complexity and potential delays associated with adoption of a separate provision on advance requests for delayed filing of requests for hearing/petitions to intervene outweigh any perceived advantages, in light of the current provisions in § 2.309(c) on non-timely filings. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The rule should allow an intervenor to outline a concern it may have and to state a specific schedule that it will follow to investigate the concern and determine if it is worth pursuing as a contention. (1217b)

Section 2.309(f) should contain a provision for allowing the filing of contentions based upon documents which will be provided later, such as the Environmental Impact Statement (EIS) and the Safety Evaluation Report (SER). (1158y)

Commission Response:

The first commenter's proposal assumes that the hearing process exists for the purpose of allowing a member of the public to act as an independent regulator. Under the commenter's suggested approach, a member of the public may invoke the hearing process in order to initiate an "investigation" on an application, and then use the hearing to force the Commission to address the intervenor's concerns stemming from the "investigation." The Commission does not agree, and has long-held the view that the hearing process should be for the purpose of resolving substantial and material issues known to an interested person. The commenter's approach would essentially allow an intervenor to act in parallel to the NRC staff's safety and environmental review. The Commission declines to adopt such an approach.

For similar reasons, the Commission declines to adopt the second commenter's suggestion. Intervenors are under a duty to develop their contentions independent of any information that may be found in any forthcoming SER or EIS. If any information from an SER leads a person to identify additional concerns, those late-filed contentions may be admitted under the provisions of § 2.309(c). In the case of issues arising under NEPA, section 2.309(f)(2) provides for new or amended contentions if justified by data or conclusions in NRC environmental documents. In light of the availability of § 2.309(c) and (f) for the NRC to consider new contentions developed as a result of issuance of documents such as the SER or EIS, the Commission declines to adopt the second commenter's suggestion.

Comment:

In a HLW proceeding, § 2.309 vests discretion in the judge to shut out would-be intervenors who cannot meet the costs of technical experts to get onto the electronic docket or did not participate earlier because the organization was not in existence during the 30 day period when the docket opened. The rule needs to specify a procedure for ruling on this issue to assure fairness and provide notice of what procedure will be used. (1158s)

Commission Response:

It is unclear what is being referred to by the commenter's reference to a "30-day period when the docket is opened." It is also unclear on what basis the commenter believes that intervention must be denied to a requestor/petitioner who "cannot meet the costs of technical experts," but otherwise timely meets the standing and contention requirements in § 2.309. Section 2.309(a) only provides that the Commission, presiding officer or ASLB shall "consider" the failure of a petitioner to participate in the pre-license application phase under Subpart J. It does not make such failure determinative.

Comment:

Why is standing under § 2.309(d)(1)(ii) limited to standing under the Atomic Energy Act? What about other acts - such as the National Environmental Policy Act, etc.? (1158v)

Commission Response:

As set forth in § 2.300, the hearing procedures in Subpart C apply to adjudications which are conducted under the authority of the Atomic Energy Act of 1954, as amended (AEA) and the Energy Reorganization Act of 1974, as amended (ERA). A hearing for a nuclear power facility whose subject is the adequacy of the EIS is considered to be a hearing required under the AEA by virtue of *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F. 2d 1109 (D.C. Cir. 1972), *cert. denied*, 404 U.S. 942 (1972). For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

What is meant by "among other things" in 2.309(d)(3)? This section should be less subjective, inasmuch as unconstitutional criteria such as race or clothing could be used. (1158w)

Commission Response:

The Commission intends the term "among other things" to mean that it will consider the totality of information made known to it - not just information submitted in the request for hearing/petition to intervene - in determining whether standing exists. The statement of considerations for the final rule will include this explanation in the section-by-section analysis.

Comment:

Regarding § 2.309(d)(1), having a telephone should no more be a requirement to participate in the hearing process than having a computer. (1158u4)

Commission Response:

While most parties to NRC adjudicatory proceedings have telephone service, the proposed rule does not require telephone service as a prerequisite to participation in the adjudicatory process. While telephone service greatly enhances communication between the parties, the rule simply stated that name, address, and telephone number be included in any request for hearing or petition to intervene. It does not require dismissal of any party who lacks access to a telephone. Consequently, the Commission has made no changes to this provision.

Comment:

The NRC should provide information on its web site on what standing is and the text of cases NRC relies upon to in determining standing. (1216c/1218)

Commission Response

The Commission does not believe it would be useful or appropriate for the NRC to provide information on standing and the text of cases that the NRC relies upon in determining standing. NRC decisions on standing are available for review in the NRC's public document room, are reported in the NRC Issuances, and are available through commercial legal databases. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.309(e)(1)(ii) does not provide any different criteria than those of standing as of right. (1158x1)

Commission Response:

The commenter is correct. Paragraph (e)(1)(ii) was not intended to establish an entirely new criterion to be evaluated in making a discretionary standing determination; rather it is one of several identified factors that the regulation requires should be treated as a factor favoring discretionary intervention.

Comment:

The reference in the Statement of Considerations to the proposed rule regarding "persons who do not have a direct interest and cannot demonstrate standing nevertheless are able to make a substantial contribution to the record," is unclear. (1161f)

Commission Response:

This factor, which has long been used by the NRC in weighing requests for discretionary intervention under the *Pebble Springs* decision (*Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976)) is intended to take into account the possibility that there may be individuals or organizations with legal, technical or policy expertise that could contribute significantly to the development of a record on a contention, but who may not be able to meet the standing requirements because the individual or organization is not directly and adversely affected by the proposed action.

Comment:

The Commission should advise parties admitted discretionary intervention that the proceeding is merely advisory and not subject to judicial review, since Article III courts cannot hear a case where a party lacks standing. (1217h)

Commission Response:

Discretionary intervenors in NRC proceedings would not have an automatic right to seek judicial review. Federal courts require an independent showing of standing; participation in agency proceedings does not necessarily provide standing in a judicial proceeding. *See, e.g.,* Competitive Enterprise Institute v. DOT, 856 F.2d 1563, 1565 (D.C. Cir. 1988); *see also* Reytblatt v. NRC, 105 F.3d 715, 720-22 (D.C. Cir. 1997). However, the Commission sees no need to include a discussion of the complexities involved in this area of federal law in this rulemaking. Thus, the Commission declines to accept commenter's suggestion.

Comment:

There should be a provision for filing contentions based upon documents which will be provided later, for example, where a scientist has made preliminary findings and is in the process of experimentally verifying those findings. (1158z)

Commission Response:

The Commission's provisions for consideration of late-filed contentions based upon information not available at the time for filing of contentions are in § 2.309(f)(2). Using the example of the commenter, if the final findings of the scientist show that there is a significant issue, and the information is materially different from information previously available, a timely-filed motion for amendment of an existing contention or submission of a new contention may be filed. The Commission notes that the proposed rule's language in paragraph (f)(2)(i) through (iii) has been modified in the final rule to reflect that it applies to consideration of late-filed new contentions, as well as amended contentions.

The Commission emphasizes that the possibility that there may be significant new information in the future that may either bear on an existing contention or support the admission of a new contention, does *not* provide a basis for delaying the resolution of already-admitted contentions of otherwise suspending or delaying the progress of a proceeding. If new information becomes available after a proceeding has been closed, a person may submit the information together with a request for action under the provisions of 10 CFR § 2.206.

Comment:

The use of "materiality" in § 2.309(f)(1)(iv) is confusing here, and there is no plain statement of requisite findings. A clearer statement of the requirement would be to state that, "the issue must be arguably relevant to one that the NRC must decide in order to grant or deny the application at issue. (1158x2)

Commission Response:

The Commission finds no basis for changing the rule as proposed. The concept of information being "material" is well understood in the legal community. In this context "material" means that the issues raised must have real importance or consequence to the findings the NRC must make to support the action that is involved in the proceeding. Because the commenter has provided no basis for how the term is confusing in this context, the Commission declines to adopt the commenter's proposal.

Comment:

The "material difference" standard in § 2.309(f)(2) of the proposed rule is a much higher standard than "changed facts and circumstances" standard in the existing rule. (1158aa)

Commission Response:

The Commission intended to adopt the higher standard embodied in the "material difference" standard of § 2.309(f)(2). Logically, the only changes in facts or circumstances that are worthy of consideration are those that are material and may have led to a different result had the changed facts and circumstances been known earlier. The final rule is unchanged in this regard.

Comment:

Changes to the rules requiring filing of contentions with basis and specificity will lead to early definition of issues. (1159h)

Commission Response:

The Commission agrees with the commenter's observation.

Comment:

Section 2.309(f)(1)(iv) of the proposed rule should state that, in addition to being material, the contention, if proven, would entitle the petitioner to relief. (1159y)

Commission Response:

The Commission disagrees that the proposed language is necessary. Section 2.309(f)(1)(iv) provides that the request for hearing/petition to intervene must show that the issue in the contention is "material to the *findings the NRC must make* to support the action that is involved in the proceeding" (emphasis added). If an issue cannot affect the findings that the NRC must make (*e.g*., it is beyond the authority of the NRC to consider or address), then the §2.309(f)(1)(iv) criterion is not met and the contention may not be admitted. Inasmuch as the regulatory language already accomplishes the commenter's goal, the Commission declines to adopt the commenter's proposal.

Comment:

A new § 2.309(f)(3) should also include a provision indicating that: (1) a petitioner will be dismissed if all of its originally-sponsored contentions are dismissed, even if the petitioner has adopted contentions sponsored by other parties and the contentions have yet to be resolved; and (2) if a petitioner is dismissed from a proceeding, all contentions sponsored by that petitioner will be dismissed even if the contentions have been adopted by other parties. (1159z2)

Commission Response:

The commenter argues that this provision is necessary in order to assure the orderly conduct of a proceeding, and to avoid petitioners from adopting other parties' contentions as insurance against dismissal from a proceeding where all of the petitioner's-sponsored contentions have been dismissed. However, since there will always be a lead party for each contention (see final rule, § 2.309(f)(3)) the Commission does not see why dismissal of a party should occur even if all of its originally-filed contentions have been dismissed. Furthermore, "adoption" of a contention must logically entail the concept that the party is to be deemed to be a cosponsor of the contention, with all of the rights associated with being a party with respect to that contention, otherwise "adoption" would be a largely-meaningless concept. Finally, the commenter provided no logical or legal basis for dismissal of all contentions originally-sponsored by a party, even if adopted by other parties, if the originally-sponsoring party is dismissed. Since dismissal of the petitioner in the posited situation must have occurred for reasons other than a decision on the merits of the party's-sponsored contentions, there does not appear to be a logical reason for dismissal of the party's originally-sponsored contentions *to the extent that they have been adopted by other parties*. Presumably, other parties are able and willing to prosecute those contentions; if not, they could file a motion for dismissal of the contentions. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

The Commission should allow Licensing Boards to reasonably extend a due date for filing of answers to petitions to intervene if good cause exists, thus allowing for flexibility. Section 2.309(h) contains no such flexibility and violates the mandate of the Administrative Procedure Act (APA) that all scheduling matters take into account the conveniences and necessities of the parties and their representatives. (1217d)

Commission Response:

The Commission disagrees with the commenter that § 2.309(h) does not afford the Commission or the presiding officer the authority to extend the due date for filing of answers to requests for hearing/petitions for review upon a showing of good cause. The 25-day deadline, as with all deadlines established in Part 2, must be read and applied in conjunction with the other regulations governing the authority of the Commission and presiding officer. The Commission itself has plenary authority to grant, for good cause shown, extensions of deadlines established in Part 2. Such authority is also granted to presiding officers by § 2.319(g) and (h).

Comment:

In long running and complex cases, there should be a 3 judge panel appointed. (1216g/1218)

Commission Response:

The Commission believes that this is a matter which is best left to the discretion of the Commission and/or Chief Administrative Judge to determine on a case-by-case basis. There may be instances where there is a long-running, complex case that involves a single or a few discrete issues/contentions. In such cases, appointing a single presiding officer may be more appropriate and efficient. Accordingly, the Commission declines to adopt the commenter's implicit suggestion that the rules be modified to specifically provide for the appointment of 3-judge panels in long running and complex cases.

Comment:

Section 2.310(f) regarding transfers of licenses should require use of Subpart M and not leave it discretionary. (1159dd)

Commission Response:

The Commission agrees. The proposed rule requires the use of Subpart M procedures for all license transfer proceedings, unless the Commission determines otherwise in a case-specific order, and the final rule maintains this requirement.

Comment:

Section 2.311 should include an automatic stay provision that suspends proceedings while intervention/hearing issues are decided. (1158cc)

Commission Response:

The commenter argues that a proceeding may have to begin "all over again" if a decision to deny intervention is reversed by the Commission on appeal. The Commission does not understand the rationale of the commenter: if the requestor/petitioner is the *only* potential party, then the only action in the proceeding is the appeal on intervention - there is no further hearing activity (e.g., discovery). The same lack of hearing activity occurs if multiple requests/petitions are all denied and there is at least one appeal. On the other hand, if there are multiple requests/petitions and at least one is granted, the hearing proceeds with respect to that request/petition, but if there is a successful appeal of one or more of the other denials, then the hearing process commences where it left off for those requests/petitions - except to the extent that there is a consolidation of the successfully-appealed contentions with the already-admitted contentions. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

The proposed rule must include a process where a petitioner can appeal directly to the Commission if the petitioner believes that a Presiding Officer is grossly mismanaging a hearing. (1216a, 1218)

Commission Response:

The commenter made no showing of need for a dedicated procedure for requesting Commission action on case management. The Commission monitors adjudicatory procedures and should not be reluctant to step in and provide guidance if it perceives substantial case management difficulties. In addition, any party may attempt to bring case management issues first to the attention of the presiding officer and subsequently to the Commission's attention. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

In § 2.313(e) of the proposed rule, 5 days is too short of time to file a motion objecting to substitution. Instead the rule should provide for, at least, 10 days. (1158bb)

Commission Response:

The commenter provided no reason why five days is not sufficient time to file a motion opposing substitution. The basis for objecting must ordinarily focus either on the need for substitution which is made known in the order directing substitution, or because of some pre-existing matter that would form the basis for a disqualification motion. It is reasonable to either prepare a motion challenging the bases for substitution as set forth in the substitution order, or research the background of the new substitute to determine if there is a basis for disqualification based upon pre-existing information. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Section 2.313(c) should contain a legal standard for the disqualification of the Presiding Officer, viz., "A presiding officer or board member should be disqualified if such an officer or board member has a conflict of interest, an appearance of such a conflict is apparent, or if a reasonable person would conclude, based on a totality of circumstances, that the officer or board member might not be partial". (1158dd)

Commission Response:

The proposed standard for disqualification contains some, but not all, of the important elements for disqualification that have been adopted in NRC practice. *See* Nuclear Engineering Co., Inc., (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 391 (1978), Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), ALAB-777, 20 NRC 21, 34 (1984). The Commission believes that because of the wide range of circumstances in which disqualification may be raised, disqualification should be handled on a case-by-case basis, and the criteria should not be explicitly set forth in a regulation. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The provision allowing for the Commission to hand-pick a Presiding Officer invites abuse. The selection of a Presiding Officer should be random as in federal courts, and the regulations should be neutral. (1217m)

Commission Response:

The Commission has not identified any federal statute requiring random assignment in Federal courts. Rather, the procedures for case assignment are left to each district and circuit. Therefore, contrary to the commenter's suggestion, random case assignment is not required of Article III courts.

Furthermore, the commenter did not suggest that in the past the Commission has used the opportunity to assign presiding officers in a manner that undermines the concept of the presiding officer as an independent decisionmaker. In fact, the Commission, in its Orders, does not assign a presiding officer specifically by name. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

All proposed rules which allow the Commission to interfere or control the hearing process should be eliminated, since such oversight in the past made it "difficult to assemble the complete factual records, has caused delays and has increased the costs of litigation." (1217n)

Commission Response:

The commenter did not specify (except to the extent that its comments were on § 2.313) the rules which the commenter proposed be eliminated. Therefore, it is impossible to address

this comment on a specific basis. Nor did the commenter provide any examples to support its claim that the Commission's oversight of licensing boards has made it "difficult to assemble complete factual records, has caused delays and has increased the costs of litigation." Therefore, it is impossible to provide the Commission's assessment of the claims of the commenter. As a general matter, the Commission declines to adopt the suggestion that it should disclaim its plenary oversight of the hearing process.

Comment:

Proposed § 2.314(a) should include an "adherence to truth" standard. (1158ee1)

Commission Response:

It is unclear what such a phrase would add, or whether such an admonition is relevant in all aspects of a hearing. For example, the proper interpretation and application of a Commission regulation is not, in normal parlance, a search for "truth." Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

In proposed § 2.314(b), for-profit corporations should be required to be represented by attorneys. The regulation should also be amended to refer to the "entity" on whose behalf a representative appears. (1158ee2)

Commission Response:

The Commission does not believe that for-profit corporations must always be represented by attorneys. A corporation may legally be represented by an officer or other duly-authorized person, and there is no legal prohibition against representation of a for-profit corporation by an attorney. Indeed, in an alternative dispute resolution, there may be value in having the corporation represented by non-attorneys. Accordingly, the Commission declines to adopt this suggestion by the commenter.

The Commission agrees with the commenter that § 2.314(b) should be amended to refer to the "entity" on whose behalf a representative appears.

Comment:

In proposed § 2.314(c), contemptuous conduct should be the only ground for discipline. The other grounds listed in the proposed rule are overbroad, and in violation of the First and Fifth amendment. For example, there may be sound legal grounds for refusing to comply with a direction by a presiding officer, and zealous advocacy could be viewed as "disorderly" or "disruptive" by some. (1158ee3)

Commission Response:

The Commission disagrees with the commenter's suggestion that "disorderly" and "disruptive" behavior are overbroad and violative of the First and Fifth Amendment. The

commenter presented no legal citations suggesting that the use of these terms as criteria for sanction in a judicial proceeding, have been found to be in violation of either the First or Fifth Amendment.

It is also difficult to see why, if "disorderly" or "disruptive" conduct is unconstitutionally vague and should be stricken from the regulation as proposed by the commenter, that the term, "contemptuous conduct" affords any greater certainty or is any less vague. "Disorderly" and "disruptive" conduct already constitutes grounds for imposition of civil contempt in Federal courts, and it is unclear why § 2.314 becomes unconstitutionally vague by simply listing actions that are well-recognized as a basis for imposition of civil contempt. The substantial protections afforded by § 2.314 to contest the imposition of reprimand, censure or removal has proved sufficient in the past to protect the rights of attorneys and other representatives of parties.

Finally, the commenter did not refer to any NRC proceeding where the commenter believes that the provisions in § 2.314 (formerly § 2.713) were applied in an unconstitutional manner. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.314's provision which provides 72 hours before a suspension takes effect is insufficient; five days is more appropriate. (1158ee3)

Commission Response:

The commenter provided no basis for the view that 72 hours is "insufficient," such that a five-day period would be more appropriate. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The Commission should amend proposed regulation § 2.315(a) to provide for, at most, one session per proceeding during which the presiding officer or Atomic Safety and Licensing Board entertains limited appearances. Holding several sessions on one action results in repetitive presentations that add little value to either public understanding or the administrative record. (1073v)

Commission Response:

The commenter provided no support for its assertion that holding multiple opportunities for members of the public to make limited appearances adds little value to public understanding. Furthermore, in long, drawn-out proceedings, there may be value in affording several opportunities for making limited appearances distributed over the course of the proceeding. Given the variation in individual circumstances with respect to each hearing, the Commission believes that the need for and timing of multiple opportunities for making limited appearances is best left to the discretion of the presiding officer or Atomic Safety and Licensing Board, as applicable. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.315(c) should not limit participation to federally recognized tribes, but should allow non-federally recognized tribes to participate as well. (1158ff1)

Commission Response:

The Commission's practice of permitting the participation of federally recognized tribes in Commission hearings is based upon the concept that federally-recognized tribes are essentially governmental entities, having the powers and functions with respect to tribal matters and within the jurisdiction of the tribal government as recognized by the Federal government. As such, federally-recognized tribes are akin to municipal and state governments. Accordingly, the Commission recognizes the role that federally-recognized tribes have as governmental entities in representing the interests of tribal members. No such governmental powers and jurisdiction inure to non-federally recognized tribes. Therefore, the Commission does not believe that non-federally recognized tribes should be accorded the same status in Commission hearings under § 2.315(c) as federally-recognized tribes. Furthermore, in the absence of an entity constituting a federally-recognized tribe, the Commission may be faced with situations where competing groups or organizations claim to be acting as a tribe. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.315(d), the provisions dealing with amicus briefs, should follow the Federal Rules of Appellate Procedure, Rule 29(e), in the following respects: (i) briefs should be filed with the consent of all parties; (ii) the party (sic) seeking to file the brief should be permitted to do so no later than seven days after the brief of the party being supported is filed; and (iii) the motion for leave to file may be filed with the amicus brief itself. (1158ff2)

Commission Response:

The Commission agrees that a person who is not a party who wishes to file an amicus brief should file the motion seeking leave to file together with the amicus brief itself. The final version of § 2.315(d) has been clarified to make that clear. However, the Commission does not agree that all parties must agree to the Commission's consideration of amicus briefs by persons who are non-parties. The Commission's consideration of amicus briefs must ultimately depend upon the value afforded to the decision-making process by consideration of the amicus briefs, balanced against the potential delay attributable to consideration and ultimate resolution of matters raised in the amicus briefs. Nor does the Commission believe that serial filings of amicus briefs should be permitted. The primary value of an amicus brief is to provide the independent perspective and analysis of the non-party. These may be effectively presented in an amicus brief without first reviewing the briefs of a party whose position the non-party would support. The Commission is willing to tolerate potential duplicative arguments of briefs filed in parallel, in order to avoid extending the time necessary to complete the briefing process.

Comment:

Proposed § 2.316 should be deleted. It contains an unclear standard and it is unfair to force parties with major differences together. This provision also creates possible ethical issues for attorneys, by forcing them to represent parties with serious disagreements and breach confidentiality. (1158gg)

Commission Response:

10 CFR Part 2 has long-included a provision addressing consolidation of parties in nuclear reactor licensing proceedings (§ 2.715a). The Commission is not aware of any situations where consolidation has actually resulted in the problems asserted by the commenter. Furthermore, § 2.316 itself contains criteria regarding consolidation (*e.g.*, consolidation may not be ordered if it would "prejudice the rights of any party") which, if properly applied, should obviate any of the concerns identified by the commenter. In the absence of any showing of consolidation of parties with substantially-different interests, or the creation of insurmountable ethical problems with attorneys, the Commission believes that the option of consolidation should be expanded to encompass all hearings under Part 2. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.319(b) should eliminate the clause beginning "upon the requestor's showing of general relevance . . . " It should be up to the party receiving the subpoena to move to quash it on such grounds. Having a dual-tier requirement is inefficient and unnecessary. (1158hh1)

Commission Response:

The commenter has provided no basis in support of the recommended change. The Commission continues to support the power of the presiding officer to request that the requestor of a subpoena for the production of evidence show general relevance and reasonable scope of the evidence sought. Contrary to the commenter's assertion that this requirement is inefficient, the Commission believes that management of the pre-trial discovery process is critical to the overall progress, and thus efficiency, of a proceeding.

Comment:

What does the word "strict" mean in the context of proposed § 2.319(d)? Either the rules of evidence apply or they don't. (1158hh2)

Commission Response:

The Commission intends the term "strict" to mean "rigorously conforming." While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. Proposed § 2.319(d) simply captures this policy by stating that written submissions do not have to "rigorously conform" or "strictly comply" with the Federal Rules of Evidence.

Comment:

Delete as vague the phrase "or similar matters" in proposed § 2.319(h). (1158hh3)

Commission Response:

The Commission finds no basis to adopt the commenter's suggestion. Section 2.319(h), which is identical to former § 2.718(f), appropriately delineates the power of the presiding officer to dispose of "procedural requests or similar matters." Indeed, the Commission intended the language to be broad enough to encompass various matters rather than requiring them to be listed in detail in the regulation.

Moreover, the commenter has pointed to no instances in which a presiding officer's use of this section has been questionable on prior occasions. Therefore, the Commission finds no basis to change this long-standing provision at this time.

Comment:

In proposed § 2.319(p), replace the phrase "consistent with" to "authorized by." I suspect there are many bad things that might be construed to be "consistent with" the act that would be ultra vires because they are not authorized by it. (1158hh4)

Commission Response:

The Commission continues to support the rule as proposed. The "consistent with" language in § 2.319(p), which is identical to the language in former § 2.718(m), requires that the action be compatible with the Administrative Procedure Act (APA). The commenter's suggested language has the same meaning as the current language, and thus, the Commission finds no reason to adopt the suggested change.

Comment:

Proposed § 2.319(m) should be modified to provide for reopening of the record "when newly-discovered evidence exists, or the taking of further evidence may be necessary to protect the public health or safety." (1158hh)

Commission Response:

The Commission disagrees with the commenter's proposal that newly-discovered evidence, by itself, warrants reopening of the record without a determination as to the relevance and materiality of the evidence and whether an unjust or incorrect result would result if the evidence were excluded. Moreover, § 2.319(m) is merely intended to establish the authority of the presiding officer to reopen the record; the substantive criteria that the presiding officer must use when determining motions to reopen the record are set forth in § 2.326. Paragraph (a)(2) of § 2.326 incorporates the substance of the commenter's proposal with respect to protection of public health and safety, in that a motion for reopening must address a "significant safety or environmental issue." For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

The Board should be empowered and encouraged to strike unsupportable "expert" witness testimony. The Commission should formally adopt a standard for determining the adequacy of expert opinions tendered as the basis for proposed contentions. (1159c)

Commission Response:

With respect to the commenter's first suggestion, the Commission notes that with a change to the final rule (see response to comment below), the presiding officer possesses the authority under § 2.319(d) and (e) to limit "unreliable" evidence; this is reinforced by § 2.337, which states that only "reliable" evidence may be admitted in a hearing. These provisions clearly authorize the presiding officer to limit testimony by "experts" whose opinions are unsupportable or unreliable.

The Commission declines to adopt the commenter's second proposal with respect to establishing a standard for determining the adequacy of expert opinions tendered as the basis for proposed contentions. The commenter itself provided no proposal for such a standard, and the Commission believes that development of a standard would be difficult. Moreover, such a standard would be sufficiently controversial such that an additional round of public comment would be advisable in order to assure a wide range of stakeholder comment.

Comment:

The proposed rule should contain a regulation that states that if the Presiding Officer determines that a proceeding should be temporarily delayed, such a granting of a delay must be based upon absolute necessity and must be substantially justified. Such a delay should not be based upon notion that another decision might moot the Presiding Officer's decision in the proceeding. (1216/1218)

Commission Response:

The Commission does not believe that such a provision is necessary. The commenter did not identify any NRC adjudications - much less a pattern of conduct - where a presiding officer or Atomic Safety and Licensing Board delayed a proceeding without valid cause, or that an undue hardship or injustice was placed upon a party as a result of such delay. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The default section, proposed § 2.320, is far too severe. Mere non-compliance with a pre-hearing or discovery order should not give rise to default. There should be an exception where the non-complying party can give a reason therefor (perhaps an excusable neglect standard). Otherwise, the proposal would violate due process and the First Amendment. As written, the rule favors a party with superior resources who can overwhelm the other side with discovery requests that cannot reasonably be complied with

given the shortened deadlines provided for by these proposed regulations. (1158ii1)

Commission Response:

The Commission continues to believe the default provision in § 2.320, provides the appropriate standard and is far from severe. Section 2.320 provides, that in the event of a default, "the Commission or the presiding officer may make any orders in regard to the failure that are just . . . " Thus, the Commission or presiding officer has the discretion to tailor the sanction to the nature of the default taking into account the explanation, if any, offered by the party. If a party could avoid default by simply providing "a reason therefor," the regulations and orders applicable in any given instance would be meaningless.

Additionally, § 2.320 is substantively equivalent to former § 2.707, and the commenter has provided no prior instances where a presiding officer abused this provision by applying sanctions incompatible with the circumstances of the default. Consequently, the Commission sees no need to alter this long-standing provision at this time.

Comment:

All sanctions provided throughout the regulations should be reasonably related to the prejudice, if any, caused by the non-compliance. If there is no prejudice, or prejudice is slight and/or curable, there should be no default, or dismissal of a claim, party, motion, discovery request, etc. (1158ii1, 1158jj2, 1158mm2, 1158vv2, 1158ww1, 1158ccc5)

Commission Response:

All of the sanction provisions in the proposed rule provide the presiding officer or Commission with the necessary discretion to tailor the sanction to the action or inaction involved, including the prejudice resulting to the parties. Thus, the Commission declines to adopt the commenters' suggestion as it is, in essence, already embodied in the proposed regulations.

Comment:

Does this mean that the findings of facts or taking of proof will be done without notice to the party that has erred during the discovery process, or the other parties involved? If so, it violates due process. In cases where several citizens' groups have intervened, and only one such group has violated a pre-hearing or discovery order, the drastic steps specified here would prevent the "innocent" groups from having an opportunity to present their cases, and thereby would violate due process and the First Amendment. (1158ii2)

Commission Response:

The commenter has offered no evidence that the regulation as written violates due process. The regulation provides that, in the event of a default, the presiding officer may make any orders that are just. The "drastic steps" the commenter references are provided as options

in the event of a default. The presiding officer is required to take neither the actions identified, nor he or she limited by the delineated options.

Furthermore, contrary to the scenario presented by the commenter, the default section of the regulations in no way punishes "innocent" groups for the actions of others, but is specifically aimed at the party who is guilty of a default. The commenter provides no evidence that this long-standing provision, which is identical to former § 2.707, has ever resulted in unfair punishment to a non-defaulting party.

Comment:

Proposed § 2.320 should allow for dismissal of the claim or contention which is the subject of the default. (1159jj)

The agency maintains too much discretion in determining dismissal as an option. (1158jj1)

Commission Response:

The Commission continues to believe that the presiding officer should maintain discretion as to whether to dismiss a claim or contention which is the subject of the default. Because the default section, § 2.320, provides adequate discretion to the Commission or the presiding officer to make any order regarding the default that is just, including dismissal, the Commission declines to adopt the commenter's suggestion.

Comment:

Lawyers certification to motion, required in proposed § 2.323(b), which states that parties attempted to resolve issues, is a waste of time except in discovery context. (1158jj1, 1159ll)

Commission Response:

While this certification requirement may be most useful in the discovery context, the Commission wants to encourage amicable resolution of other issues raised by motions as well. Unlike the commenters, the Commission maintains optimism that by requiring the parties to discuss their disagreements, at least some of them will be resolved without the necessity and corresponding delay of filing a motion. Because the resolution of such issues without the use of motions increases the efficiency of the adjudicatory process, the Commission declines to adopt the commenter's suggestion.

Comment:

Because of the broad nature of motions, it is not useful to have a 10 day limit as currently proposed in § 2.323(c). (1075o)

The ten day limit in proposed § 2.323(c) is appropriate. (1159n)

Commission Response:

In an effort to ensure the efficiency of the adjudicatory process, the Commission has decided to maintain the ten day limit specified in proposed § 2.323(c). In response to the

commenter who opposed the ten day limit, the Commission notes that it is precisely because of the broad nature of motions that the rule provides for an answer to be filed within ten days, "or other period as determined by the Secretary, the Assistant Secretary, or the Presiding Officer." Thus, the rule allows for the ten day limit to be adjusted if it is appropriate or necessary based upon the particulars of the motion in question.

Comment:

One should not have to ask leave to file a motion to reconsider. If the motion itself meets the legal standard of "compelling circumstances," then a request for leave to file it is surplusage. (1158jj3)

Commission Response:

The Commission continues to support the rule as proposed, finding that, rather than "surplusage" as alleged by the commenter, the provision will actually increase efficiency. Requiring a party to show a "compelling circumstance" prior to the investment of considerable time and effort on the part of all parties and the presiding officer in addressing a motion for reconsideration is clearly beneficial. Once a "compelling circumstance" is shown which renders the decision in the instance invalid, the justification then exists for the filing of the motion for reconsideration wherein the parties and the presiding officer revisit the merits of the decision itself. Consequently, because the process as proposed provides an extra layer of review which ultimately will be beneficial to all parties involved, the Commission declines to adopt the commenter's suggestion.

Comment:

The Commission should entirely do away with interlocutory review under § 2.323. Federal and state courts have removed similar provisions for interlocutory review. "Industry parties" could use this process to increase expense and delay proceedings. (1217l)

Commission Response:

The commenter failed to present any information suggesting that in past NRC proceedings, the provisions for certification had been misused by "industry parties," or indeed that the sole or primary users of § 2.323(f) were such parties. The Commission believes that certification of important issues can significantly reduce overall expenses and delays in resolution of contentions. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

We support the proposal to expand the interlocutory appeal provision in proposed § 2.323(f) and encourage it be expanded even farther. Interlocutory appeals would facilitate the Commission in promptly exercising its inherent supervisory authority over presiding officers and Licensing Boards. Such review should be expanded to include procedural rulings with

significant case management implications, as well as appeals to settle substantive legal issues important to other cases or public interest. (1073o)

Commission Response:

The Commission notes that §2.323(f) outlines the instances appropriate for referral and certifications of decisions and rulings to the Commission and does not discuss criteria for "interlocutory appeals" as those are covered in §2.311. The Commission continues to believe that § 2.323(f), which provides for referrals of decisions or rulings not only where the presiding officer determines that "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense," but also where the presiding officer determines that the decision or ruling involves a novel issue that merits early Commission review. The Commission is confident that the standards for referral referenced in the regulation could apply in a variety of situations. Accordingly, the Commission declines to adopt the commenter's suggestion that this provision be expanded to cover other situations.

Comment:

If the Presiding Officer makes any of the determinations in § 2.323(f)(1), referral to the Commission should be mandatory, not discretionary. (1159mm)

Commission Response:

The Commission continues to support discretion on the part of the presiding officer to determine whether interlocutory review is appropriate. With the expanded avenue for interlocutory review provided in the proposed regulations (see the discussion above), the Commission is confident that presiding officers will find it advantageous to use the expanded provision whenever appropriate. Moreover, under the final rule, the Commission may also exercise its authority to direct certification of particular questions under § 2.319(l). Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

The filing of a motion, petition, request, certification of question to the Commission, or objections should automatically stay the proceedings. Thus, proposed sections 2.329(e), 2.335(d), 2.1202(a), 2.1203(a), 2.1210(d), 2.1406(c), and 50.19(a)(4) should include an automatic stay provision. Proposed sections 2.339(b) and 2.340(e) should be deleted and there should be an automatic stay provision instead. In proposed sections 2.341 and 2.1213, stays should be automatic and these provisions should instead apply to parties who wish to apply for relief from the automatic stay. (1158jj4, 1158ll4, 1158ll9, 1158oo1, 1158tt1, 1158jjj, 1158kkk2, 1158kkk7)

Commission Response:

The Commission does not believe that automatic stays should be generally provided throughout Part 2. This rulemaking is an effort to promote efficiency and effectiveness of the

adjudicatory process, neither of which would be gained by providing for automatic stays. Automatic stays would unnecessarily delay proceedings with no corresponding benefits. While the regulations do not provide for *automatic* stays, the regulations do provide that the Commission can require a stay and the parties can seek a stay if the circumstances warrant. The Commission is confident that the proposed rule provides the necessary regulations such that stays will be provided when essential, but that in the majority of cases wherein stays are inappropriate, the adjudicatory process will be duly delayed. For these reasons, the Commission declines to adopt the commenter's proposal.

Comment:

Proposed § 2.325 should be amended to read, "unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof by a preponderance of the evidence." This would codify the standard the NRC has traditionally used. (1073t)

The NRC should require applicants to use a "beyond a reasonable doubt" standard, or minimally, by "clear, unequivocal and convincing evidence" standard for the burden of proof. (1158kk1)

Proposed § 2.325 should be amended so that it distinguishes between the burden of proof with respect to the Commission action and ultimate burden on licensing application. (1159oo).

Commission Response:

The Commission is satisfied that § 2.325 adequately describes the burden of proof in NRC adjudications. There were no substantive changes to this provision in the proposed rulemaking. Proposed § 2.325 is substantively identical to the current § 2.732. None of the commenters provided any basis for changing the long-standing burden of proof provision. Consequently, the Commission declines to adopt the commenters' suggestions.

Comment:

In the second sentence in § 2.326(b), the phrase "competent individual" may refer to the sanity of the affiant. While it may be appropriate for the affiant to be mentally competent, this may not be what the Commission had in mind, and thus, the phrase should be clarified. (1158kk2)

Commission Response:

The Commission finds that in the context of the language of the proposed regulation, "competent individual" means one who has knowledge of the facts alleged. Moreover, this proposed regulation did not substantively change the current regulation. Proposed § 2.326 is substantively identical to the current § 2.734. The commenter has cited no instance in which this provision required clarification in the past. The Commission finds no basis for amending this long-standing provision at this time, and declines to adopt the commenter's suggestion.

Comment:

Motions to reopen a closed record, governed by proposed § 2.326 should be denied except in exceptional circumstances. Thus, the presiding officer's discretion to hear a motion, untimely presented, must be limited by requiring at least a showing of good cause. (1159pp)

Commission Response:

The Commission finds § 2.326, as proposed, requires an appropriate standard for review of motions to reopen. According to § 2.326, a presiding officer may consider an untimely motion to reopen only if an exceptionally grave issue is involved. Thus, the commenter's suggestion is already encompassed in the proposed language and the Commission concludes that the language of § 2.326 need not be changed.

Comment:

The second sentence of § 2.327(c) should be modified to require that the charge specified by the Administrative Judge be a reasonable one. Recordings should be provided free of charge to citizens and non-profit groups. Otherwise the parties with the most resources will enjoy an unfair advantage. (1158kk3)

Commission Response:

The Commission finds no basis to include such direction in the proposed rule. The regulation is written so that the Chief Administrative Judge can determine the cost of reproduction of the recording in any given instance and charge accordingly.

Regarding the second of the commenter's suggestions, the agency is unable to provide recordings free of charge to citizen and non-profit groups. Congress, in Section 502 of the Energy and Water Development Appropriations Act for FY 1993, has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in NRC regulatory or adjudicatory proceedings. Pub. L. 102-377, Title V, Section 502, 106 Stat. 1342 (1992), 5 U.S.C. 504 note. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.328 provides unfettered discretion to determine whether a hearing will be public or not and thus, violates minimum standards of due process. (1158ll1)

Commission Response:

The Commission is uncertain as to the commenter's basis for the assertion that the proposed rule would violate due process. Section 2.328 is identical to former § 2.751 and the language in this section has not been changed as a result of this rulemaking. The section reads that, except as may be requested under Section 181 of the AEA, "all hearings will be public unless otherwise ordered by the Commission." The commenter has provided no instance where this discretion has been abused in the past, nor any recommendation on a different standard for determining when public hearings are appropriate. Moreover, the commenter has

failed to identify how this provision violates due process. Accordingly, the Commission disagrees with the comment and has not made any changes to § 2.328 in response to this comment.

Comment:

In § 2.329(b)(10), delete the reference to limitations on cross-examination. (1158ll3)

Commission Response:

The referenced provision, § 2.329(b)(10) provides that, among other matters that may be considered in the context of a prehearing conference, the Commission or the presiding officer may consider "[t]he setting of a hearing schedule, including any appropriate limitations on the scope and time permitted for cross-examination." The Commission continues to support the rule as proposed and notes that the commenter offered no basis for the suggested deletion. This discretionary power of the presiding officer to apply appropriate limitations on the scope and time permitted for cross-examination will further enhance the efficiency and effectiveness of the adjudicatory process. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

In § 2.329(e), the parties should be permitted ten days, not five for filing objections to the pre-hearing conference order. (1158ll4)

Commission Response:

The commenter provided no reason why five days is not sufficient time to file objections to the prehearing conference order. The prehearing conference order simply recites the actions taken at the conference. Thus, the basis for objecting to the prehearing conference order will be clear immediately following the conference. The Commission believes that the proposed time allotted should be sufficient to formulate meaningful objections to the pre-hearing conference order. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Motions for summary disposition should be available in Subpart M proceedings as well, but proposed § 2.329 excludes them. (1159rr)

Commission Response:

Subpart M currently does not contain provisions allowing for motions for summary disposition. Instead, Subpart M proceedings were intended to provide opportunities for meaningful public participation while minimizing areas where additional processes and motion practice could introduce delays without any commensurate benefit to the substance of the decisionmaking. In the absence of any argument or historical data showing that summary disposition motions would materially advance the timely completion of Subpart M proceedings,

the Commission continues to believe that motions for summary disposition generally would not advance the efficiency of Subpart M proceedings. Accordingly, the Commission declines to accept the commenter's suggestion.

Comment:

The regulations should provide that the time from acceptance of contentions until the commencement of a hearing shall be prescribed in a scheduling order to be issued within 30 days after the parties and contentions for hearing have been identified. The schedule should only be extended upon a showing of: (1) requesting party has exercised due diligence to adhere to the schedule; (2) requested change is the result of unavoidable circumstances; (3) failure to grant extension will cause substantial and irreversible prejudice to the requesting party; (4) extension will not cause substantial prejudice or harm to other parties. (1075g)

Commission Response:

The commenter has failed to provide a basis for requiring a rigid 30-day timeframe in which to allow the presiding officer to issue his or her scheduling order. The proposed regulation provides for the scheduling order to be issued "as soon as practicable after consulting with the parties," and the Commission continues to believe such discretion is appropriate. Due to the varying complexities of NRC adjudicatory hearings, this discretion enables a presiding officer to tailor the amount of time to the proceeding at hand. In some instances, perhaps where there are few participating parties, the presiding officer may not need 30 days to issue the scheduling order. On the other hand, in complex matters with a wide variety of participants and issues, the presiding officer may require additional time.

The Commission finds no basis to alter the proposed factors as recommended by the commenter inasmuch as factors (3) and (4) introduced by the comment are already incorporated into the rule. Proposed section 2.332(b)(3) arguably touched on the issue of prejudice to the parties inasmuch as it identifies "whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case" as one factor to be considered by the presiding officer before allowing modification of the schedule. Moreover, § 2.332(b) allows the presiding officer to consider other factors not specifically listed in the regulation. For these reasons, the Commission declines to adopt the commenter's proposals.

Comment:

In proposed § 2.333(b), strike the word, "argumentative"; evidence is never argumentative. (1158ll7)

Commission Response:

Evidence encompasses anything that offers proof, and may be presented through the medium of testimony, writings, or material objects. Both testimony and writings may, in some instances, indeed be argumentative and the Commission continues to support the rule as proposed which provides that the presiding officer may strike evidence if he or she deems it argumentative. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.333 should be broader. There are other reasons for the presiding officer to take action besides unnecessary delays or large record. Thus, the regulation should state, "[t]o provide for the orderly conduct of a proceeding, the presiding officer may, on his or her own initiative or upon motion by a party" (1159tt)

Commission Response:

The Commission believes that the proposed language is actually broader than that recommended by the commenter. The regulation was designed to assist the presiding officer in conducting an efficient and effective adjudicatory hearing and the Commission believes that the regulation as written will serve to accomplish this task. The commenter's suggested language would not accomplish this task as a proceeding could be extremely orderly, but longer than necessary and with an unnecessarily large record. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The presiding officer should be allowed to strike repetitious testimony, as provided in proposed rule § 2.333. (1161n2)

Commission Response:

The Commission agrees.

Comment:

Attorneys fees should be recoverable under provision other than Program Fraud Civil Remedies Act. (1161n3).

Commission Response:

The decision to provide attorneys fees only in PFCRA cases is consistent with the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. This statute authorizes the recovery of attorneys' fees by certain "prevailing parties" in "adversary adjudications". The term "adversary adjudication" is defined in 5 U.S.C. 504(b)(1)(C) to generally mean, for purposes of the EAJA, adjudications conducted under 5 U.S.C. 554, the section of the APA applicable to adjudications required by statute to be determined on the record after the opportunity for an agency hearing. "Adversary adjudications" do not include adjudications to consider the grant or renewal of a license. The NRC decided to authorize the payment of attorneys' fees only for adjudications under the Program Fraud Civil Remedies Act, which by law must be on-the-record, on the grounds that no other NRC adjudications (other than those for the licensing of uranium enrichment facilities under Section 193) must by law be on-the-record. The commenter provides no basis to challenge this NRC decision, and thus, the regulations remain as proposed.

Comment:

Proposed § 2.334(a), in addition to requiring maintenance of schedule, should include a provision that absent Commission authorization, the schedule shall not exceed 60 days after completion of post-hearing filings for the issuance of the initial decision. (1159uu)

Commission Response:

The commenter has failed to provide a basis for requiring a rigid 60-day timeframe in which to allow the presiding officer to issue the initial decision. The final rule requires the presiding officer to establish and maintain a schedule for the completion of the evidentiary record, as well as for the issuance of the initial decision. The presiding officer must notify the Commission of any substantial delay from the schedule. *See, e.g.,* §§ 2.332, 2.333, 2.334. The Commission continues to find such discretion appropriate. Due to the varying complexities of NRC adjudicatory hearings, this discretion enables a presiding officer to tailor the amount of time for issuance of the initial decision to the proceeding at hand. In some instances, perhaps where there are few parties and/or few issues, the presiding officer may not need 60 days to issue the initial decision. On the other hand, in complex matters with a wide variety of participants and issues, the presiding officer may require additional time. The Commission finds that there are adequate assurances throughout the proposed regulations to ensure that the presiding officer issues an initial decision as soon as practicable. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

We strongly endorse the requirement in proposed § 2.334(b) that a Presiding Officer or licensing board must report in writing to the Commission whenever it appears that a decision will be delayed beyond the time specified in the schedule set for the proceeding. (1159a, 1213m)

Proposed § 2.334(b) should require Commission notification if proceeding is 30 days beyond that in schedule rather than 60 days. (1159vv)

Commission Response:

The Commission continues to believe that notification of the Commission by the presiding officer of serious delay in a proceeding is a useful and necessary step in maintaining efficiency and effectiveness in the adjudicatory process. Section 2.334(b) requires the presiding officer/licensing board to notify the Commission when there is a non-trivial delay in the established schedule for the proceeding. The second commenter failed to provide any basis why a 30 day time period is more appropriate in this instance than that of 60 days. Accordingly, the Commission declines to adopt the commenters' suggestions.

Comment:

The proposed § 2.335 is an appropriate place for the Commission to also codify its standard relating to the scope of the NRC

hearing. It is well established by NRC case law that the scope of an NRC hearing is limited to matters specified in the notice of hearing. Specifically, the Commission should clarify that the licensing board or presiding officer does not have jurisdiction over ongoing NRC inspection, enforcement, and investigation matters in license amendment cases. (1073x)

Commission Response:

The Commission does not believe that it is necessary to "codify" the scope of NRC hearings. The Commission believes that the permissible scope of a hearing is adequately embodied in various sections of the proposed regulations, including proposed § 2.309 wherein the standing and contention requirements are explained. Specifically, § 2.309(f)(1)(iii) requires the requestor/petitioner to demonstrate that the issue raised in the contention is within the scope of the proceeding, and § 2.309(f)(1)(iv) requires the requestor/petitioner to demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding. Thus, the Commission believes that §§ 2.309 and 2.335, together, should ensure that the hearing will be limited to the matters identified in the notice of hearing. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The proposed § 2.335 should contain a clear distinction between challenging a rule or regulation, which is impermissible, and requesting waiver of a rule or regulation in a specific instance. Thus, the regulation should read: "Any rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is not subject to attack by way of discovery, proof, argument, motion, or other means in any adjudicatory proceeding subject to this part. A party to such a proceeding may petition, subject to the provision of paragraphs (b), (c), and (d) of this section, for the waiver of the applicability of a Commission rule or regulation or a provision thereof for the particular proceeding." (1159ww)

Commission Response:

The Commission does not believe that any further distinction needs to be drawn in § 2.335 with respect to impermissible challenges to a rule or regulation, versus a permissible request for a waiver. This provision is essentially the same as that in former § 2.758, which has not been found to be unclear in its application. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.336(a)(2) is duplicative as parties are already obliged to produce a witness list pursuant to (a)(1). (1073j)

Commission Response:

The Commission disagrees with this comment, inasmuch as paragraph (a)(1) requires disclosure of persons who the party relies upon, while paragraph (a)(2) requires disclosure of persons who may have knowledge of discoverable information. However, for other reasons discussed in the SOC for the final rule, paragraph (a)(2) has been deleted from the final rule and supports the language as revised in the final rule.

Comment:

Proposed § 2.336(a)(3) requires disclosure of documents and, as written, would present an exceptionally difficult standard. This would place the burden upon the applicant to understand what might be relevant to an intervenor's contention. If this approach is employed, it should be better focused and should primarily run to those documents that the party itself will rely upon to make its own case. Otherwise, the Commission must provide clear limits defining the extent to which a party is required to search its internal databases to produce potentially relevant documents. (1073k)

Commission Response:

The Commission disagrees with the commenter's analysis. The language in § 2.336(a)(3) specifically limits the documents required for disclosure to those "relevant to the contentions" and thus does not present an "exceptionally difficult standard". At the time that this disclosure requirement would take effect, contentions will have been admitted and the issues for litigation will have been defined. The parties are then required to make a good faith effort to disclose information that would appear to be relevant to the issues. This should be no more burdensome than normal discovery. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed §s 2.336(a)(5) is unreasonably burdensome since it does not limit the request to documents relevant to contentions. (1159aaa)

Commission Response:

Section 2.336(a)(5) requires parties to provide a list of "all discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents." Thus, contrary to commenter's assertion, the list of documents is limited to those "discoverable" - those that would normally be required to be disclosed under § 2.336(a)(1)-(3), but are somehow privileged or protected. Because § 2.336(a)(1)-(3) only requires disclosure of documents relevant to the admitted contentions, the commenter's concern is without merit. Accordingly, no change in the final rule was made as a result of this comment.

Comment:

Aside from the hearing file, discovery should be limited to matters relevant to the specific admitted contentions and § 2.336 should specifically state that, aside from the hearing file, matters not relevant to a specific contention are not discoverable. Discovery should occur through 2.336(a)(1), (2), (3), and (5). (1075i).

Commission Response:

Subpart C relies upon initial disclosure provisions which are intended to alleviate the parties of the time and expense involved in traditional discovery burdens. Discovery is already limited to matters relevant to the admitted contention/matter in controversy, and it is unnecessary to further complicate this in § 2.336. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Aside from material in NRC docket or hearing file, automatic discovery should be limited to material that the party intends to rely upon to support its position in the proceeding. (1213f)

Commission Response:

The Commission disagrees with the commenter's suggestion. Section 2.336(a) requires parties to disclose information relevant to a contention, but that it may not intend to rely upon. Such information, which may be averse to a party's position, should be disclosed in order to allow for a thorough understanding of the issues involved, and thus, a more effective effort toward adjudication and resolution of the issues. Based upon the foregoing, the Commission declines to accept the commenter's suggestion.

Comment:

Early witness identification and document disclosures are good first steps, but the Commission should adopt the full panoply of truth finding techniques provided in the Federal Rules of Civil Procedure, Rule 26. (1217g)

Commission Response:

The commenter has failed to provide any specific provision of the Federal Rules of Civil Procedure (FRCP) which the Commission has neglected to include in the Part 2 revisions that the commenter feels would be useful in NRC adjudicatory hearings. For this reason, the Commission finds no basis for modification of the rule as proposed.

Comment:

Proposed § 2.336 must allow parties 60 days after issuance of an order granting a request for a hearing to provide information or they will begin to gather it, generally with a substantial outlay of time and expense, before they know whether or not they have been admitted to the proceeding. (1158ll10, 1159xx).

Commission Response:

The commenter appears to misunderstand the details of the rule as proposed. The proposed rule provides the parties with sufficient time to gather the necessary information to comply with the initial disclosure provisions. Moreover, the rule provides the presiding officer, Commission or licensing board with the necessary discretion to alter the particulars of the initial disclosure provisions if it is deemed necessary. Contrary to the commenters assertion, the initial disclosures will not occur before the party has been admitted to a hearing. Instead, § 2.336 requires parties to disclose the identified material within 30 days of the issuance of the order granting a request for hearing or a petition to intervene. Under the proposed rules, an order granting a request for hearing or petition to intervene will only be issued if the Board, presiding officer or Commission decides that the requestor/petitioner has standing and has proposed at least one admissible contention. Consequently, no modifications to the proposed rule are necessary based upon the comment.

Comment:

Proposed § 2.336(a)(1) should include asking for additional information as in 2.704(b)(2) - which requests backup data on which analysis and opinions are based. Additionally, overly broad to ask for information on each person. This should be narrowed. (1159yy)

Commission Response:

Proposed § 2.336(a)(1) requires production of "a copy of the analysis or other authority upon which the person bases his or her opinion." The Commission believes that this provision is neither overly broad, nor particularly burdensome and thus, declines to adopt the commenter's suggestion.

Comment:

We support the use of a hearing file as a discovery tool in NRC proceedings, and encourage its use as a sole discovery tool for informal hearings. (1073g)

Commission Response:

The Commission disagrees with the assertion that the hearing file could be used as the sole discovery tool. While the hearing file will provide necessary information on the formal regulatory interaction between the applicant/subject of regulatory action and the NRC, the Commission believes that the general discovery provisions requiring the parties to disclose information relevant to the contentions is necessary for the parties to develop their positions on a contention/contested matter.

Comment:

The term "NRC correspondence" in proposed § 2.336(b)(2) should be clarified to include all exchanges of information, including all

documents and all means of communication, including electronic means. (1158ll11)

Commission Response:

The language in § 2.336(b)(2) requires the NRC staff to provide the parties with "NRC correspondence" associated with the application or proposed action that is the subject of the proceeding. There is nothing in the regulation which would exclude electronic correspondence meeting this description. Consequently, the Commission declines to adopt commenter's suggestion.

Comment:

In proposed § 2.336(b)(4), delete the use of the pathetic fallacy. Documents are inanimate objects and hence they cannot "act" on an application. The discovery should include all documents and all means of communication, including electronic means. (1158ll12)

Commission Response:

With respect to the first suggestion, the Commission believes the language in the proposed rule adequately conveys the intended meaning, that NRC documents memorializing or otherwise representing the NRC staff determination on the application or proposal that is the subject of the proceeding must be disclosed by the staff. With respect to the second comment, nothing in the language of the rule excludes electronic documents. Therefore, the Commission declines to adopt either of the commenter's suggestions.

Comment:

Disclosure should be "forthwith" not within 14 days as specified in proposed § 2.336(d), because a party could wait until the last minute to disclose. (1158mm1)

Commission Response:

The Commission disagrees with commenter's suggestion. The commenter fails to provide any explanation of how requiring initial disclosure of documents "forthwith," as the commenter suggests, rather than providing a specified period of time, as the Commission proposes, provides a greater assurance that parties will not delay in disclosing the required information. The Commission continues to believe that providing a specified period of time will enhance the initial disclosure provisions and at the same time, provide a reasonable period for the parties to identify and assemble their required disclosures. Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

Intervenors rely on discovery because they do not have access to utility company's studies and documents. Take this away and the engine to get to truth disappears (998b).

Commission Response:

The Commission disagrees with the commenter's implicit contention that the proposed rule eliminates discovery, or is otherwise so limited as to effectively eliminate it. Section 2.336(a) requires extensive disclosures to be made by all parties. These disclosures are intended to alleviate the parties of the time and expense involved in traditional discovery burdens. Moreover, other traditional discovery provisions are provided in the regulations under the applicable subpart if the matter is one in which traditional discovery mechanisms offer an additional benefit.

Comment:

Formal discovery is not useful in most hearings, and thus, it should be limited to a request from a Presiding Officer. (1220e)

Commission Response:

It is unclear what the commenter meant by "formal" discovery. The Commission believes that allowing the full panoply of discovery tools, including interrogatories, requests for admissions, and depositions, can result in a lengthy and burdensome discovery process. Thus, the final rule relies upon extensive initial disclosure of documents, as outlined in the regulations, as the sole discovery mechanism, unless there is further discovery permitted under the specific subpart or if the Commission provides otherwise.

Comment:

Enforcement cases should entail full discovery rights. (1220f)

Commission Response:

The Commission agrees that in cases involving true factual disputes, such as those generally encountered in enforcement matters, full discovery is often necessary. Thus, the rule as proposed allows for traditional methods of discovery in formal hearing procedures under Subpart G, which includes enforcement cases.

Comment:

Documents disclosed during settlement negotiations were almost certainly discoverable to begin with, so no need to go through discovery or subpoena as a predicate to the hearing. Instead, provide that, by disclosing a document at a settlement conference, the party producing the document does not waive any claim to privilege. (1158nn1).

Commission Response:

The Commission continues to support the language in § 2.338 because it provides protections which the Commission hopes will encourage the increased use of alternative dispute resolution methods. Accordingly, the Commission declines to accept the commenter's suggestion.

Comment:

The waiver of further proceedings in proposed § 2.337(h)(2) should not extend to fraud, newly discovered evidence, or a substantial change in material circumstances. (1158nn2)

Commission Response:

The Commission believes the commenter's suggestion is unnecessary. Under existing case law, a settlement agreement that is tainted - either by fraud or by mutual mistake by both parties, would be open to attack utilizing the judicial appellate process. Asberry v. United States Postal Service, 692 F.2d 1378, 1380 (Fed. Cir. 1982). Such detail, however, is not necessary for general rules of procedure. The Commission, therefore, declines to adopt the commenter's suggestion.

Comment:

By allowing the issuance of a license 10 days after the initial decision, the Commission is effectively mooting the appellate process. (1158oo2)

Commission Response:

The Commission disagrees with the commenter's assertion. This provision of the regulations was not substantively changed by this rulemaking and the Commission finds no basis to modify the regulation at this time. This long-standing NRC practice of allowing for the immediate effectiveness of an initial decision in a matter in no way moots the appellate process. The Commission maintains the authority under proposed § 2.343 (current § 2.770) to render the final decision in the matter notwithstanding the initial decision or the effectiveness thereof. The regulations provide that in rendering the final decision, the Commission may choose to adopt, modify, or set aside the findings, conclusions, and order in the initial decision.

Comment:

The proposed section providing that "the Commission will not decide that a stay is warranted without giving the affected parties an opportunity to be heard" is skewed in favor of the nuclear industry. If hearings are to be required, the Commission should hold one when the shoe is on the other foot. (1158oo3)

Commission Response:

The Commission fails to understand the commenter's disapproval of the proposed rule language. The commenter provides no basis for the assertion that the stay provision embodied in the regulations is skewed in favor of the nuclear industry. Moreover, the comment provides no suggested revision to the regulations. For these reasons, the Commission has not made any changes to the rule as proposed.

Comment:

A party should have 30 days to file a petition for review under proposed § 2.340(b)(1), and an opposing party should have an additional 10 days to file a cross-petition. (1158ss1)

Proposed § 2.340(b)(3) time and page limits are too restrictive to permit a petitioner to submit an adequate reply to arguments raised. (1159ddd)

Commission Response:

The commenters provide no basis why 15 days to file a petition for review, as provided in § 2.341(b) (proposed § 2.340(b)), is insufficient. Additionally, the commenters have failed to provide any basis for altering the page limits at set forth in that section. The Commission continues to support the time and page limits in an effort to increase the efficiency and effectiveness of the adjudicatory process. Therefore, the Commission has not made change to the rule as proposed.

Comment:

Proposed § 2.340(b)(4) does not provide for the possibility of filing a petition for review of actions by the Presiding Officer which may be inconsistent with the Commission's rules and regulations. (1159eee)

Commission Response:

The Commission believes that if a presiding officer's decision were inconsistent with the Commission's rules and regulations it would more than likely fall under a number of considerations outlined in § 2.341(b)(4) (proposed § 2.340(b)(4)). If such a ruling failed to fall within considerations in § 2.341(b)(4)(I) - (iv), certainly it would fall within § 2.341(b)(4)(v) which allows for Commission review for "any other consideration which the Commission may deem to be in the public interest." Therefore, the Commission does not agree with the commenter's suggestion, and the Commission has not made any change to the rule as proposed.

Comment:

The proposed § 2.340(b)(6) is inefficient and inflexible. The Commission should have the discretion to decide such petitions for review to save time, or remand them for consideration along with the petition for consideration. (1158ss4)

Commission Response:

The Commission disagrees with the commenter's assertion that § 2.341(b)(6) (proposed § 2.340(b)(6)) is inefficient and inflexible. The rule provides that a petition for Commission review will not be granted regarding issues raised and currently pending with the presiding officer on a motion for reconsideration. Thus, the rule allows the presiding officer, who is most familiar with the issues at hand, to initially review any requested reconsideration before the issue may be raised with the Commission. Moreover, the Commission will have ample opportunity for review, should the need arise, after the presiding officer's ruling on a motion for reconsideration. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

In proposed § 2.344(b), delete the phrase "which could not have been reasonably anticipated". It is irrelevant whether a particular error of law in an NRC decision could have been anticipated by a party. The point is that the decision was erroneous. In any event, errors in the decisions of the NRC are arguably foreseeable as a matter of law. No federal agency is infallible. That is why we have judicial review. (1158uu)

Commission Response:

The commenter misunderstands the regulation. The phrase, "which could not have been reasonably anticipated" modifies "compelling circumstance," not "clear and material error." Thus, the regulation provides that a petition for reconsideration must demonstrate a compelling circumstance which could not have been reasonably anticipated. The "clear and material error" language in the regulation is for exemplary purposes only. For this reason, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.345(a) should include "prescribe fair and reasonable procedures . . . " (1158vv1)

Commission Response:

The Commission finds the suggested language superfluous and thus, unnecessary. The Secretary is required by general principles of fairness and due process to act fairly and reasonably. The commenter fails to identify any instance in which the Secretary has failed to act fairly and/or reasonably. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.345(i) should include "where the request substantially and materially fails to comply with the Commission's pleading requirements . . . " (1158vv3)

Commission Response:

The Commission finds that the level of detail requested by the commenter is unnecessary. Section 2.346 (proposed § 2.345) provides for the authority of the Secretary to act in circumstances where briefs, motions, or other papers are submitted to the Commission itself. Paragraph (i) provides the Secretary with authority to deny a request for hearings where the request fails to comply with pleading requirements. The Commission has determined that providing the Secretary with this authority is necessary and useful. While the commenter implies that the Secretary will abuse this authority and deny requests due to some trivial lack of compliance, the commenter, provides no basis for this concern. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.346(d) should include, "require the party to show cause why its application, claim or interest . . . " (1158ww1)

Commission Response:

The phrase "claim or interest" is sufficient to encompass a party's application which is the subject of the proceeding. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.336(f) should explicitly state that public communications, such as statements to the news media, conversations in an elevator, etc., which may be overheard by the Commission or its staff, do not constitute ex parte communications. (1158ww2)

Commission Response:

The Commission disagrees. According to the rule, interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding. This rule does not limit the location of such occurrences, nor should it, as ex parte communications are serious matters. On the other hand, conversations which are inadvertently overheard by the Commission or its staff, are not "knowingly" made to the Commission and are, therefore, not covered by the rule. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

The NRC violated this proposed rule (§ 2.390) in connection with this rule-making process. Describe here the issue of the inadequacy of ADAMS. Delete the phrase "in the absence of a compelling reason . . . and the public interest in disclosure." The list of exemptions should be all inclusive. (1158xx1)

Commission Response:

The commenter has failed to provide any basis for its assertion that the NRC violated any rules in connection with this proposed rulemaking. The Commission acknowledges that this rulemaking was interrupted by the tragic events of September, 11, 2001. However, all efforts were made to ensure minimal disruption of this rule making process, including consideration of comments arriving long after the comment expiration date. Additionally, the commenter has offered no specific comment regarding ADAMS.

The Commission disagrees with commenter's suggestion to remove the phrase referenced in the third sentence of the comment. There will be instances where disclosure of documents into the public domain is inappropriate and the Commission finds that the regulation provides for an acceptable standard for determining when nondisclosure is warranted. The commenter cited no problems stemming from this long-standing provision of the regulations. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.390(a)(7)(iv) should include, "could reasonably be expected, even with appropriate redaction of identifying information, to disclose the identity of a confidential source whose identity is required by law to be protected." Delete the clause beginning "including a state . . . " and ending with "which furnished the information on a confidential basis . . . " As written, this clause is overly broad and would mandate the suppression of a great deal of relevant information that should in the public interest be disclosed. (1158xx2)

Commission Response:

This provision of NRC regulations is based upon the Freedom of Information Act, 5 U.S.C. § 552(b)(7). The commenter provided no basis why this long-standing rule language should be modified. Therefore, the Commission declines to adopt the commenter's suggestions.

Comment:

Proposed § 2.604(c) which requires an intervenor to file a notice of intent to remain as a party with supporting documentation is unnecessary and unduly burdensome, particularly to parties with limited means. It should be deleted. (1158yy)

Commission Response:

The Commission disagrees. This provision is intended to aid all parties by clarifying the parties' interest in the proceeding. The burden of filing a notice with a supporting affidavit is certainly outweighed by the benefits gained in requiring each party to identify the aspect or aspects of the subject matter of the proceeding as to which he or she wishes to continue to participate and the basis for their contentions. Moreover, the purpose of this change was solely to correct the references to Part 2, and not to reopen the substantive issues concerning site suitability hearings. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

We support an approach in which the Presiding Officer or the Licensing Board conducts the examination of witnesses. This approach should be adopted and even extended, to the maximum extent practicable, to Subpart G. (1073f)

Commission Response:

While the Commission recognizes the benefits of allowing the presiding officer to conduct the examination of witnesses in many instances, the Commission continues to believe that, due to the nature of the issues reserved for formal hearing procedures, it is conducive to the expeditious development of an adequate record for decision if the parties conduct cross-

examination in these instances. Thus, the Commission declines to adopt the commenter's suggestion that presiding officer's examination of witnesses be extended to Subpart G hearings.

Comment:

Proposed Subpart G has omitted sections: 2.720, subpoenas; 2.733, examination by experts; 2.742, admissions: 2.743, evidence; 2.754 proposed findings of fact and conclusions; 2.756, informal procedure; and 2.759, settlement. The absence of these sections is confusing and inexplicable. (1158e)

Commission Response:

Contrary to commenter's assertion, the above sections have been retained in the proposed rulemaking, however their locations and thus, corresponding section numbers, have changed. The majority of these provisions remain in Subpart G. The informal procedures are now covered in Subpart L, and settlement issues were appropriately relocated to Subpart C. Therefore, no changes to the proposed rule were necessary based upon this comment.

Comment:

In proposed § 2.702, the issuing officer should not be able to require a threshold showing of "general relevance of the testimony or evidence sought." Instead, the attorney or person seeking the subpoena should be subject to the requirement of FRCP 45(c)(1) to "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena," and to the sanctions provided in the rule for breach of this duty. (1158zz1)

Commission Response:

The Commission disagrees with the commenter's suggestion. Section 2.702 provides the presiding officer to whom application is made with the discretion to require such a showing and the discretion to withhold the subpoena if the showing is not made. This provision aims to protect all parties from the burden of responding to requests for irrelevant testimony or evidence. The Commission finds the proposed language adequate, and thus, declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.702(f)(1), which provides for the issuing officer to quash or modify a subpoena "if it is unreasonable" is vague and vests unfettered discretion in the agency in violation of due process of law. It would be preferable for the Commission to adopt FRCP 45(c)(3), which sets forth detailed standards for the quashing of a subpoena. In general, it would be preferable for the Commission to adopt the tried and true Federal Rules of Civil Procedure where applicable rather than attempting to devise rules

of procedure that have not stood the test of time and have not been thoroughly thought through. (1158zz2)

Commission Response:

The commenter has failed to provide any basis for the assertion that this provision is in violation of due process of law. While the Federal Rules of Civil Procedure (FRCP) have been used as guidance in drafting the rule, the Commission is not required to use the FRCP. Furthermore, the FRCP was developed for judicial adjudications, which are different from, and subject to stricter requirements, as compared with the conduct of administrative hearings.

Comment:

Proposed § 2.702(h) should be deleted or modified to provide for a fair and equitable procedure to compel the testimony of NRC personnel, or the production of NRC records or documents. (1158zz3)

Commission Response:

The Commission disagrees. All necessary discovery against the NRC staff is addressed in proposed § 2.709 and is in accordance with the Commission's *Policy on the Conduct of Adjudicatory Proceedings* (63 FR 41872, August 5, 1998). The commenter did not explain why the existing procedures are not sufficient to provide adequate discovery against the NRC staff. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The second sentence of proposed § 2.703(b) should be deleted because its meaning is unclear and it is overly broad. A lawyer cannot be responsible for the way in which a layperson or expert witness cross-examines a witness. In the American system of justice, guilt is personal. In any event, what does such responsibility imply? Is the lawyer strictly liable for the peccadillos of the questioner? The rule does not specify. It will cause more problems than it can possibly solve. (1158aaa)

Commission Response:

The Commission disagrees. Due to the highly technical nature of some of the issues raised in NRC adjudicatory proceedings, it is useful at times to have experts conduct the cross-examination of a witness. If a party wishes to utilize an expert in such a manner, the Commission believes it is appropriate to place the burden upon the sponsoring party and its legal representatives to ensure that the expert conducts him or herself appropriately. The commenter's reference to "guilt" is also inapposite, inasmuch as the rule is not focused upon criminal or civil responsibility with respect to the underlying matter. Rather, the rule is focused on ensuring that a party's legal representative is responsible for controlling the actions of its agent-expert during the conduct of cross-examination, e.g., ensuring that the expert examiner complies with the directions of the presiding officer. Because the Commission continues to find the provision necessary and clear, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.704 can be read to require a virtually impossible burden and should be revised. (1213e)

Commission Response:

The commenter provides no basis for their claim that § 2.704 is unnecessarily burdensome. In fact, § 2.704 tracks the Federal Rules of Civil Procedure 26(a)(1). The Commission disagrees with the comment and declines to adopt the commenter's suggestion.

Comment:

The truncated deadlines in proposed § 2.704 unfairly favor the parties with the most resources and burden those with the least resources. The NRC has made no showing that these shortened discovery procedures are necessary or reasonable. Hence they violate due process. Specifically, 45 days in § 2.704(a)(3) and 14 days in § 2.704(c)(3) are unreasonably short. (1158bbb1)

Commission Response:

The Commission disagrees. The provisions outlined in proposed § 2.704 assist all parties, especially those with limited resources, as they require initial and continuing disclosure of information without awaiting a discovery request. The deadlines included in the proposed section are fair and provide for ample time to gather and disclose such information. Moreover, the presiding officer has the discretion to alter the deadlines when necessary. The commenter has provided no basis to support its claim that the deadlines are unreasonable, nor how the provisions violate due process. Based upon the foregoing, the Commission has not made any changes to the rule as proposed.

Comment:

In proposed §§ 2.704(a) and 2.704(c)(1), delete the exemption for the NRC staff. (1158bbb2)

Commission Response:

The Commission disagrees with the commenter's suggestion. Discovery against the NRC staff is addressed separately in proposed § 2.709 which is in accordance with the Commission's *Policy on the Conduct of Adjudicatory Proceedings* (63 FR 41872, August 5, 1998). The commenter failed to provide any basis for treating the NRC staff as any other party in discovery under Subpart G. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

In proposed § 2.704(a)(2), the term "documents' should be expanded to explicitly include within its scope electronic

information, such as emails, information on computer drives, etc. (1158bbb3)

Commission Response:

Nothing in the language of the proposed rule excludes electronic documents from this provision. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

If the Commission adopts either a hearing file or disclosure provisions, there is no need to require traditional discovery. To the extent traditional discovery mechanisms remain available (Subpart G), we support time limits on the discovery period. As such, the Commission should incorporate into proposed § 2.705 a provision similar to that contained in current § 2.1111. (1073l).

Commission Response:

The Commission supports the rule as proposed wherein traditional discovery mechanisms remain available in Subpart G proceedings, where, due to the nature of the issues, discovery is useful and necessary. The Commission does not support strict time frames for traditional discovery purposes inasmuch as this could result in additional delay, rather than increased efficiency. While the proposed Subpart G procedures do not contain an equivalent of current § 2.1111, the proposed regulations instead, allow for increased flexibility depending upon the nature of the case at hand. For example, proposed § 2.705(f) requires the parties to meet within 30 days after issuance of a prehearing conference order. At that meeting, the parties are to develop a discovery plan and parties are then obligated to comply with the plan according to § 2.705(d). The Commission believes this proposal will provide increased efficiency by allowing the presiding officer to tailor the discovery plan to the specific nature of the hearing. Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.705(b)(1) is workable and fair only if the ADAMS document system is fixed to permit general computer access of documents with ease of location, reading on screen, and high speed downloads of documents. (1158ccc1)

Commission Response:

Proposed § 2.705(b)(1) states that if a book, document, or tangible thing is reasonably available from another source, such as the NRC Web site and/or the NRC Public Document Room, a sufficient response to an interrogatory on materials would be the location, the title, and a page reference to the relevant book, document or tangible thing. The Commission believes that any reference to the availability of the document in the NRC web site or in the ADAMS system must include a reference to the ADAMS accession number, or the URL for the specific web page where the document is located. The Commission believes that this provision will operate as envisioned and will save all parties the time and expense of responding traditionally. Accordingly, the Commission has not made any changes to the rule as proposed in response to this comment.

Comment:

The factor in proposed § 2.705(b)(2)(iii) cannot reasonably be applied without advance disclosure of the information sought. Hence, it is irrational and an obstacle to a fair and efficient discovery process. (1158ccc2)

Commission Response:

The Commission disagrees. The Commission believes the presiding officer will have ample available information to impose the limitations outlined in § 2.705(b), should the need arise, inasmuch as the limitations envisioned in paragraph (b)(2)(iii) may be instituted on the presiding officer's own initiative or on motion of a party. Therefore, the Commission has not made any changes to the rule as proposed in response to this comment.

Comment:

Proposed § 2.705(b)(5) should set a limit on the number of interrogatories allowed, preferably 100. (1158pp).

Commission Response:

The Commission finds no basis to change the regulation as proposed. Proposed § 2.705(b)(2) vests the presiding officer with the discretion to limit the number of interrogatories if he or she determines it necessary. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Proposed § 2.705(g)(3) is an example of the proper way to deal with pleadings that are unsigned. Proposed § 2.304 which is in conflict with this section is unreasonable and inflexible. (1158ccc4)

Commission Response:

The Commission disagrees. Proposed § 2.705(g)(3) does not deal with pleadings that are unsigned, but deals only with specific discovery requests, responses, or objections, which are not signed as required by § 2.705(g)(2). Proposed § 2.304, on the other hand, deals with the formal requirements necessary for acceptance of filing all pleadings in an adjudication, including the necessary signature requirements. Discovery matters represent interactions between the parties and do not represent submissions to the presiding officer. Accordingly, some leeway is appropriate with respect to unsigned discovery materials. By contrast, pleadings to the presiding officer and Commission are of a greater significance and merit a more stringent approach to signatures on such pleadings. The difference in treatment between the two sections is merited.

Comment:

Add to the second sentence of 2.706(a)(7), "any party may introduce any other parts that are admissible in evidence." (1158ddd1)

Commission Response:

The Commission finds the proposed alteration unnecessary. Proposed § 2.706(a)(7) adequately explains when and under what circumstances additional parts of a deposition may be admitted into the record. The addition of the language "admissible in evidence" adds nothing to the proposed rule, and thus, the Commission declines to adopt the commenter's proposal.

Comment:

The person answering interrogatories under proposed § 2.706(b)(2) should reproduce each question along with each answer in order to make them readily comprehensible to the reader. To facilitate this process, the party propounding the interrogatories should provide an electronic copy to the person to whom they are directed. (1158ddd3)

Commission response:

The Commission disagrees with the commenter's suggestion. Requiring electronic copies necessarily complicates matters due to the incompatibility of certain software applications. Furthermore, the suggestion presumes that all parties would be able to use electronic documents in preparing interrogatory responses - an assumption which may not always be true since is presumes all parties have easy access to a computer. In any event, details such as the reproduction of questions, etc., could be resolved during the meeting of parties to discuss discovery matters required by § 2.705(f). Therefore, the Commission declines to adopt the commenter's proposal.

Comment:

The timetables established in proposed § 2.706 are inadequate. 14 days is inadequate to respond to interrogatories, particularly where, as here, the matters in question are detailed and highly technical. The time period should be at least 30 days as provided in FRCP 22(b)(3), and as provided in 2.707(d)for responses to document requests. Otherwise a party with greater resources could overwhelm a party with relatively scant resources. This is particularly the case where, as here, there is no limit set on the number of interrogatories. (1158ddd4)

Commission Response:

At this time, the Commission believes that the timetables provided for discovery in proposed § 2.706 are sufficient and appropriate. Additional provisions throughout the regulations should provide for adequate assurance that abuse of the discovery process will not occur. Not only must the interrogatories be filed with the Commission or Secretary, but details regarding the discovery plan should be addressed in advance in the meeting required by §

2.705(f). Additionally, the presiding officer is provided with the discretion in § 2.706(b)(2) to provide for a shorter or longer amount of time to respond to interrogatories depending upon the nature of the case and the issues at hand. Moreover, it is inaccurate to compare the response time provided for production of documents with that of responding to interrogatories as the two require quite distinct response burdens. For these reasons, the Commission declines to adopt the commenter's suggestions.

Comment:

Discovery by deposition should be limited to pure factual issues, and no discovery depositions of experts should be allowed unless the party seeking discovery demonstrates by affidavit that the prior procedures in the proceeding are insufficient to prepare expert rebuttal testimony. (1213g)

Commission Response:

The Commission agrees that discovery by deposition should be limited to matters reserved for formal hearings and thus, the rule provides for traditional discovery, including depositions, only in the setting of formal hearings such as those covered by Subparts G and J. Regarding the discovery deposition of experts, the Commission believes proposed § 2.706 contains the necessary provisions regarding the taking of depositions. The commenter has provided no basis for amending the section. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

Discovery against the NRC staff should be permitted in same manner as other parties. (1158eee1).

Commission Response:

The Commission disagrees. Due to the nature of the staff's work, the Commission continues to support the rule as proposed wherein discovery against NRC staff is addressed in proposed § 2.709. Additionally, the Commission notes that § 2.709 is in accordance with the Commission's *Policy on the Conduct of Adjudicatory Proceedings*, (63 FR 41872, August 5, 1998). Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

In the proposed § 2.709(d)(4)(e), in the place of "reasonably obtainable from another source" substitute "readily obtainable from another source." (1158eee2)

Commission Response:

The commenter has offered no basis why "readily obtainable" enhances the clarity of the regulation as compared with "reasonably obtainable." Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The party opposing a motion for summary disposition should have 30 days to respond, not 20. (1158fff1)

Commission Response:

The commenter provided no basis suggesting that 20 days is insufficient time to respond to a motion for summary disposition. The Commission, in this rulemaking, is seeking to increase the efficiency and effectiveness of the adjudicatory process and thus, is attempting to limit the delays caused by motions for summary disposition. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The summary disposition procedure should never be used to grant the issuance of a permit. The Commission should always make an independent determination as to whether such issuance is appropriate. (1158fff2)

Commission Response:

If by "permit" the commenter means a construction permit for a utilization or production facility, § 2.710(d)(2) specifically provides that summary disposition motions may not be used to determine whether the permit should be issued. This limitation is based upon the requirement in Section 189.a.(1)(A) of the AEA requiring a hearing on a construction permit for a utilization or production facility. For all other proceedings, there is no requirement for a hearing. Thus, for all other permits, there is no reason why the Commission - as opposed to the presiding officer - must make the decision to issue the permit and why it could not be accomplished through a decision on a summary disposition motion. For these reasons, the Commission declines to adopt the commenter's suggestion.

Comment:

Cross-examination should be limited to those matters about intent, credibility, and claims regarding specific past occurrences, and need not be retained by Subpart L (1075k).

Commission Response:

The Commission agrees that cross-examination is most effective for resolution of: (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter. However, the Commission believes that the presiding officer is in the best position to determine when and if cross-examination is necessary for the development of an adequate record in a given proceeding under Subpart L. Thus, the rule provides for the presiding officer in Subpart L proceedings to allow cross-examination by the parties if he or she determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision. However, in response to other comments expressing general concern about uncontrolled cross-examination (not limited to Subpart L) and to ensure that any cross-examination permitted by the presiding officer is appropriately focused and does not unduly delay the hearing, the Commission has added a requirement in section 2.1204 (consistent with

section 2.711) requiring the filing of cross-examination plans, and a requirement in section 2.703 requiring the filing of cross-examination plans where a party proposes to use experts for cross-examination.

Comment:

There is no evidence that the use of pre-filed testimony saves time, and this procedure denies the finder of fact the opportunity to observe the demeanor of the witness during a live direct examination and by its nature results in "canned" testimony. If pre-filed testimony is used, it should be provided to the opposing parties 30 days in advance, not 15. (1158ggg1)

Commission Response:

The Commission disagrees with the commenter's suggestion. If the presiding officer determines that observing the demeanor of a witness is helpful in any given proceeding, the proposed regulations provide for that discretion. The Commission believes that providing the testimony to the opposing party at least 15 days before the hearing is a sufficient amount of time. The 15-day prefiling requirement has long been a part of the NRC's rules of practice, and the commenter has offered no basis in support of a different time frame. Thus, the Commission finds no basis to amend the proposed regulation.

Comment:

It is unduly burdensome, and exalts form over substance, to require that an original and two copies of a document be offered to the tribunal as a predicate for admissibility as required in proposed § 2.711(h). Presumably the NRC has photocopying capability. (1158ggg2)

Commission Response:

This section maintains the longstanding requirement for paper copies in order to provide for timely handling, docketing and internal distribution of documents submitted to the NRC. Electronic filing without additional paper copies is not currently acceptable due to the lack of written signature. The NRC is currently addressing the issue of electronic filing in a separate rulemaking effort. Thus, the Commission finds no basis to amend the regulation at this time.

Comment:

The party opposing the permit or other NRC action should have 30 days, not just 10 as provided in proposed § 2.712, to file proposed findings after the proponent has filed its proposed findings. (1158hhh)

Commission Response:

The Commission believes that the timelines provided in the rule are sufficient. The party who has the burden of proof must file proposed findings of fact and conclusions of law, and briefs and a proposed form of order or decision within 30 days after the record is closed. Other parties then must file the same documents within 40 days after the record is closed. Because a

large portion of the findings of fact and conclusions of law, and briefs and proposed order are based upon the record, the parties should have ample time to comply. Thus, the Commission declines to adopt the commenter's suggestion.

Comment:

ADAMS problems need to be solved or else § 2.1203 will not make the documents readily available, hence the prohibition of discovery will mean that intervenors do not have access to any document during the evidentiary presentation in the hearing. It must be clarified that before any intervenor is required to make an evidentiary presentation, the hearing file must be complete. This means that any safety evaluation, environmental assessment, environmental impact statement, or other significant licensing document has been placed in the hearing file with a reasonable amount of time available to the intervenor to obtain, review, and obtain expert review of that material. (1158kkk3)

Commission Response:

The Commission continues to support the regulation as proposed. Under Subpart L, the NRC staff is required to assemble the hearing file containing the information specified in the regulations, and to make the hearing file available to all parties, either by service of hard copies or by making the file available at the NRC web site. Moreover, contrary to the commenter's suggestion that there is no discovery, the initial disclosure provisions in Subpart C are also applicable to Subpart L.

Comment:

The times allotted in proposed § 2.1208(a)(2)-(4) are patently unreasonable; time must be provided following rebuttal for written questions rather than filed with rebuttal testimony. (1158kkk6)

Commission Response:

The Commission disagrees with the commenter's assertions that the times allotted for filing written responses, rebuttals, and proposed question are unreasonable. Proposed § 2.1208 provides for a tiered approach to written submissions. The parties are always provided with a specified period of time in which to propose questions based upon the latest round of filings. *See* § 2.1208(a). Such an approach provides ample opportunity to develop and file proposed questions regarding the latest submissions.

Comment:

Proposed § 2.1209 is unnecessary and should be deleted in all informal cases. § 2.1208(a)(4) provides for written concluding statements of position on the contentions, to be filed following service of written responses and rebuttal testimony. These concluding statements with other filings and transcript should suffice for the presiding officer to issue a decision. Additionally,

the Commission should add a provision similar to § 2.1406(a) allowing a presiding officer in Subpart L to issue a bench decision where practicable. (1073w)

Commission Response:

The Commission continues to support the requirement in § 2.1209 of requiring parties to submit written post-hearing proposed findings of fact and conclusions of law on the contentions addressed in the oral hearing. The Commission believes, due to the nature of issues raised in Subpart L proceedings, that such written proposed findings can substantially assist the presiding officer. The Commission disagrees with the commenter's second proposal instead supporting the idea that bench rulings should be reserved for the types of issues presented in a Subpart N procedure, but not those involved in Subpart L. Therefore, the Commission declines to adopt the commenter's suggestions.

Comment:

Proposed § 2.1331 needs a provision, similar to § 2.1117, to make it clear that to the extent not specifically addressed in M, the general hearing procedures in C and simplified procedures in L, apply to hearings on license transfer applications under M. (1159kkk)

Commission Response:

The Commission disagrees inasmuch as the commenter's suggestion runs contrary to the purpose of Subpart M. Section 2.1304 provides, as the Commission intends, that the procedures in Subpart M constitute the exclusive basis for hearings on license transfer applications. Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

Allowing cross examination at informal hearings such as Subpart N risks dilatory questions, thus, the presiding officer ought to factor in explicitly the potential hearing delay resulting from the cross-examination. (1159lll)

Commission Response:

The Commission believes that proposed § 2.1402(c) provides sufficient discretion to the presiding officer to determine, based upon the specifics of an admitted contention, whether or not cross-examination is appropriate. Where the presiding officer determines that cross-examination is needed to develop an adequate record, the regulations require that cross-examination plans be submitted so that the presiding officer can appropriately control the cross-examination.

Comment:

In proposed § 2.1404(a), the presiding officer should hold a conference 60 days after an order granting a hearing request, 40 days is too soon (1159mmm)

Commission Response:

The Commission disagrees with the commenter's suggestion. The proposed time of 40 days should provide ample time for parties to prepare for a pre-hearing conference. Moreover, the presiding officer is provided with the discretion to alter time frames if necessary for the orderly and effective conduct of the proceeding. *See* §2.1402(a)(7). Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

In proposed § 2.1405(f), written briefs and memoranda should be permitted as a matter of course. (1158lll2)

Commission Response:

The Commission disagrees. To allow written pleadings as a matter of course in Subpart N proceedings would eliminate the expeditious nature of the proceeding. Thus, the Commission continues to support the proposed rule, wherein written pleadings are only allowed where provided for elsewhere in this subpart or where the presiding officer or Commission determines such pleadings necessary due to the nature of the issue.

Comment:

It is a bad policy to have bench rulings allowed (1158rr).

Commission Response:

The Commission believes that due to the nature of Subpart N's expedited hearing procedures, it is useful and necessary for the presiding officer to issue bench rulings where practicable. These must be followed by written memorializations. Thus, the Commission continues to support the rule as proposed.

Comment:

In proposed § 51.109(a)(2) in Appendix D, at least 60 days are needed to file contentions on adoption of the DOE EIS, given the complex scientific and technical issues involved, and the length of the environmental documents and the administrative record. Contentions should not in all cases be required to be accompanied by affidavits, since the environmental documents may be flawed on their face--- for example, by containing inconsistent, contradictory or patently unreasonable conclusions. (1158mmm1)

Commission Response:

The Commission believes that 30 days is sufficient time for a party that contends it is not practicable to adopt the DOE environmental impact statement, as it may have been

supplemented, to file a contention to that effect. Thus, the Commission declines to accept the commenter's suggestion.

Comment:

Delete the word "undue" from the phrase "undue risk" in proposed § 52.21 in Appendix D. (1158mmm2)

Commission Response:

The commenter provided no reason for deleting the word "undue" from the rule. The regulation accurately captures the appropriate criteria to be considered by the presiding officer. Therefore, the Commission declines to adopt the commenter's suggestion.

Comment:

Throughout the regulations, whenever factors and objectives are outlined or certain standards are adopted (e.g. sections 2.309(c)(1)(iii), 2.312(b), 2.329(b), 2.332(c), 2.339(I), 2.340(b)(4), 2.340(f)(1), 2.341(e), 2.402(b), 2.705(g)((2)(iii), 2.1213(d)), they should include, where applicable, the relative resources available to the parties, best available science; a paramount concern for the public health and safety; the availability of convenient and affordable public transportation to the place of the hearing; and fundamental fairness. (1158u3, 1158cc2,1158ll2, 1158ll6, 1158oo4, 1158ss3, 1158ss6, 1158tt2, 1158xx3, 1158ccc3, 1158kkk8)

Commission Response:

The Commission believes that the objectives, factors and/or standards referenced in the comment are appropriate and comprehensive but are referenced or implicit in the context of Part 2. Moreover the provisions usually provide for significant discretion by the Commission, presiding officer, or board, when determining the appropriate considerations and the weight thereof in any particular situation. Accordingly, the Commission declines to adopt the commenter's suggestion.

Comment:

The following sections contain typographical errors that require correction: §§ 2.304(f); 2.310(e); 2.340(d), 2.327(c); 2.334(a); 2.704(b)(3), and 2.706(b)(1). (1159t, 1159cc, 1158kk3, 1159qq, 1158ll8; 1158bbb4, 1159ggg, 1158ddd2)

Commission Response:

These typographical errors have been corrected in the final version of the rule.