January 3, 1991 **RULEMAKING ISSUE** SECY-91-001

(Affirmation)

For: The Commissioners

From: William C. Parler
General Counsel

Subject: ADOPTION OF FINAL RULE CONTAINING REVISIONS TO THE COMMISSION'S RULES OF PRACTICE IN ORDER TO FURTHER STREAMLINE THE HIGH-LEVEL WASTE LICENSING PROCESS

Purpose: To seek Commission approval and adoption of a final rule containing amendments to the Commission's Rules of Practice in 10 CFR Part 2 Subpart J in order to streamline the high-level waste (HLW) licensing process.

Summary: The Commission issued a Notice of Proposed Rulemaking proposing revisions to the Rules of Practice in 10 CFR Part 2 Subpart J. After considering and responding to the public comments and making minor clarifying changes to the proposed rule, the General Counsel recommends that the Commission adopt the final rule.

The final rule establishes a new standard for the admission of initial contentions, defines late contentions as any contentions filed after initial contentions were submitted, adds failure to participate in the LSS as a factor to be considered in a petition for intervention, establishes a compulsory hearing schedule, and eliminates sua sponte review by the Commission's adjudicatory boards. The final rule also clarifies that the LSS Administrator's written report and periodic evaluations of the Department of Energy's (DOE) compliance with the LSS requirements will be circulated to potential parties who must timely file any objections they may have to the Administrator's evaluations or report or risk waiving such objections. In addition, the rule clarifies the Commission's authority to designate a Pre-License Application Presiding Officer to resolve disputes during the period prior to the receipt of the formal application for the construction of the high-level waste repository and that the Commission will specify the

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NOTE: TO BE MADE PUBLICLY AVAILABLE WHEN THE FINAL SRM IS MADE AVAILABLE

jurisdiction of the Pre-License Application Presiding Officer in designating the officer. Several hearing management issues which will be handled in the Notice of Hearing for the HLW proceeding are discussed.

Background: In a February 27, 1989 Staff Requirements Memorandum, the Commission requested that the General Counsel evaluate the need for additional modifications to the procedural provisions for the high-level waste (HLW) licensing proceeding. This request was prompted by the discussion of the status of the procedural framework for the HLW licensing proceeding in SECY-89-23. The final rule on the Licensing Support System (LSS), promulgated on April 24, 1989 (54 Fed. Reg. 14925), added a new Subpart J to 10 CFR Part 2, which establishes the basic procedures for the HLW licensing proceeding, including the use of the LSS in the proceeding.

In evaluating the need for revisions to these regulations we consulted with Commission staff, the adjudicatory panels, and the technical staff, to identify the full range of procedural reforms for consideration for inclusion in the notice of proposed rulemaking. The notice of proposed rulemaking, forwarded to the Commission in SECY-89-186 on June 20, 1989, also incorporated the procedural revisions contained in the draft final rule on regulatory reform which adopted changes to Part 2 Subpart G (SECY-89-133).

The Commission approved the recommendations in SECY-89-186 subject to a Staff Requirements Memorandum dated August 1, 1989. The Commission published a notice of proposed rulemaking in the Federal Register on September 26, 1989, stating that it was proposing to amend its Rules of Practice for the HLW licensing proceeding and inviting public comment (54 Fed. Reg. 39387). The specific revisions proposed involved a new standard for initial contentions, a new definition of "late contentions", a requirement of direct testimony on contentions, a compulsory hearing schedule, elimination of sua sponte review by adjudicatory boards, the parties' ability to receive and file timely comment upon the LSS Administrator's evaluations and report on DOE's compliance with the LSS requirements, and the Commission's ability to appoint and specify the jurisdiction of the pre-license application presiding officer. The Commission also proposed some issues for inclusion in the Notice of Hearing. The comment period expired November 27, 1989.

Discussion: The Commission received six comments including comments from Florida Power & Light Company (FPL), the National Congress of American Indians (NCAI), Malachy Murphy for the State of Nevada (Nevada), the Department of Energy (DOE), the Edison Electric Institute/Utility Nuclear Waste and Transportation Program (EEI/UWASTE), and jointly from the Environmental

Defense Fund, Friends of the Earth, and the National Audubon Society (environmental groups).

Although the proposed rules were generally supported by three commenters, three others protested the initiation of these revisions to the procedural rules agreed to by the Negotiating Committee less than six months after adoption of the rules.

The major modifications to the proposed rule that are recommended for the final rule concern direct testimony on contentions and the requirement of affidavits in opposition to motions for summary disposition supported by affidavits.

Final Rules:

Standards for initial contentions. The threshold for initial contentions is being raised consistent with the standard now incorporated in Subpart G, section 2.714. The proponent of a contention must show that a genuine dispute exists on a material issue of law or fact. Only minor editorial changes have been made to the proposed rule and section 2.1014(c)(5) has been added to clarify that the Presiding Officer, in determining whether a genuine dispute exists on a material issue of law or fact, should consider as a dispositive factor whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

Late-filed contentions. Section 2.1014(a)(4) requires that any contentions proposed after the initial contentions have been filed must satisfy the higher standard for admission of initial contentions that is contained in 2.1014(a)(1) and in addition must demonstrate that the contention raises a new material issue related to the performance appraisal required by 10 CFR §§ 60.112 and 60.113. The extensive interaction of the participants in the LSS with early access to documents in the pre-application phase should substantially reduce the need for late filed contentions. Early identification of the genuine issues in controversy should also contribute to an efficient hearing process. No changes have been made to the proposed rule.

Participation in the LSS. Section 2.1014(c)(4) adds the failure of the petitioner to participate in the LSS as a factor to be considered in ruling on petitions to intervene. No changes have been made to the proposed rule.

Direct testimony on contentions; summary disposition. Proposed new section 2.1024 would have required a party that sponsored a contention must present direct testimony on the contention. In section 2.1025(a), the requirement for a direct case would have applied to replies to motions for summary disposition as well as to contentions. Based upon

the comments received and further consideration, we are recommending that the Commission not adopt these proposed rules. Rather we are proposing that the Commission preserve the status quo and allow intervenors the option to present their cases and opposition to motions for summary disposition in the manner that they judge to be the most effective.

The reason for this position on a direct case on contentions is that the Administrative Procedure Act entitles a party "to conduct such cross-examination as may be necessary for a full and true disclosure of the facts." 5 U.S.C. §556(d). If the requirement for a direct case on contentions were adopted, an intervenor with contentions already admitted which could establish its case on the basis of cross-examination or documents already in the record would be denied its right to cross-examine unless it went to the additional expense and expansion of the record to introduce direct testimony. No overriding justification for this new requirement had been advanced.

The recommendation against adoption of the requirement for an affidavit for opposition of motion for summary disposition is based on the fact that the proponent of a motion for summary disposition has the option whether to provide affidavits in support of its motion. The opponent should also have the decision of how to oppose the motion effectively and, in particular, should have the option of attacking the legal sufficiency of the proponent's motion and affidavits without submitting affidavits. Again, no overriding justification for the new requirement had been offered.

New section 2.1025 provides that motions for summary disposition may be filed at any time, however the Presiding Officer will have liberal discretion to summarily dismiss or hold in abeyance motions filed shortly before or during the hearing if considering the motion would divert substantial resources from the hearing. There have been minor deletions of language patterned after section 2.749 referring to availability of discovery methods and inappropriate in this section.

Compulsory hearing schedule. The schedule which the Commission set forth in the Supplementary Information of the LSS rule [54 Fed. Reg. 14924, 14939] has been made compulsory with some flexibility to the Presiding Officer to address mitigating circumstances. The Presiding Officer may grant up to 15 day extensions to the parties for individual milestones. A party seeking an extension of more than 15 days must file the request for extension no later than 5 days before the scheduled date of the milestone. The

Presiding Officer's extension granted to a party for more than 15 days would be referred to the Commission. If the Commission did not act to disapprove the extension within 10 days, the Presiding Officer's extension would be effective. The final rule clarifies that if the Commission disapproves the requested extension, the due date will be 5 days after the date of the Commission's disapproval action.

The Presiding Officer would have a grace period of thirty days to accomplish the milestone. If the Presiding Officer anticipates that a milestone will be exceeded by more than thirty days, the Presiding Officer must notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay. Several milestones related to motions for summary disposition have been amended to be consistent with amendments section 2.1025. Section 2.1022(a)(1), which had been deleted in the proposed rule, has been restored. Amended contentions, if any are submitted, are an appropriate topic for consideration at the second prehearing conference.

Sua Sponte. Section 2.1027 specifically prohibits the Presiding Officer from raising issues that have not been placed in controversy by the parties to the proceeding. The wording of this section has been amended to be consistent with terminology for adjudicatory entities. Also, the applicability of this section to the Appeal Board has been deleted, as the Commission has decided to abolish the Atomic Safety and Licensing Appeal Board Panel. All references to the Appeal Board have been deleted throughout this subpart and references to the Commission have been substituted appropriately.

Subpoenas. A party could subpoena a witness of applicant or the NRC staff, in effect calling a "hostile" witness. However, named NRC personnel may not be subpoenaed unless there are exceptional circumstances, such as a case in which a named NRC employee has direct knowledge of a material fact not known to the NRC witnesses made available by the EDO, and the testimony sought is not reasonably available from another source. The proposed language regarding subpoenas for NRC personnel has been moved from the proposed rule 2.720(h)(2)(v) to existing section 2.1019(j) in Subpart J. This required only the addition of the phrase "the testimony sought is not reasonable attainable from another source by any party".

Clarifications to LSS Regulations. Section 2.1003(h) clarifies that both the periodic evaluations of DOE compliance and the written report on DOE's compliance with the LSS requirements under sections 2.1003(h)(2)(i) and (ii)

will be circulated to potential parties for comments due within 30 days of issuance of the evaluation or report. Modifications to section 2.1010 clarify that the Commission may designate one or more members of the Commission or an atomic safety and licensing board or a named officer to serve as the Pre-License Presiding Officer, whose jurisdiction will be specified at the time of designation. This provision is parallel to section 2.704 which applies during the licensing proceeding. For clarification, new definitions of "Pre-License Application Presiding Officer" and "Presiding Officer" have been included in section 2.1001. These terms have been substituted appropriately throughout Subpart J for consistency.

Notice of Hearing. Several issues pertinent to the management of the HLW hearing that will be announced in the Notice of Hearing have been discussed with public comments that have been left for resolution until the time of the issuance of the Notice of Hearing. I would recommend that the staff begin preparation for the Notice of Hearing at least one year prior to the anticipated time of filing of the DOE license application.

Recommendation: That the Commission:

1. Approve publication in the Federal Register of the final rule adopting amendments to Part 2 Subpart J enclosed here (Attachment A) which clarifies procedures for the HLW licensing proceeding.

2. Certify that this rule will not have any significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(a).

3. Note:

   a. This clarification to the regulations is the type of action described in categorical exclusions in 10 CFR § 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

   b. Appropriate Congressional Committees will be informed by a letter similar to Attachment B.

   c. The final rule contains no information collection requirements subject to the Paperwork Reduction Act of 1980.

   d. The Office of Public Affairs has determined that it is necessary to issue a public announcement in connection with this final rule.

e. If approved, this rule would be effective 30 (thirty) days after publication in the Federal Register.

f. The provisions of 10 CFR § 50.109, the Backfit Rule, do not apply to this rulemaking because the regulations are not applicable to production and utilization facilities licensed under Part 50.

g. This paper has been coordinated with NMSS, the ASLBP, and the ASLAP. Their comments have been incorporated.

William C. Parler 12/31
William C. Parler
General Counsel

Attachments:
A. Draft Federal Register Notice
B. Draft Congressional Letter
C. Public Comments

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Wednesday, January 16, 1991.

Commission Staff Office comments, if any, should be submitted to the Commissioners NET Wednesday, January 9, 1991, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of January 14, 1991. Please refer to the appropriate Weekly Commission Schedule when published, for a specific date and time.

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ATTACHMENT A

10 CFR Part 2

RIN 3150-AD27

# Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

AGENCY: Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission is amending its Rules of Practice for the licensing of high-level radioactive waste at a geologic repository (HLW proceeding). The revised rules will enhance the Commission's ability to comply with the schedule for the Commission's decision on the construction authorization for the repository contained in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, (NWPA), while providing for the thorough technical review of the license application and the equitable treatment of the parties to the hearing. For the HLW proceeding, the rules establish a new standard for the admission of initial contentions, define "late contentions" as any contention proposed after the initial contentions are submitted, establish a compulsory hearing schedule, and specify that there will be no sua sponte review by the Commission's adjudicatory boards. The new rules also clarify that the LSS Administrator's written report and periodic evaluations of the Department of Energy's (DOE) compliance with the LSS requirements will be circulated to potential parties who must timely file any objections they may have to the Administrator's evaluations or report or risk waiving such

objections. In addition, the rules clarify the Commission's authority to designate a Pre-License Application Presiding Officer to resolve disputes during the period prior to the receipt of the formal application for the construction of the high-level waste repository. The new rules indicate that the Commission will specify the jurisdiction of the pre-License Application Presiding Officer in designating the officer pursuant to these amendments.

EFFECTIVE DATE: [30 days from date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Kathryn L. Winsberg, Senior Attorney, or Stuart A. Treby, Assistant General Counsel, Rulemaking and Fuel Cycle Division, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone (301) 492-1636.

SUPPLEMENTARY INFORMATION

I. Background.

In adopting the final rule on the Licensing Support System (LSS) promulgated on April 14, 1989 (54 Fed. Reg. 14925), the Commission added a new Subpart J to 10 CFR Part 2 which establishes the basic procedures for the HLW licensing proceeding including the use of the LSS in the proceeding. These rules were primarily the result of a negotiated rulemaking proceeding conducted with the participation of DOE and other parties potentially affected by the HLW licensing proceeding. However, when the Commission promulgated these rules, the Commission stated that it might be necessary to make further

changes to these rules in order to streamline the licensing process. As the Commission noted in the Supplementary Information--

> ...the Commission is committed to do everything it can to streamline its licensing process and at the same time conduct a thorough safety review of the Department of Energy's application to construct a high-level waste repository. The negotiators to this rulemaking have made a number of improvements to our existing procedures. However, more improvements may be necessary if the Commission is to meet the tight licensing deadline established by the Nuclear Waste Policy Act of 1982, as amended. By publishing this rule, the Commission is not ruling out further changes to the rules contained in the negotiated rulemaking. 54 Fed. Reg. 14925, 14930 (1989).

After further study, on September 26, 1989, the Commission published a notice of proposed rulemaking stating that it was proposing to amend its Rules of Practice for the HLW licensing proceeding and inviting public comment (54 Fed. Reg. 39387). The specific revisions proposed involved a new standard for initial contentions, a new definition of "late contentions", a requirement of direct testimony on contentions, a compulsory hearing schedule, elimination of sua sponte review by adjudicatory boards, the potential parties' rights to receive and file timely comment upon the LSS Administrator's evaluations and written report on DOE's compliance with the LSS requirements, and the Commission's ability to appoint and specify the jurisdiction of the Pre-License Application Presiding Officer. The Commission also proposed some issues for inclusion in the Notice of Hearing. The comment period expired November 27, 1989. The Commission received six comments including comments from Florida Power & Light Company (FPL), the National Congress of American Indians (NCAI), Malachy Murphy for the State of Nevada (Nevada), the Department of Energy (DOE), the Edison Electric Institute/Utility Nuclear Waste and Transportation Program (EEI/UWASTE), and jointly from the

Environmental Defense Fund, Friends of the Earth, and the National Audubon Society (environmental groups).

II. Summary of Comments.

A. General.

Although the proposed revisions were generally supported by DOE, EEI/UWASTE, and FPL, the three other commenters raised strong general objections to the Commission's consideration of revisions to Subpart J which require some discussion. Nevada, NCAI, and the environmental groups protest the initiation of this rulemaking proceeding to adopt revisions to the procedural rules agreed to by the LSS Negotiating Committee less than six months after their adoption. These commenters assert that their participation in the give and take of the negotiations was based upon a good faith effort to achieve consensus and that the Commission's attempted revision of the recently adopted rules reflects bad faith in the negotiating process. The commenters state that the future integrity of the negotiated rulemaking process and their own trust and future willingness to participate are threatened by the Commission's actions.

In announcing the possible formation of an advisory committee for negotiated rulemaking [51 Fed. Reg. 45338 (1986)], and at every subsequent

stage of the negotiated rulemaking process,[1] the Commission has clearly stated that it retains the responsibility for formulating the final rules for the HLW licensing proceeding. The Commission has the ultimate responsibility to draft regulations to implement statutory provisions in its purview. Because of the novelty and technical complexity of the issues involved in the HLW licensing proceeding, as well as the strict time deadlines imposed in section 114(d) of the NWPA, the Commission sought to formulate new efficient and streamlined procedures with the assistance of those parties which would probably be affected by the HLW licensing proceeding.

In the notice of establishment of the Negotiating Committee, the Commission announced that any consensus of the Negotiating Committee would only be the basis for the agency's issuance of a proposed rule for notice and comment. "The consensus is not the basis per se for the final rule which the agency will develop after traditional notice and comment procedures." 52 Fed. Reg. 29024 (1987).

According to the committee's protocol, "consensus" was defined as no dissenting vote by any committee member on a matter before the committee for approval. The Negotiating Committee did not ultimately reach consensus due to the dissenting vote of the industry coalition member. Although the industry coalition dissented in the final vote, it participated fully in the drafting of the substantive parts of the agreement and dissented in the end over the

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[1] See Notice of Proposed Rulemaking, 53 Fed. Reg. 44411, 44413 (1988) regarding the opportunity for other participants to comment and respond to any criticism or potential revision of the text after the Commission considered comments in the proceeding.

broader question of whether the LSS was a cost-effective method to achieve the goal of streamlining the licensing process. Therefore, in spite of the lack of consensus, the Commission published a notice of proposed rulemaking inviting public comment, based on the product of the Negotiating Committee's efforts. 53 Fed. Reg. 44411 (1988). The Commission received comments and duly adopted a final rule. 54 Fed. Reg. 14925 (1989).

Thus the intensive work of the Negotiating Committee resulted in the enactment of Part 2 Subpart J regulations to facilitate the creation of the LSS. These regulations reflect significant new efficiency in the procedures applicable to the HLW licensing proceeding. However, the Commission must fulfill its ultimate responsibility to insure that its procedural rules will facilitate compliance with its statutory responsibilities under the NWPA.

In the time subsequent to the adoption of the final rules for Subpart J, two events intervened. First, revisions to the Rules of Practice for domestic licensing proceedings, Part 2 Subpart G, were adopted on August 11, 1989 [54 Fed. Reg. 33168, aff'd, Union of Concerned Scientists v. NRC, No. 89-1617 (D.C. Cir., November 30, 1990)]. Second, an internal review was conducted to consider possible improvements to the procedural rules in Subpart J. In the Statement of Considerations to the Subpart J rules, the Commission had explicitly stated the intention to evaluate further the Subpart J rules in general [54 Fed. Reg. 14925, 14930 (1989)], and specifically to revisit the issue of the threshold for initial contentions in light of the later resolution of the then pending consideration of changes to Subpart G regulations (id. at 14931). The amendments that are the subject of this

rulemaking proceeding were either proposed to bring the Subpart J regulations into conformity with Subpart G regulations which apply in other licensing proceedings or were proposed to enhance further the Commission's ability to meet deadlines and conduct a fair and effective HLW licensing proceeding.

The mechanism of public rulemaking with notice and comment pursuant to the Administrative Procedure Act, is a necessary element of the Commission's powers. In addition to the negotiated rulemaking which allowed advisory input by potentially affected parties, this rulemaking procedure is contributing substantially to the Commission's ability to fulfill effectively and efficiently its responsibilities in the contemplated novel and technically complex HLW licensing proceeding.

B. Comments on Specific Proposals with Responses.

The sections which follow contain a description of the amendments, a summary of the comments received and an NRC response.

1. Standards for initial contentions (§2.1014).

The amendments to section 2.1014 incorporate a similar standard for admission of initial contentions to that now incorporated in Subpart G, section 2.714, adopted in the final rule on regulatory reform. 54 Fed. Reg. 33168 (1989). These amendments raise the threshold for the admission of contentions to require the proponent of the contention to supply information showing the existence of a genuine dispute with the applicant on an issue of

law or fact. The contention must be supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware, which will be relied upon to establish the facts or expert opinion. Absent a showing that there is a genuine dispute on a material issue of fact or law, the contention will not be admitted. Admission of a contention may also be refused if it appears that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief. Finally, the amendments would provide that a contention raising only an issue of law will not be admitted for resolution in an evidentiary hearing but shall be decided on the basis of briefs and any oral argument that may be held.

While EEI/UWASTE (FPL also supports the specific comments of EEI/UWASTE) supports the Commission's discretion to conform the requirements for initial contentions to the requirements in Subpart G, the commenter states that the availability of the information in the LSS data base and of certain types of discovery during the pre-license application phase warrant a more substantial threshold for contentions. EEI/UWASTE suggests that, at a minimum, the Commission should require a proffer in affidavit or other evidentiary form to demonstrate that a genuine dispute exists concerning a material fact or law issue.

The Commission disagrees that a higher threshold is warranted for the admission of initial contentions. An intervenor should not be required to prove its case at the stage of the initial submission of contentions. This rule's requirement that sufficient information be presented to establish the

existence of a genuine dispute with the applicant on a material issue of fact or law allows the scope of the proceeding to be defined and advanced without prematurely eliminating legitimate contentions.

EEI/UWASTE suggests that the language in section 2.1014(a)(2)(iii)(D) should be improved. As proposed, the section states that in determining whether a genuine dispute exists, the Commission or the Presiding Officer "shall consider" whether the contention, if proven, would be of no consequence because it would not entitle the petitioner to relief. The commenter believes the language should mandate rejection of the contention.

The Commission considers that the clear implication of the language stating that the Commission or the Presiding Officer "shall" consider the factor of whether a petitioner would be entitled to relief is that this factor will be dispositive in deciding whether a genuine dispute exists. Therefore, the Commission does not believe that a revision is necessary. However, to clarify that this is factor which the Presiding Officer shall consider, a new section 2.1014(c)(5) has been added. Slightly revised language in section 2.1014(a)(2)(iii)(D) remains to advise the parties that this is a dispositive factor.

EEI/UWASTE also suggests a minor change in subsection 2.1014(a)(3) where the currently effective language refers to a failure of a petitioner to comply with "paragraphs (a)(2)(ii),(iii) and (iv) of this section". The amended version of this subsection refers only to paragraph (a)(2)(iii) of this section, although no changes are proposed to subsections 2.1014(a)(2)(ii) and

(iv). The commenter suggests that there does not appear to be any reason to delete the reference to these two paragraphs and that the reference should be reinstated.

The Commission agrees and is adopting a minor revision to the amended rule to restore the reference to subsection (a)(2)(ii). However, in connection with the amendments, several minor editorial changes are also necessary for clarity and parallel construction which slightly modify subsection (a)(2)(ii) and redesignate subsection (a)(2)(iv). The proposed rule (no changes were proposed for subsections (a)(2)(i), (ii), and (iv)) read as follows:

[§2.1014(a)] (2) The petition shall set forth with particularity--

(i) The interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (c) of this section;

(ii) A list of the contentions that petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity;

(iii) With respect to each contention:

(A) A specific statement of the issue of law or fact, to be raised or controverted.

(B) A brief explanation of the bases of the contention.

(C) A concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(D) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to specific documentary material that

provides a basis for the contention, or if the petitioner believes that any documentary material fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. In determining whether a genuine dispute exists on a material issue of law or fact, the Commission or the presiding officer shall consider whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

(iv) As to each contention, the specific regulatory or statutory requirement to which the contention is relevant.

In the final rule, the words "and the bases for each contention set forth with reasonable specificity" have been eliminated from subsection (a)(2)(ii), as this subject is now covered in subsection (a)(2)(iii)(B). The words "As to each contention" have been eliminated from subsection (a)(2)(iv) and the remainder of this provision has been redesignated subsection 2.1014(a)(2)(iii)(E) to maintain parallel construction in this section.

NCAI objects that the amended standard for initial contentions (and the Subpart G revisions with which it is consistent) is unwarranted and violative of the Atomic Energy Act section 189(a) hearing right and due process. The commenter states that only a well financed intervenor will be able to get any contentions admitted because the high initial standard for admission of contentions assumes extensive access to the LSS which may not be possible for many parties on a limited budget. Therefore it may be impossible for a small tribe or organization to participate at all.

Nevada also comments that the requirements for initial contentions of intervenors are more rigorous than the requirements imposed upon the applicant, and that this criteria is too burdensome for members of the public or groups of citizens who may wish to intervene.

The Commission disagrees with the assertions that the proposed amendments are unduly burdensome and that it will be virtually impossible for persons who wish to participate to have any contentions admitted. Under these rules, an intervenor is not required to make its full case at this stage of the proceeding, however, the intervenor must read the license application and indicate that a specific genuine dispute exists as to a material issue of law or fact.

In addition, sections 116 and 118 of the NWPA provide for financial assistance to affected Indian tribes, to the State of Nevada, and to any affected unit of local government for participation in the HLW repository licensing process. The availability of these grants should mitigate the financial burden of participation for affected parties.

The Commission has addressed, rebutted, and prevailed on judicial challenge[2] against the arguments that this higher threshold for contentions is inconsistent with the hearing right in section 189a of the Atomic Energy Act of 1954, as amended. See the Commission's more detailed discussion regarding the adoption of the same higher threshold for contentions in other domestic licensing proceedings in Subpart G, section 2.714 adopted at 54 Fed. Reg. 33168 (1989) and the Court's affirmance referenced above.

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[2] Union of Concerned Scientists v. NRC, No. 89-1617 (D.C. Cir., November 30, 1990).

2. Late-filed contentions (§2.1014).

The rule revises section 2.1014 to require that any contentions proposed after the initial contentions have been filed must satisfy the higher standard for admission that is now set forth in subsection 2.1014(a)(4) of Subpart J. In addition to the criteria for initial contentions set forth at subsection 2.1014(a)(1), a proponent of a late-filed contention has to demonstrate that the contention addresses a significant safety or environmental issue, or that the contention raises a material issue related to the performance evaluation required by 10 CFR §§ 60.112 and 60.113. The standard for late contentions remains the same as the existing rule; however, the amended rule applies that standard to any contention filed after the initial contentions are submitted.

In evaluating whether the contention raises "significant" or "material" issues, factors such as whether a materially different result in the proceeding might be likely if the contention were to be admitted, or whether a modification in facility design or construction that substantially enhances the protection of public health and safety would result if the contention were to be admitted, should be considered.

EEI/UWASTE supports this change which applies the late-filed contentions standard to all contentions that are filed after initial contentions, including contentions based on information contained in the Staff Safety Evaluation Report (SER). The commenter maintains that the adequacy of the application is the issue, not the adequacy of the SER, therefore the issuance of the SER should not automatically constitute good cause for late

contentions. The commenter suggests further modification to require that a late-filed contention must address a "new" and "significant" issue. The commenter asserts the admission late in the process of contentions that raise insignificant issues or those that are not new will imperil the schedule set by the Commission.

The Commission responds that the criterion of significance is already included in this section in the requirement that a "significant safety or environmental issue is involved". The other criterion involved is a "material issue related to the performance evaluation anticipated by §§60.112 and 60.113". The Commission believes that the adjectives "significant" and "material" adequately restrict the admissibility of late-filed contentions and encourage the early identification of issues in controversy.

EEI/UWASTE also suggests that subsection 2.1014(a)(4) does not appear to incorporate the requirements of subsection 2.1014(a)(2)(ii)-(iv), although the commenter postulates that this must have been the intention of the Commission.

The commenter is correct that those sections are intended to be referenced but the amended section 2.1014(a)(4) does in fact incorporate the cited sections by reference to the "balancing of the factors specified in paragraph (a)(1) of this section." Paragraph (a)(1) requires "satisfying those [factors] set out in paragraphs (a)(2) and (c) of this section".

Nevada strongly objects that this amendment removes an element that was specifically agreed to by the Negotiating Committee, i.e. the forty day period

immediately following the publication of the SER when contentions might still be filed without being subjected to the higher standard for late-filed contentions. The commenter points out that this amendment will deprive the parties and the intervenors of the right to incorporate new issues raised by the SER.

The Commission responds that the extensive interaction in the pre-license application phase between NRC, DOE, and affected parties such as the State of Nevada, as well as the early availability of relevant documents through the LSS, should aid in the formulation of initial contentions. The need for late-filed contentions should be substantially reduced, yet, as described in the rule, significant and/or material issues will be admitted as late-filed contentions. The later in the proceeding that a contention is raised, the greater the burden will be to demonstrate its significance or materiality. The Commission is confident that the revision will contribute to an efficient hearing process.

3. Participation in the LSS (§2.1014).

New section 2.1014(c)(4) adds the failure of the petitioner to participate in the LSS as a factor to be considered by the Commission or the Presiding Officer in ruling on petitions to intervene. This amendment restores a form of a provision which the Negotiating Committee had proposed as a factor to be considered governing admission to the high level waste proceeding. The Commission removed the provision in the Subpart J rulemaking so that participation would not be given weight as a factor in favor of

intervention. However, the Commission does not wish to remove entirely the provision's beneficial effect of encouraging participation in the LSS. The Commission has therefore added the failure to participate in the LSS as a factor to be considered.

Nevada supports this amendment and affirms that this reflects the original intent of the Negotiating Committee.

4. Direct testimony on contentions (§2.1024); Summary disposition (§2.1025).

The proposed rule added a new section 2.1024 requiring that a party who sponsors a contention must present direct expert testimony to support that contention. The party's evidence may not consist solely of cross-examination of the license applicant's or the NRC staff's witnesses.

The requirement for a direct case also would be applied to replies in opposition to motions for summary disposition under a new section 2.1025. Summary disposition motions that are supported by evidentiary material in the form of affidavits would require an opposition to the summary disposition motion likewise to be supported by affidavits.

Motions for summary disposition may be filed at any time, however the Commission anticipates that motions for summary disposition will be filed early. The Presiding Officer will have liberal discretion to summarily dismiss or hold in abeyance motions filed shortly before the hearing commences

or during the hearing if considering the motion would divert substantial resources from the hearing.

Minor deletions of wording referring to discovery methods (patterned after section 2.749) contained in section 2.1025(b) and (c) of the proposed rule have been made in the final rule to tailor this section to the HLW licensing proceeding. The availability of the LSS allows a different framework of discovery for this proceeding.

NCAI objects to the changes in sections 2.1024 and 2.1025 on the ground that these provisions drastically raise the minimum costs of intervention by requiring intervenors to hire experts for both testimony and affidavits. NCAI asserts that intervenors who cannot afford to do more should continue to have the opportunity to make their case by cross-examination only. Nevada also objects that these provisions impose on intervenors additional expenses which might not be necessary if their presentation were based on cross-examination of applicant's or the NRC staff's witnesses, or argument from documents already in the record. Both NCAI and Nevada note that there appears to be no purpose for these requirements.

With regard to section 2.1024, which would require intervenors to present a direct case on contentions, the Commission has reconsidered the proposed rule with the benefit of public comments received, summarized above, and further consideration of the requirements of the Administrative Procedure Act. The Administrative Procedure Act provides that "A party is entitled ... to conduct such cross-examination as may be required for a full and true

disclosure of the facts." 5 U.S.C. § 556(d). Although in general the agency may place reasonable bounds upon the right to cross-examination to facilitate the efficient conduct of its hearings, in the circumstances presented here, the requirement of presenting a direct case on contentions could operate to deny the right of cross-examination to some intervenors. These intervenors would have been subject to the hurdles of stating a contention with enough specificity to get it admitted, responding to discovery requests, and withstanding potential motions for summary disposition. At that point, the matter in controversy should be sufficiently clear so that requiring presentation of a direct case by intervenors for the purpose of stating their assertions does not appear to be necessary. Further, the Commission agrees that those parties whose contentions have been admitted and who believe a full disclosure of the facts regarding such contentions could be established by cross-examination of the other parties or by reference to materials already in the record as provided by the Administrative Procedure Act, would be forced to go to the extra expense and unnecessary expansion of the record to present a direct case. On balance, the Commission does not find a justification for imposing this requirement. Proposed section 2.1024 will not be adopted.

The Commission has also reconsidered the requirement in proposed new section 2.1025 that an affidavit be submitted in opposition to a motion for summary disposition when the motion for summary disposition is supported by an affidavit. The proponent of the motion for summary disposition has the option whether or not to submit an affidavit in support of its motion. It seems reasonable that the opponent of the motion should have the same option whether to support its answer with an affidavit, based on its evaluation of how best

to prevail against the motion. In particular, the opponent should have the option of attacking the legal sufficiency of the proponent's motion and affidavits without submitting affidavits. This is consistent with the parallel provision in Subpart G of Part 2 which applies to other domestic licensing proceedings, section 2.749. The sentence requiring supporting affidavits has been removed and the clause ", with or without affidavits," has been restored to the preceding sentence to read: "Any party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion."

EEI/UWASTE supports the new section 2.1025 and further suggests additional changes to this section to require that answers supporting a motion for summary disposition also be accompanied by supporting affidavits.

Although it might be desirable for a party to submit an affidavit with an answer supporting a motion for summary disposition, the Commission does not view this as necessary.

5. Compulsory hearing schedule (§2.1026).

The amendment adds a new section 2.1026 and a new Appendix D to Subpart J which would incorporate a model hearing schedule substantially the same as that originally set forth in the Supplementary Information of the LSS rule [54 Fed. Reg. 14924, 14939 (1989)] and make the schedule mandatory with some flexibility for the Presiding Officer to handle special circumstances.

The Presiding Officer may grant extensions of up to 15 days of any individual milestone for the parties' filings. Except for "exceptional and unforeseen" circumstances, requests for extensions in excess of 15 days must be filed 5 days in advance of the deadline for which an extension is sought, and must be referred by the Presiding Officer to the Commission. If the Commission does not act to disapprove the extension within 10 days, the extension is effective. The final rule contains the additional clarification that if the Commission disapproves the requested extension, the date which was the subject of the extension request will be set for 5 days after the date of the Commission's disapproval action.

For Presiding Officer issuances, the Presiding Officer may delay up to 30 days beyond the date of the milestone set in the hearing schedule. If the Presiding Officer anticipates that a milestone will be exceeded by more than 30 days, the Presiding Officer shall notify the Commission at least 10 days before the scheduled date of the milestone and provide a justification for the delay.

DOE suggests that the Commission should provide a few examples of the "exceptional and unforeseen circumstances" which would be permissible bases for an exception from the rule in subsection 2.1026(b)(1) requiring requests for extensions of more than 15 days to be submitted at least 5 days in advance of the required filing deadline.

The Commission believes that it would not be particularly useful to provide examples of situations that would meet these criteria. By definition,

"exceptional" and "unforeseen" circumstances are difficult to predict in advance. It should be sufficient to note that the Commission expects that such exceptions would not be routine.

NCAI asserts that the adoption of a mandatory schedule at this point in time defies reality and belies the Commission's inability to anticipate what might occur during the licensing proceeding. Nevada finds it unreasonable for the Commission to commit to the three year time frame which the NRC's proposed Waste Confidence Decision "now finds to be unnecessary". Nevada asserts that this timetable may compromise the NRC's statutory obligation to protect the public health and safety against undue radiological risk and may also preclude effective public participation.

The Commission rejects the assertions that the schedule is unrealistic or inconsistent with its statutory obligations. This schedule was discussed by the Negotiating Committee with the participation of a full range of the parties that are likely to be affected by the HLW licensing proceeding. The schedule illustrates how the statutory deadline can be met. The Commission has reviewed the schedule and finds that it balances the need to comply with the statutory deadline with the need to insure effective public participation and a thorough technical review of the application. The Commission has determined that this schedule should be adhered to unless special circumstances dictate otherwise.

The Commission also rejects the assertion that the findings in the Commission's Waste Confidence Decision have any bearing on the NRC's existing

statutory duty, imposed in section 114(d) of the NWPA, to make a decision on the issuance of a construction authorization for the repository within 3 years after the submission of the DOE license application. The original Waste Confidence Proceeding resulted in a decision issued August 31, 1984. The purpose of the proceeding was "to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or offsite storage will be available and to determine whether radioactive waste can be safely stored onsite past the expiration of existing facilities licenses until offsite disposal or storage is available." 49 Fed. Reg. 34658 (1984). The Commission reviewed the Waste Confidence Decision and proposed revisions to two of its five findings. 54 Fed. Reg. 39767 (1989). After considering the public comments, the Commission approved the revision of the Waste Confidence Decision. 55 Fed. Reg. 38474 (1990). The revised Waste Confidence Decision takes into consideration the developments since the time of the original decision in 1984. Due to these events, there have been significant delays in the anticipated timetable for the construction of a geologic repository. See Reassessment of the Civilian Radioactive Waste Management Program, Report to Congress by the Secretary of Energy, November 29, 1989. Therefore there have been necessary changes in the Commission's estimate of the timing of the availability of the repository. None of these developments effectively mitigates the Commission's existing statutory obligation to comply with the deadlines set in the NWPA, once the application is filed.

EEI/UWASTE supports the hearing schedule provisions and finds that they represent an appropriate combination of firmness with flexibility. However

the commenter suggests that Appendix D and/or section 2.1026 should be modified to reflect the possibility that some of the actions in the hearing schedule may be taken earlier than indicated on the schedule. This might be accomplished, for instance, if the Hearing Licensing Board conducted portions of the proceeding in parallel, rather than in the linear fashion.

The Commission believes that the suggested modification to the rule or to Appendix D is not necessary because schedule provisions do not prevent some actions from being taken earlier. As indicated in the section concerning the Notice of Hearing, it is contemplated that subsidiary Boards may be appointed. Past licensing experience indicates that conducting parallel hearings before several Boards is an efficient way to meet a statutory deadline. This procedure may be used in the repository licensing proceeding.

The schedule is designed for realistic compliance with the 3 year deadline set for the NRC in section 114 of the NWPA. However, if at later time in the HLW licensing proceeding it appears desirable or necessary to amend the schedule to accommodate a particular plan for the proceeding, the Commission could then consider amending the schedule.

Several small editorial changes to the schedule and related rules have been made to the proposed versions. The amendment to section 2.1022 has been limited to changing the timing of the second pre-hearing conference to not later than thirty days after the Safety Evaluation Report. Paragraph 2.1022(a)(1), which was deleted in the proposed rule, has been restored. Although subject to the stricter standards in section 2.1014(a)(4), amended

contentions, if any are submitted, are an appropriate topic for consideration at the second prehearing conference.

Also, in Appendix D, the description of several milestones concerning "final motions for summary disposition" have been amended because they were based upon a prior version of section 2.1025. Section 2.1025 has been amended to allow motions for summary disposition to be filed at any time, therefore the milestones formerly set at days 660, 680, 700, 710, and 750 have been amended to reflect that these are the "last practicable" dates for motions for summary disposition. This wording has been chosen to emphasize that although motions for summary disposition may be filed at any time, after these dates the Presiding Officer will have liberal discretion under section 2.1025 to summarily dismiss or hold in abeyance any motion for summary disposition if considering the motion would divert substantial resources from the hearing.

6. Sua sponte (§2.1027).

The new rule specifically prohibits the Presiding Officer[3] from raising issues that have not been placed in controversy by the parties to the proceeding.

EEI/UWASTE asserts that The Commission is justified in withdrawing the

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[3] The proposed version of this rule also applied to the Appeal Board, however, the Commission has subsequently decided to abolish the Atomic Safety and Licensing Appeal Board Panel. Appeals to initial decisions will now be heard by the Commission. See Proposed Rulemaking Notice, Options and Procedures for Direct Commission Review of Licensing Board Decisions, 55 Fed. Reg. 42947 (October 24, 1990)

use of sua sponte authority in this particular proceeding. The commenter observes that four governmental entities will be scrutinizing the application (DOE, the State of Nevada, the NRC staff, and the Advisory Committee on Nuclear Waste) and that a fifth level of review is unnecessary.

Nevada objects that the new rule takes away a basic and essential attribute of judicial activity, the ability to recognize issues in a proceeding affecting public health and safety which are not raised by the litigating parties. NCAI and Nevada both assert that this amendment suggests that the Commission is elevating considerations of an efficient schedule over health and safety issues or scientific validity in the proceeding.

The Commission does not agree that the new rule takes away anything. The current regulations in 10 CFR Part 2, Subpart J, do not provide for sua sponte review by the Presiding Officer. The new provision merely clarifies that it is the Commission's specific intention not to grant this authority to the Presiding Officer in this proceeding.

The only existing provision which explicitly allows sua sponte review for specified matters, section 2.760a, applies only to initial decisions in contested proceedings for an operating license for a production or utilization facility. This provision was never incorporated by reference in Subpart J and does not, by its terms, apply to the repository licensing proceeding. Therefore new section 2.1027 simply removes any remaining uncertainty that sua sponte authority is not granted to the Presiding Officer.

The Commission also rejects the notion that the rule will have any effect upon the thorough consideration of health and safety issues in this proceeding. The parties to this proceeding will include entities which should be well prepared after the extended pre-license application period and the availability of licensing information in the LSS. The Commission believes that there is little likelihood that a significant issue will be overlooked. All parties will be focused upon a thorough identification of the issues for litigation.

7. Subpoenas (§ 2.1019).

Under proposed amended subsection 2.720(a), a party seeking to subpoena a hostile witness, other than NRC staff, would be required to demonstrate the general relevance of the testimony to the contention. Under proposed subsection 2.720(h)(2)(v), the Presiding Officer is directed not to issue a subpoena requiring the testimony of named NRC personnel unless a showing is made that the particular named NRC employee has direct knowledge relevant to the contention, and the testimony sought is not reasonably obtainable from another source.

The Commission has decided to reorganize the proposed provisions relating to subpoenas. The proposed change to subsection 2.720(a) will not be adopted because the current language already contains a requirement of general relevance. The proposed addition of subsection 2.720(h)(2)(v) will not be adopted and instead, the same purpose will be accomplished by the adoption of a revision to subsection 2.1019(j) adding the language "and that the testimony

sought is not reasonably obtainable from another source by any party" to the last sentence.

8. Conforming Amendments.

The amended rule requires several conforming amendments. Section 2.1000 has been revised to delete sections 2.749 and 2.785. The amended rule adds a new section 2.1025 on summary disposition for the HLW proceeding. Therefore the reference to the summary disposition provision in Subpart G, section 2.749 no longer needs to be cross referenced in section 2.1000. Also, as discussed in footnote 2, the Commission has decided to abolish the Atomic Safety and Licensing Appeal Board Panel. The Commission itself will now review initial decisions. Therefore, the cross-reference in section 2.1000 to section 2.785, (entitled Functions of the Atomic Safety and Licensing Appeal Board) has been deleted. All references to the Appeal Board elsewhere in this subpart have been revised to refer to the Commission.

Revised section 2.4 clarifies that for purposes of section 2.1018, "NRC Personnel" includes NRC consultants.

Subsection 2.1008(b)(1) has been revised to include reference to two new subsections that have been added as criteria for considering petitions to intervene, §§ 2.1014(c)(4) and (5).

9. Clarifications to LSS Regulations.

The amended rule contains a modification to section 2.1003(h) to clarify that both the periodic evaluations of, and the written report on, DOE's compliance with the LSS requirements pursuant to sections 2.1003(h)(2)(i) and (ii) will be circulated to the potential parties for comments due within 30 days of the issuance of the evaluation or report.

DOE does not agree with the interpretation of the Commission that the evaluation required by section 2.1003(h)(2)(i) and the written report of the evaluation required by section 2.1003(h)(2)(ii) are two separate written documents. As a participant in the Negotiating Committee, DOE understood that the first section requires that an evaluation be performed and the second section specifies the method of recording the evaluation, a written report. DOE does agree that potential parties should be required to submit comments or objections to the evaluation report within 30 days of the issuance of the report or the comments or objections are waived.

The Commission disagrees with DOE's interpretation. The evaluations required by subsection 2.1003(h)(2)(i) are scheduled every six months, beginning 6 months after the appointment of the LSS Administrator. There is only one written report required in subsection 2.1003(h)(2)(ii). Pursuant to subsection 2.1003(h)(1), this report must show DOE's substantial compliance with the section 2.1003 requirements and is due at least 6 months prior to the submission of the license application. In practice, one of the evaluations prepared pursuant to subsection 2.1003(h)(2)(i) could serve as the written

report required by subsection 2.1003(h)(ii) if all the required information were included. However, the revision clarifies that both the periodic evaluations and the written report will be written documents and will be circulated to potential parties. These potential parties may submit comments or objections to either the periodic evaluations or the report within 30 days of issuance or else waive the right to comment or object. The schedule for initiating the compliance evaluation process will be set in the LSS Administrator's Compliance Evaluation Strategy to be submitted to the Commission in 1991.

Modifications to section 2.1010 clarify that the Commission may designate one or more members of the Commission or an atomic safety and licensing board or a named officer to serve as the Pre-License Application Presiding Officer. A new section 2.1010(f) clarifies that the Commission will specify the jurisdiction of the Pre-License Application Presiding Officer in designating the Officer.

Both FPL and EEI/UWASTE oppose the amendment allowing the appointment of a Pre-License Application Presiding Officer and favor retaining the use of a three member licensing board during the pre-license application phase. EEI/UWASTE favors this approach in the hope that members of the Pre-License Application Licensing Board might have the benefit of early exposure to the HLW licensing issues and that at least some of these members might eventually serve on the adjudicatory board (Presiding Officer).

The Commission did not intend to limit its options when it adopted section 2.1010. Although the Commission may actually decide to use a three member licensing board during the pre-license application phase of the HLW licensing proceeding, the Commission wishes to maintain the same options it would have in other NRC proceedings. The range of options that the Commission is specifying in this pre-license application phase of the proceeding is similar to that in section 2.704, which is applicable in other NRC proceedings and to this licensing proceeding as well, by specific reference in Subpart J, section 2.1000.

FPL suggests adding a new subsection 2.1010(f) which would specify that the jurisdiction of the Pre-License Application Board would not extend to any substantive issue in the application to build all or part of a repository.

The Commission responds that subsection 2.1010(f) has been added to clarify that the Commission will specify the jurisdiction of the Pre-License Application Presiding Officer at the same time that it designates the Officer.

In the Notice of Proposed Rulemaking, two clauses were inadvertently omitted from the text of amended subsection 2.1010(a)(1) which are in this subsection as it currently reads. These clauses relating to the authority of the Pre-License Application Presiding Officer to resolve "disputes relating to relevance and privilege;" and "disputes relating to access to the Licensing Support System;" have been restored.

In addition, for clarity and consistency, definitions of "Pre-License Application Presiding Officer" and "Presiding Officer" have been added to section 2.1001. Minor conforming amendments have been added to correct old references to the "Pre-License Application Board" to refer to the "Pre-License Application Presiding Officer" and to substitute "Presiding Officer" for "Board" or "Hearing Licensing Board". These terms have been inserted throughout Subpart J for consistency only and do not constitute any substantive change.

10. Notice of Hearing.

In addition to the procedures set forth for the HLW licensing proceeding in Subpart J, the Commission also proposed several issues related to the management of the hearing that would be set forth in the Commission's Notice of Hearing for the HLW proceeding. The Commission has proposed the following issues that it plans to include in the Notice of Hearing:

(1) The Commission itself will designate the Presiding Officer. If the Presiding Officer is a Hearing Licensing Board, the Commission will designate the members. This Hearing Licensing Board will have plenary authority and management responsibility for the HLW hearing, including the authority to discipline parties, to rule on procedural motions on issues before it, and to rule on party status and contentions. The Hearing Licensing Board may establish such other subsidiary boards as are necessary to hear and decide discrete issues identified by the Hearing Licensing Board for separate disposition.

(2) The Commission will select the technical members of the Hearing Licensing Board from a wide pool of external and internal candidates, including members of the Commission's Licensing Board Panel. This will ensure the greatest potential for identifying candidates with the requisite expertise. The Commission anticipates a three member Hearing Licensing Board consisting of a lawyer-chairman who is experienced with NRC procedures, and two technical members, one with engineering expertise, and one with geoscience expertise, and both with a background in performance assessment.

(3) The Commission will encourage the Presiding Officer to set time limits on cross-examination if necessary to meet the hearing schedule.

(4) The Commission will direct the Presiding Officer to institute the "lead intervenor" concept for the proceeding.

(5) The Commission will direct the Presiding Officer to limit the scope of re-direct and re-cross examination to the issues raised on cross-examination and re-direct examination, respectively.

(6) The Commission will encourage the Presiding Officer and parties to reach agreement on the order of hearing issues so that related issues can be addressed at the same time, and to the extent practicable, in a logical sequence.

(7) The Commission will instruct the NRC staff to refrain from becoming involved in procedural disputes between other parties in which the staff does not have an interest, unless the Presiding Officer specifically requests the staff's views on the matter.

(8) The Commission will clearly define the precise scope of the hearing, outline the appropriate general issue areas to be considered in the proceeding and define the boundaries of the Presiding Officer's jurisdiction in the Notice of Hearing.

With reference to the selection of the technical members of the Hearing Licensing Board, DOE suggests that at least one of the technical members ought to have some experience in the NRC licensing process, and also that it might unnecessarily limit the pool of available candidates to require that both technical members have a background in performance assessment.

Nevada opposes the setting of time limits on cross examination. The commenter believes that sufficient authority currently exists in the licensing boards to control cross examination when necessary.

Nevada strongly opposes the "lead intervenor" concept and urges the Commission not to include this procedure in the Notice of Hearing. The commenter believes that Nevada's right to participate is clearly recognized and should not be subordinated in any way to a "lead intervenor."

EEI/UWASTE does not agree that the staff should be instructed to refrain from involvement in procedural disputes between the parties. The commenter asserts that procedural disputes might affect the timing, scope, or outcome of the hearing, or establish precedent with broad impact. Although in a narrow sense, the staff is not directly affected, the commenter feels that the views of the staff should be brought to the Hearing Licensing Board's attention without the requirement of a specific request.

The Commission will consider the comments that have been submitted in the future in formulating the Notice of Hearing.

## Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

## Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et. seq.).

## Regulatory Analysis

The Commission prepared a regulatory analysis on these amended regulations. The analysis examines the costs and benefits of the alternatives considered by the Commission. No comments were received on the draft regulatory analysis. The analysis is available for inspection in the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Kathryn L. Winsberg, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 492-1637.

## Regulatory Flexibility Certification

This final rule will not have a significant economic impact upon a substantial number of small entities. The amendments modify the Commission's rules of practice and procedures. The license applicant for the HLW repository will be the Department of Energy, which would not fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, in the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or in the NRC's size standards published December 9, 1985 (50 Fed. Reg. 50241). Although a few of the intervenors in the HLW proceeding are likely to fall within the pertinent Small Business Act definition, the impact on intervenors or potential intervenors will not be significant. While intervenors or potential intervenors will have to meet a higher threshold to gain admission

to NRC proceedings and will be required to present a direct case on contentions, and thereby incur some additional costs in preparing for, and participating in, the proceeding, these costs will be minimized by the early availability of information through the LSS and the pre-license application consultation process. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this final rule will not have a significant economic impact upon a substantial number of small entities.

## Backfit Analysis

This final rule does not modify or add to systems, structures, components, or design of a production or utilization facility; the design approval or manufacturing license for a production or utilization facility; or the procedures or organization required to design, construct, or operate a production or utilization facility. Accordingly, no backfit analysis pursuant to 10 CFR 50.109(c) is required for this final rule.

## List of Subjects in 10 CFR Part 2

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

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

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

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

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

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix

C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et. seq.).

2. Section 2.4 is amended by revising the definition of "NRC Personnel" to read as follows:

§ 2.4 Definitions.

* * * * *

"NRC personnel" means (1) NRC employees; (2) for the purpose of §§ 2.720, 2.740, and 2.1018 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and (3) members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings; and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

* * * * *

3. Section 2.1000 is revised to read as follows:

§ 2.1000 Scope of subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR Part 2 Subpart G, rules of general applicability, except for the following provisions: §§ 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.762, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.787, 2.788, and 2.790.

4. In §2.1001 the paragraphs concerning "Party" and "Potential party" are revised and the following new paragraphs are added to read as follows:

* * * * *

"Party" for the purpose of this subpart means the DOE, the NRC staff, the host State and any affected Indian Tribe in accordance with § 60.63(a) of this chapter, and a person admitted under § 2.1014 of this subpart to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter; provided that a host State or affected Indian Tribe shall file a list of contentions in accordance with the provisions of § 2.1014(a)(2)(ii) and (iii) of this subpart.

* * *

"Potential party" means any person who, during the period before the issuance of the first pre-hearing conference order under §2.1021(d) of this subpart, is granted access to the Licensing Support System and who consents to comply with the regulations set forth in Subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to §2.1010 of this subpart.

* * *

"Pre-License Application Presiding Officer" means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation.

* * *

"Presiding Officer" means one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, designated in the notice of hearing to preside.

* * * * *

5. In § 2.1003 paragraph (h)(2)(iii) is revised to read as follows:

§ 2.1003 Submission of material to the LSS.

* * * * *

(h) * * *

(2) * * *

(iii) The LSS administrator shall circulate each evaluation prepared

pursuant to paragraph (h)(2)(i) of this section, and the written report prepared pursuant to paragraph (h)(2)(ii) of this section, to potential parties to the high level waste proceeding. Potential parties may submit comments on or objections to the evaluations prepared pursuant to paragraph (h)(2)(i) of this section or the report prepared pursuant to paragraph (h)(2)(ii) of this section, to the LSS Administrator within 30 days of issuance of the evaluation or report. Comments or objections not filed within this time period are waived.

* * * * *

6. Section 2.1004 is amended by revising paragraph (d) to read as follows:

§ 2.1004 Amendments and additions.

* * * * *

(d) Any document that has been incorrectly excluded from the Licensing Support System must be submitted to the LSS Administrator by the potential party, interested governmental participant, or party responsible for the submission of the document within two days after its exclusion has been identified unless some other time is approved by the Pre-License Application Presiding Officer or the Presiding Officer designated for the high-level waste proceeding; provided, however, that the time for submittal under this paragraph will be stayed pending Officer action on a motion to extend the time for submittal.

7. Section 2.1006 is amended by revising paragraphs (b), (b)(1), and (b)(2) to read as follows:

§ 2.1006 Privilege.

* * * * *

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be submitted by the party, interested governmental participant, or potential party that asserted the claim to--

(1) The LSS Administrator for entry into the Licensing Support System into an open access file; or

(2) To the LSS Administrator or to the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under § 2.1010(b) or § 2.1018(c) of this subpart.

* * * * *

8. Section 2.1008 is amended by revising paragraphs (a), (c) and (d) to read as follows:

§ 2.1008 Potential parties.

(a) A person may petition the Pre-License Application Presiding Officer designated pursuant to §2.1010 of this subpart for access to the Licensing Support System.

(b) * * *

(1) The factors set out in § 2.1014(c)(1), (2), and (3) of this subpart as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide; or

(2) * * *

(c) The Pre-License Application Presiding Officer shall, in ruling on a petition for access, consider the factors set forth in paragraph (b) of this section.

(d) Any person whose petition for access is approved pursuant to paragraph (c) of this section shall comply with the regulations set forth in this subpart, including § 2.1003 and agree to comply with the orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010 of this subpart.

9. Section 2.1010 is amended by revising the heading, paragraph (a), the introductory language to paragraph (b), paragraphs (b)(6), and (e), and by adding a new paragraph (f) to read as follows:

§ 2.1010 Pre-License Application Presiding Officer.

(a)(1) The Commission may designate one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority on the matter (Pre-License Application Presiding Officer) to rule on all petitions for access to the Licensing Support System submitted under § 2.1008; disputes over the entry of documents during the pre-license application phase, including disputes relating to

relevance and privilege; disputes relating to the LSS Administrator's decision on substantial compliance pursuant to § 2.1003(h); discovery disputes; disputes relating to access to the Licensing Support System; disputes relating to the design and development of the Licensing Support System by DOE or the operation of the Licensing Support System by the LSS Administrator under § 2.1011, including disputes relating to the implementation of the recommendations of the LSS Advisory Review Panel established under § 2.1011(e).

(2) The Pre-License Application Presiding Officer shall be designated six months before access to the Licensing Support System is scheduled to be available.

(b) The Pre-License Application Presiding Officer shall rule on any claim of document withholding to determine--

* * * * *

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a potential party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The Pre-License Application Presiding Officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the

procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Pre-License Application Presiding Officer for violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

* * * * *

(e) The Pre-License Application Presiding Officer shall possess all the general powers specified in §§ 2.721(d) and 2.718.

(f) The Commission, in designating the Pre-License Application Presiding Officer in accordance with paragraphs (a)(1) and (2) of this section, shall specify the jurisdiction of the Officer.

10. Section 2.1012 is amended by revising paragraphs (c) and (d) to read as follows:

§ 2.1012 Compliance.

* * * * *

(c) The Presiding Officer shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any person who is not in compliance with all applicable orders of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

(d) Access to the Licensing Support System may be suspended or terminated by the Pre-License Application Presiding Officer or the Presiding Officer for any potential party, interested governmental participant or party who is in noncompliance with any applicable order of the Pre-License Application Presiding Officer or the Presiding Officer or the requirements of this subpart.

11. In §2.1013, paragraph (c)(1) is amended by replacing the word "board(s)" with "Presiding Officer"; paragraph (c)(6) is amended by replacing the word "Board" with "Presiding Officer"; and paragraph (d) is amended by replacing the word "Board" with "Presiding Officer" and the word "board(s)" with "Presiding Officer".

12. In § 2.1014, paragraph (a)(1) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (c) is amended by replacing ""Hearing Licensing Board" with "Presiding Officer" and replacing "Board" with "Presiding Officer"; introductory language in paragraph (d) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (e) is amended by replacing "Hearing Licensing Board" with "Presiding Officer". Paragraph (a)(2)(iv) is deleted and paragraphs (a)(2)(ii), (iii), (a)(3), and (a)(4) are revised and paragraphs (a)(2)(iii)(E), (c)(4), (c)(5), and (h) are added to read as follows:

§ 2.1014 Intervention.

(a) * * *

(2) * * *

(ii) A list of the contentions that petitioner seeks to have litigated in the matter;

(iii) With respect to each contention:

(A) A specific statement of the issue of law or fact to be raised or controverted.

(B) A brief explanation of the bases of the contention.

(C) A concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(D) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include reference to the specific documentary material that provides a basis for the contention, or if the petitioner believes that any documentary material fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. In determining whether a genuine dispute exists on a material issue of law or fact, a dispositive factor shall be whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

(E) The specific regulatory or statutory requirement to which the contention is relevant.

(3) Any petitioner who fails to satisfy paragraphs (a)(2)(ii) and (iii) of this section with respect to at least one contention shall not be permitted to participate as a party.

(4) Any party may amend its contentions specified in paragraph (a)(2)(ii) of this section. The Presiding Officer shall rule on any petition to amend such contentions based on the balancing of the factors specified in paragraph (a)(1) of this section, and a showing that a significant safety or environmental issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by §§ 60.112 and 60.113 of this chapter.

* * * * *

(c) * * *

(4) The failure of the petitioner to participate as a potential party in the Licensing Support System.

(5) In determining whether a genuine dispute exists on a material issue of law or fact, whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

* * * * *

(h) If the Commission or the Presiding Officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according a schedule determined by the Commission or the Presiding Officer.

13. In § 2.1015, paragraph (a), the introductory text of paragraph (b) and paragraphs (b)(1), (b)(3), and (d) are revised, and former paragraph (e) is eliminated and former paragraph (f) is redesignated as paragraph (e), to read as follows:

§ 2.1015 Appeals.

(a) No appeals from any Pre-License Application Presiding Officer or Presiding Officer order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), and (d) of this section.

(b) A notice of appeal from (1) a Pre-License Application Presiding Officer order issued pursuant to § 2.1010, (2) a Presiding Officer First or Second Prehearing Conference Order issued pursuant to § 2.1021 or § 2.1022, (3) a Presiding Officer order granting or denying a motion for summary disposition issued in accordance with §2.1025 of this part, or (4) a Presiding Officer order granting or denying a petition to amend one or more contentions pursuant to §2.1014(a)(4), shall be filed with the Commission no later than ten (10) days after service of the order. A supporting brief shall accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten days after service of the appeal.

(c) Appeals from a Presiding Officer initial decision or partial initial decision shall be filed and briefed before the Commission in accordance with the requirements of § 2.762.

(d) When, in the judgment of a Pre-License Application Presiding Officer or Presiding Officer, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Pre-License Application Presiding Officer or Presiding Officer may refer the ruling promptly to the Commission, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also

request that the Pre-License Application Presiding Officer or Presiding Officer certify, pursuant to §2.718(i) of this part, rulings not immediately appealable under paragraph (b) of this section.

(e) Unless otherwise ordered, the filing of an appeal, petition for review, referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

14. Section 2.1016, paragraph (a) is amended by replacing "Board" both times it appears with "Presiding Officer"; paragraph (c) is amended by replacing "Board" with "Presiding Officer"; paragraph (d) is amended by replacing "Board" with "Presiding Officer"; paragraph (e) is amended by replacing "Board" where it appears in the second, third and fourth sentences with "Presiding Officer

15. In section 2.1018, paragraph (a)(2) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (b)(2) is amended by replacing "Board" with "Presiding Officer"; the introductory language in paragraph (c) is amended by replacing "Board" with "Presiding Officer"; paragraph (c)(5) is amended by replacing "Board" with "Presiding Officer"; paragraph (c)(7) is amended by replacing "Board" with "Presiding Officer"; paragraph (d) is amended by replacing "Board" with "Presiding Officer"; paragraph (f)(1) is amended by replacing "Board" with "Presiding Officer"; paragraph (f)(2) is amended by replacing "Board" with "Presiding Officer"; paragraph (g) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; and paragraph (e)(3) is revised to read as follows:

§ 2.1018 Discovery.

* * * * *

(e) * * *

(3) A duty to supplement responses may be imposed by order of the Presiding Officer or agreement of the parties, potential parties, and interested governmental participants.

16. In section 2.1019, paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" both times it appears and paragraph (j) is revised to read as follows:

§ 2.1019 Depositions.

* * * * *

(j) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the Presiding Officer, by subpoena or otherwise: Provided, That the Presiding Officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations and the testimony sought is not reasonably obtainable from another source by any party, require the attendance and testimony of named NRC personnel.

17. In section 2.1020, paragraph (b) is amended by replacing "Board" with "Presiding Officer".

18. In section 2.1021, the introductory language in paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" both times it appears; paragraph (a)(3) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (b) is amended by replacing "Board" with "Presiding Officer"; and paragraph (d) is amended by replacing "Board" with "Presiding Officer".

19. In section 2.1022, paragraph (c) is amended by replacing "Board" with "Presiding Officer" and paragraph (a) is revised to read as follows:

§ 2.1022 Second prehearing conference.

(a) The Commission or the Presiding Officer in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than thirty days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

* * * * *

20. In section 2.1023, paragraph (a) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; the introductory language in paragraph (b) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; paragraph (c)(1) is amended by replacing "Hearing

Licensing Board" with "Presiding Officer" both times it appears; paragraph (c)(2) is amended by replacing "Hearing Licensing Board" with "Presiding Officer"; and paragraph (c)(3) is amended by replacing "Hearing Licensing Board" with "Presiding Officer" once in the first sentence and twice in the third sentence.

21. Section 2.1025 is added to Subpart J to read as follows:

§ 2.1025 Authority of the Presiding Officer to dispose of certain issues on the pleadings.

(a) Any party may move, with or without supporting affidavits, for a decision by the Presiding Officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Motions may be filed at any time. Any other party may file an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be filed by the moving party will be deemed to be admitted unless controverted by the statement required to be filed by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The

Presiding Officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the Presiding Officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

(b) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Presiding Officer may permit affidavits to be supplemented or opposed by further affidavits. When a motion for summary disposition is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of its answer; its answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, must be rendered.

(c) The Presiding Officer shall render the decision sought if the filings in the proceeding show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, in any proceeding involving a construction authorization for a geologic repository operations area, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the authorization must be issued.

22. Section 2.1026 is added to Subpart J to read as follows:

§ 2.1026 Schedule.

(a) Subject to paragraphs (b) and (c) of this section, the Presiding Officer shall adhere to the schedule set forth in Appendix D of this Part.

(b)(1) Pursuant to § 2.711, the Presiding Officer may approve extensions of no more than 15 days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforeseen circumstances, requests for extensions of more than 15 days must be filed no later than 5 days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

(2) Extensions beyond 15 days must be referred to the Commission. If the Commission does not disapprove the extension within 10 days of receiving the request, the extension will be effective. If the Commission disapproves the extension, the date which was the subject of the extension request will be set for 5 days after the Commission's disapproval action.

(c)(1) The Presiding Officer may delay the issuance of an order up to thirty days beyond the time set forth for the issuance in Appendix D.

(2) If the Presiding Officer anticipates that the issuance of an order will not occur until after the thirty day extension specified in paragraph (c)(1) of this section, the Presiding Officer shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

23. Section 2.1027 is added to Subpart J to read as follows:

§ 2.1027 Sua Sponte.

In any initial decision in a proceeding on a application to receive and possess waste at a geologic repository operations area, the Presiding Officer shall make findings of fact and conclusions of law on, and otherwise give consideration to, only those matters put into controversy by the parties and determined to be litigable issues in the proceeding.

24. Appendix D is added to 10 CFR Part 2 to read as follows:

Appendix D - Schedule for the Proceeding on Application for a License to Receive and Possess High-Level Radioactive Waste at a Geologic Repository Operations Area

| Day | Regulation (10 CFR) | Action |
|---|---|---|
| 0 | 2.101(f)(8)<br>2.105(a)(5) | Federal Register Notice of Hearing |
| 30 | 2.1014(a)(1) | Petition to intervene/request for hearing, w/contentions |
| ... | 2.715(c) | Petition for status as interested government participant & interested government participant petitions |
| 50 | 2.1014(b) | Answers to intervention & interested government participant petitions |
| 70 | 2.1021 | 1st Prehearing Conference |
| 100 | | 1st Prehearing Conference Order; identifies participants in proceeding, admits contentions, and sets discovery and other schedules |
| ... | 2.1018(b)(1)<br>2.1019 | Deposition discovery begins |
| 110 | 2.1015(b) | Appeals from 1st Prehearing Conference Order, w/briefs |

| | | |
|---|---|---|
| 120 | 2.1015(b) | Briefs in opposition to appeals |
| 150 | | Commission order ruling on appeals from 1st Prehearing Conference Order |
| 548 | | NRC staff issues SER |
| 578 | 2.1022 | 2nd Prehearing Conference |
| 608 | | 2nd Prehearing Conference Order; finalizes issues for hearing and sets schedule for pre-filed testimony and hearing |
| 618 | 2.1015(b) | Appeals from 2nd Prehearing Conference Order, w/briefs |
| 628 | 2.1015(b) | Briefs in opposition to appeals |
| 658 | | Commission order ruling on appeals from 2nd Prehearing Conference Order |
| 660 | | Last practicable date for motions for summary disposition |
| 680 | | Replies to last practicable motions for summary disposition |
| 690 | Supp. info. | Discovery complete |
| 700 | | Presiding Officer order on last practicable motions for summary disposition |
| 710 | 2.1015(b) | Appeals from last practicable summary disposition order w/ briefs |
| 720 | | Evidentiary hearing begins |
| ... | 2.1015(b) | Briefs in opposition to appeals from last practicable summary disposition orders |
| 810 | | Evidentiary hearing ends |
| 840 | 2.754(a)(1) | Applicant's proposed findings |
| 850 | 2.754(a)(2) | Other parties' (except NRC staff's) proposed findings |
| 860 | 2.754(a)(2) | NRC staff's proposed findings |

| | | |
|---|---|---|
| 865 | 2.754(a)(3) | Applicant's reply to proposed findings |
| 955 | 2.760 | Initial Decision |
| 965 | 2.788(a)<br>2.762(a)<br>2.1015(c) | Stay motions to Commission Notices of Appeal |
| 975 | 2.788(d) | Replies to stay motions |
| 995 | | Commission ruling on stay motion |
| ... | 2.762(b) | Appellant's briefs |
| 1005 | 2.788(a) | Stay motions to Commission |
| 1015 | 2.788(d) | Replies to stay motions |
| 1025 | 2.762(c) | Appellee's brief |
| 1035 | 2.762(c) | NRC staff brief |
| 1055 | 2.1023 Supp. Info. | Completion of NMSS and Commission supervisory review; Commission ruling on any stay motions; issuance of construction authorization; NWPA 3-year period tolled |
| 1065 | 2.763 | Oral argument on appeals |
| 1125 | | Commission decision |

ATTACHMENT B

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

The Honorable Bob Graham, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The NRC has sent to the Office of the Federal Register for publication the enclosed amendment to the Commission's rules in 10 CFR Part 2 Subpart J. The amendment modifies the Commission's Rules of Practice to improve the hearing process in the high level radioactive waste repository licensing proceeding in order to comply with the statutory three year licensing review required by Section 114(d) of the Nuclear Waste Policy Act of 1982, as amended.

Sincerely,

Dennis K. Rathbun, Director
Congressional Affairs
Office of Governmental
and Public Affairs

Enclosure:
As stated

cc: Senator Alan K. Simpson

ATTACHMENT C

P.O. Box 14000, Juno Beach, FL 33408-0420

(1)

FPL

DOCKET NUMBER PROPOSED RULE PR 2
(54 FR 39387)

NOVEMBER 8-4 1989 P5:15
fax copy received on 11-27-89
L-89-430

Mr. Samuel J. Chilk
Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Attn: Docketing and Service Branch

Re: Proposed Rule: Procedures Applicable to Proceedings for the Issuance of Licensees for the Receipt of High-Level Radioactive Waste at a Geologic Repository (54 Fed. Reg. 39,387)

Dear Mr. Chilk:

On September 26, 1989, the Nuclear Regulatory Commission (NRC) published in the Federal Register the above-referenced rulemaking notice. These responsive comments are submitted on behalf of the Florida Power & Light Company (FPL).

The Edison Electric Institute (EEI) and Utility Nuclear Waste and Transportation Program (UWaste) have offered comprehensive comments on the proposed rule. FPL supports those comments and adds the following.

First, as proposed, Section 2.1010 provides for a "Prelicense application presiding officer." FPL supports the EEI/UWaste comments on this section requesting that the regulation not be modified to provide for appointment of a prelicense presiding officer, and that the current provisions of Section 2.1010 -- which would limit a pre-license application phase tribunal to a three-member licensing board -- be maintained.

In addition, FPL notes that Section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, provides for Commission consideration of "an application for a construction authorization for all or part of a repository" (emphasis added). FPL suggests that 10 CFR § 2.1010 be modified so as to make it clear that the jurisdiction of any tribunal designated to rule on matters pertinent to the Licensing Support System would not extend to consideration of substantive licensing issues, particularly those arising from an application for construction authorization for only part of a repository. Such a clarification could be provided by adding a new subsection 2.1010(f)to the current rule providing as follows:

(f) unless otherwise provided in an appropriate notice or order, authority of the Pre-Application Licensing Board shall not extend to any substantive issue arising from the submittal of an application for a construction authorization for all or part of a repository.

Second, FPL wishes to emphasize the point raised in the EEI/UWaste comments concerning the importance of generic rulemaking on technical issues. Although such rulemaking does not fall within the scope of 10 CFR Part 2, it is vital to minimize the time required for repository licensing. The schedule presented in the proposed Appendix D to Part 2 provides 90 days for evidentiary hearings. It is unlikely that such a schedule can be met without maximum use of generic rulemaking for the early consideration of technical issues.

FPL appreciates the opportunity to comment on the Commission's proposed procedures for repository licensing. The NRC is to be complimented on its efforts to expand and improve its regulations so as to facilitate high-level waste repository licensing. FPL encourages the continuation and acceleration of these efforts.

Very truly yours,

R. J. Acosta
for Acting Vice President - Nuclear Energy

RJA/JAD/gp

cc: Document Control Desk, USNRC

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November 27, 1989

Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
1 White Flint North
11555 Rockville Pike
Rockville, MD 20850

ATTN: Docketing and Service Branch

VIA COURIER

Dear Mr. Chilk:

Enclosed please find the comments of the National Congress of American Indians on the Commission's proposed rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-level Radioactive Waste at a Geologic Repository, 54 Fed. Reg. 39387.

Sincerely yours,

Dean R. Tousley

Dean R. Tousley

ATTORNEY FOR THE
NATIONAL CONGRESS OF
AMERICAN INDIANS

Enclosure

cc: Members of the LSS Advisory Committee

cause In an attempt to be able to meet that excessively ambitious schedule, the Commission staff decided there was a need for a more expeditious means of accessing information and conducting discovery before and during the licensing proceeding. It decided to seek to establish a computerized "licensing support system" ("LSS").

From September 1987 until July 1988, NCAI participated as a party in the Commission's negotiated rulemaking proceeding to establish procedures for submission and management of records related to the repository licensing in connection with the LSS system. NCAI supported the LSS as a means to facilitate more timely and meaningful access to repository licensing information by interested and affected Indian tribes or other potential intervenors in the licensing process. However, NCAI has never felt that the statutorily prescribed three-year licensing period was achievable consistent with the Commission's responsibility to ensure that this crucial program is implemented so as to protect future generations for thousands of years.

Thus, while the use of the LSS to facilitate a timely and meaningful repository licensing process is something which NCAI supports wholeheartedly, it was always a primary objective of NCAI in participating in the negotiated rulemaking to ensure that the LSS and the NWPA were not used as a pretext for unwarranted curtailment of public participation rights in the licensing process. Indeed, NCAI was most concerned about, and fought hardest in the negotiations to prevent, enactment of provisions which would make intervention in the licensing process unduly difficult to sustain.

The seven parties to the negotiations came from two different fundamental perspectives. DOE and the nuclear industry, and to some extent the NRC Staff, were most interested in streamlining the licensing process, and made it clear that they would like to maximize the rule's limitations on intervention. NCAI, the State of Nevada, the

local government coalition and the environmental coalition--all prospective intervenors in the licensing process--were most interested in enhancing the effectiveness of the licensing review and their participation in it. They worked to minimize limitations on intervention.

After nearly a year of negotiations, six of the seven parties to the negotiated rulemaking--including the NRC Staff and the license applicant, DOE--agreed on carefully negotiated proposed rule language including new requirements and limitations on intervention rights. As in any negotiated result, no party was entirely satisfied with every aspect of the compromise that was reached. Only the nuclear industry representatives refused to concur in the final language--primarily based on what they considered the excessive cost of the LSS, not the intervention language. Even the industry had conditionally assented to the language on interventions, which was heavily influenced by their forcefully expressed views on the subject. This was surely an unprecedented level of agreement among parties with widely disparate viewpoints and interests.

It bears emphasizing that the license applicant and five other parties carefully negotiated and agreed to the language of the rule and the Commission promulgated that language as its own in April 1989. Yet, less than six months later, the Commission is proposing amendments to the rule which curtail public participation rights to a degree beyond anything that was proposed even by the nuclear industry in the negotiated rulemaking process.

This proposal is profoundly shocking and disappointing. It is incomprehensible that the Commission would engage in the time-consuming and costly effort entailed by negotiated rulemaking only to negate some of the most important aspects of that effort

just six months later. The purpose of negotiated rulemaking is to engage all the relevant interests in a dialogue which balances the opposing interests of the parties and results in a higher quality proposed rule--one with broad appeal and acceptability. That purpose was served to a remarkable extent in this negotiated rulemaking process, notwithstanding the nuclear industry's last-minute non-concurrence. It seemed, to some of us who have had much less pleasant experiences in agency/public interactions, a refreshingly productive endeavor. In short, the negotiated rulemaking won the Commission some much-needed public good will and credibility. It is now apparent that public good will is not something the Commission values highly.

NCAI would never have concurred in the negotiated rulemaking process to provisions like those proposed here, because nothing about the LSS or the NWPA justifies such extreme curtailment in public participation. This proposed rule, if promulgated, would render the negotiated rulemaking a nullity--a complete waste of time and effort--as far as NCAI is concerned. Since even DOE agreed to the rule as promulgated, it is very difficult to comprehend why the Commission is acting so aggressively now to promulgate these draconian and unjustifiable restrictions on public participations rights--issues that were absolutely key to the concurrence of NCAI and several other parties in the negotiated rulemaking process. Parties make concessions in negotiations in reliance on the fact that the concessions of other parties will be observed and respected. Promulgation of this rule would be an egregious violation of that reliance. Why, we wonder, did the Commission bother with negotiated rulemaking in the first place, if it was prepared to jettison the result with no apparent cause?

Promulgation of this proposed rule would severely tarnish the image of regulatory negotiations in general, but particularly that of the NRC as a sponsor of

such proceedings. As NCAI testified before the Commission before it promulgated the proposed rule last year, the negotiated rulemaking process was one we would have recommended for numerous other regulatory purposes. If this proposal is promulgated, NCAI will have no choice but to recommend that negotiated rulemaking be avoided at all costs. Why should NCAI, or anybody else, participate in a negotiating process if it is apparent that the agency can turn around and turn acceptable results into completely unacceptable results just a few months after the process ends?

Substance

In their substance, these proposed amendments--like their recently promulgated counterparts in Subpart G of Part 2--are completely unjustifiable. The Commission tried for a decade to get Congress to enact Atomic Energy Act amendments that would have gutted citizen participation, but Congress repeatedly declined those undemocratic overtures. Now, between the new combined license/standard design certification rule (Part 52), the Subpart G changes, and this proposal, the Commission is acting administratively to accomplish everything which Congress has declined to do statutorily.

A large part of the Commission's apparent justification for these proposed amendments is that they make Subpart J consistent with recently finalized revisions to Subpart G of the Commission's licensing proceedings. That is no justification, however, as the Subpart G revisions are also completely unwarranted and violative of the Atomic Energy Act section 189(a) hearing right and due process.[1] The right to a hearing in the abstract is useless if the barriers to actually getting one's concerns litigated are set too high, as is the case here and in Subpart G.

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[1] NCAI references the October 17, 1986 comments of the Yakima Indian Nation on the proposed Subpart G amendments.

In the context of the repository licensing proceeding, this proposal seems to be based on the assumption that all potential intervenors will be well-financed, large entities with many years of in-depth experience reviewing the waste program. That assumption is incorrect. In the case of Indian tribes, it is quite possible that tribes which would be affected by a proposed repository, and likely candidates for intervenor status, may *not* be officially deemed "affected Indian tribes" within the narrow compass of the NWPA definition.[2] Thus, such tribes would not enjoy the benefits of NWPA consultation and cooperation funding for meaningful, early participation in the waste program. They will be unable to attend the scores of meetings that DOE, NRC, and state representatives hold to discuss technical and institutional issues in the repository program, or to hire knowledgeable consultants to assist them in their review of the program. They would get little practical benefit from the early availability of the LSS system, because they would be largely unable to afford its use.

Thus, Indian tribes that intervene in the repository licensing proceeding may be in essentially the same position as citizens' groups or individuals. They will be required to submit to the LSS and the requirements of the pre-license application licensing board if they wish to intervene; they will be required to be computerized so they can submit their filings as ASCII files for inclusion in the LSS; but they will be hard pressed to enjoy the putative benefits of the LSS because they will be unable to afford on-line

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[2] This is, in fact, precisely the situation which currently prevails in Nevada. Because of the NWPA's very restrictive definition of "affected Indian tribe," it is possible that none of the Nevada tribes that are closest to the Yucca Mountain site will be deemed to satisfy it. The Duckwater Shoshone Tribe, for instance, has petitioned the Secretary of Interior for affected tribe status, but there has as yet been no response.

and search charges and unable to afford competent technical consultants who can make use of the information the LSS contains.

NCAI was conscious of this potentially unfair effect of the LSS rule on meagerly-financed or non-computerized intervenors during the negotiated rulemaking. Nonetheless, we begrudgingly accepted these provisions as part of the compromise of the negotiations, in large part because excessive additional restrictions on intervention were *not* part of the package. With the package that was negotiated and promulgated by the Commission, even intervenors that lacked the wherewithal to make very effective use of the LSS would have had the chance to sustain a modest intervention effort.

Under the current proposal, only the well-off or large institutional intervenor will be able to even get any contentions admitted. The Commission's protestations that it is not requiring prospective intervenors to prove their cases to get in the door do not make it any less the case. Proposed section 2.1014(a)(2)(iii) would require potential intervenors to present evidence and satisfy a summary disposition standard in order to get a contention admitted. It is not sufficient to say that the information needed to satisfy such a standard will be available in the LSS. As noted above, the LSS will not be that helpful to parties who lack the wherewithal to use it effectively or to interpret its data meaningfully. Even granting that intervention is generally a dubious undertaking for those on a severely limited budget, it should not be effectively impossible for a small tribe or organization to carry on a limited intervention if it is so inclined. This proposal's extremely high threshold for getting contentions admitted will have precisely that effect.

The Commission's own General Counsel has recognized the adverse effect of requiring satisfaction of a summary disposition standard at such an early stage:

> NRC rules providing for summary disposition on pleadings (10 CFR 2.749) recognize the general principle that an adjudicatory hearing is not required for matters as to which there is no genuine dispute. The draft rule seeks to integrate that general principle into the contention stage of the proceeding. *In practice, however, would be intervenors will be less prepared to fend off summary disposition at this early stage; thus, the rule change could significantly affect public participation in licensing proceedings.*[3]

Even utility executives who are license applicants before the Commission have acknowledged the unfairness of provisions such as the Commission here proposes. The following are comments submitted by the Public Service Company of Oklahoma on a similar proposal:

> Licensing boards would be permitted, at the time contentions were first offered, "to judge the merits of the contentions as to whether genuine issues of material fact exist." Any contention that failed to measure up would be rejected, and it would not be the subject of a hearing. This proposal undoubtedly would exclude frivolous contentions from a licensing proceeding. *Unfortunately, it is not legally supportable. It simply requires too much evidence too soon in the proceeding and, if adopted, would contravene the administrative due process tenets of the Administrative Procedure Act of 1949 and the attendant case law.*[4]

Potentially even more damaging for the prospects of intervention by a small entity are the proposed new section 2.1024, which would require any party who sponsors a contention to present direct testimony in support of that contention, and section 2.1025, which would require responses to summary disposition motions to be accompanied by affidavits if the motions themselves were accompanied by affidavits.

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[3] Memorandum from Leonard Bickwit, Jr., General Counsel, to the Commissioners (February 17, 1981) (Re: Intervention in NRC Adjudicatory Proceedings). (Emphasis added.) Mr. Bickwit's memo refers to an earlier, similar proposal to raise the threshold for admission of contentions.

[4] Comments of the Public Service Company of Oklahoma on Rulemaking Proposal – 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings; Modifications to the NRC Hearing Process," (46 Fed. Reg. 30349), July 8, 1981, at 5 (Emphasis added).

These provisions drastically raise the minimum costs of intervention by compelling intervenors to hire experts for both testimony and affidavits. It is difficult to see what purpose these provisions serve other than to facilitate getting rid of intervenors. Intervenors who cannot afford to do more should continue to have the opportunity to make their cases on the basis of cross-examination only.

The attempt to make the hearing schedule mandatory in proposed section 2.1026 simply defies reality. The Commission cannot anticipate now all the developments that might occur or need to occur during the licensing proceeding. And finally, the proposed withdrawal of the licensing and appeal boards' *sua sponte* review authority, § 2.1027, represents a needless constraint on their ability to conduct hearings and reach valid findings. It also reveals that the Commission seems to value the timing of the repository licensing proceeding above its scientific validity.

Conclusion

In sum, these proposed amendments bely a profound distaste for public participation and accountability. The theme that ties them together is the desire to get rid of and otherwise unduly constrain intervenors as quickly and effortlessly as possible. The three-year licensing time limit in the NWPA was never a good idea for a program whose implications may be felt for thousands of years. The licensing of a high-level waste repository *should not* be easy. DOE's application should be subjected to every possible iota of scrutiny before it is approved by the Commission.

The Commission now proposes to elevate the deadline to the position of prime directive, and to use it as a pretext for making intervention in the Commission's repository licensing the exclusive domain of large institutions and the well-heeled. The nuclear industry and DOE have advanced the premise that there is no real technical

impediment to a successful repository program, but rather only public relations problems. NCAI does not accept that premise, but if it is correct, this proposed rule will only hurt the cause. If this proposal becomes law, the public will correctly conclude that the avoidance of scrutiny is the paramount concern of the NRC. The damage to the credibility of the high-level waste program and the Commission's oversight of that program, and to the institution of regulatory negotiations, will be incalculable.

Section 189(a) of the Atomic Energy Act does *not* say, "[T]he Commission shall grant a hearing upon the request of any person *with unlimited resources* whose interest may be affected by the proceeding...." The Commission should not attempt to achieve that result by rulemaking. NCAI strongly urges the Commission to withdraw this proposed rule.

Respectfully submitted,

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ATTORNEY FOR NATIONAL
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Dated: November 27, 1989

# ENVIRONMENTAL DEFENSE FUND

(3)

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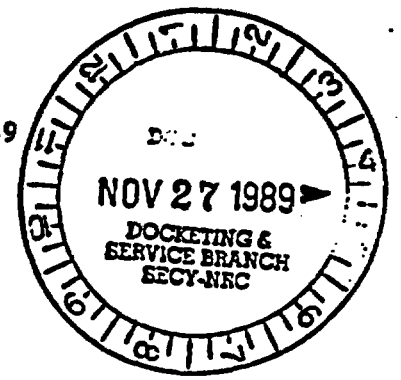
DOCKET NUMBER
PROPOSED RULE PR 2
(54 FR 39387)

November 27, 1989




Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

RE: RIN 3150-AD27, Proposed Changes to LSS Procedural Rules, 10 C.F.R. Part 2, Subpart J

Dear Mr. Chilk,

The Environmental Defense Fund (EDF) and Friends of the Earth (FOE) were two of the three participants in an environmental coalition (EC) in the negotiated rulemaking that led to the promulgation of Subpart J to the procedural rules -- 10 C.F.R. Part 2 -- of the Nuclear Regulatory Commission (NRC). EDF, FOE and the National Audubon Society (NAS), hereby submit the following comments on the changes to Subpart J that the Commission is now proposing.

In a word, EDF's, FOE's and NAS' reaction to the proposed rule is "Why?" The LSS negotiations took nine months. The process produced an unprecedented level of agreement between NRC, DOE, the State of Nevada, local governments in Nevada, Indian tribes and the EC over how NRC might go about licensing the nation's first high level nuclear waste repository. Rarely, if ever, have these disparate interests agreed about anything of even marginal importance. All parties to the negotiated rulemaking made concessions, in the spirit of achieving consensus. Although the parties did not ultimately fashion such consensus, due to the recalcitrance of the industry representatives, it was the EC's perception that the final negotiated rule even allayed most, albeit not all, of industry's concerns. Certainly with regard to the procedural rules for participation in the licensing, the negotiated rule accommodated many of industry's suggestions.

After the parties submitted the results of their negotiations to the Commission, the Commission sent the rule out for public review and comment, received and considered comments from several entities, heard from many of the LSS negotiation participants at a meeting during which the rule was discussed and eventually adopted a final rule that was substantially similar to that which the parties produced through negotiation. Yet, less than six months following that promulgation, the NRC has proposed substantial changes

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to the rule as adopted. Such action by the Commission is not only unwarranted, it makes a mockery of the negotiated rulemaking process and sends a strong message to the EC, as well as the to the broader environmental community, that there is little reason to expend the effort necessary to engage in negotiated rulemaking with the Commission, and potentially with other federal agencies, because the government will not abide by the deals it strikes.

The parties to the LSS negotiated rulemaking expressly rejected the changes that NRC now proposes to make in Subpart J. These parties spent two days a month for nine months hammering out a rule which was acceptable to all seated at the table, except industry, but including the NRC. In the Supplemental Information to the rule as adopted, NRC did reserve the right to make further changes to the rule at some time in the future to help NRC meet its three year licensing deadline; however, no parties to the negotiation intended, expected, anticipated, or would have agreed that NRC could unilaterally move to gut the central agreements of the rule less than 180 days after adopting it. During the year of negotiation, all parties were aware that NRC had under consideration other changes to Part 2. The EC, the tribes and the State of Nevada (as well as all other states who had commented on those changes) were on record as opposing those changes. There is no way that these parties would have accepted such provisions in the negotiated rule for the LSS. For the NRC to do so now suggests either that NRC acted in bad faith during the negotiations and/or in its original adoption of the rule as negotiated, or that NRC does not feel bound in any way by a bargain it struck less than one year ago. Neither of these positions is acceptable for a federal agency.

The changes that NRC proposes in the September 28, 1989 notice would severely limit the ability of third party intervenors to participate in the licensing proceeding for the high level waste repository. EDF, FOE and NAS object to the institution of such requirements; if adopted, these amendments would violate the spirit and the letter of the Nuclear Waste Policy Act, a law which stands for broad public participation in the repository process. As contrary to Congressional intent as were the general intervenor restrictions that the NRC promulgated this summer over the objections of all states and environmental groups that commented thereon, for the Commission to follow that path for this NWPA licensing would be worse.

If NRC proceeds with the proposed changes to Subpart J, the undersigned groups must refuse in the future to negotiate with the NRC. In addition, we must evaluate whether to negotiate with other federal agencies, because of the possibility that NRC's willingness to weazel out of commitments so quickly reflects an executive branch view that negotiated rules need not be followed. Moreover, we will disseminate to other members of the environmental and conservation community and to members of Congress a report explaining our concerns about negotiated rulemaking that have arisen as a result of NRC's proposal here. To the extent that recent developments at Yucca Mountain

suggest that Congress will again have to revisit the repository issue, we will express our opposition to these proposed changes, if adopted, as an NRC attempt to circumvent the public process that Congress sought to establish for building the country's first high level nuclear waste repository.

In sum, we are disappointed in the extreme with NRC's proposal and strongly urge the Commission to withdraw the proposed amendments to the rule.

Sincerely,

Melinda Kassen

Melinda Kassen
Environmental Defense Fund

David Ortman by mk

David Ortman
Friends of the Earth

Brooks Yeager by mk

Brooks Yeager
National Audubon Society

cc: William Olmstead
Howard Bellman
parties to the LSS negotiated rulemaking

Malachy R. Murphy
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(4)

November 22, 1989

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ATTENTION: Docketing and Service Branch

Re: Proposed Amendments To 10 CFR Part 2, Procedures Applicable To Proceedings For The Issuance Of Licenses For The Receipt Of High-Level Radioactive Waste At A Geologic Repository

Dear Sir:

We enclose comments on the above-referenced proposed rule submitted on behalf of the State of Nevada.

Yours very truly,

Malachy R. Murphy
Special Deputy Attorney General
State of Nevada

MRM:jfe
Enclosure

cc: Bob Loux
Harry Swainston
Jim Davenport

STATE OF NEVADA'S COMMENTS ON
PROPOSED AMENDMENTS TO
10 CFR PART 2

These comments relate to the Commission's proposed amendments to its procedures applicable to proceedings for the issuance of licenses for the receipt of high-level radioactive waste at a geologic repository, published on September 26, 1989. 54 F.R. 39387.

The only site in the nation currently under investigation as a prospective geologic repository is at Yucca Mountain, Nevada. In the event that the Department of Energy is ever to apply for an authorization to construct a repository at that site, or to seek a license to receive and possess nuclear materials there, Nevada would be a party to those proceedings. 10 CFR 2.1001(12). Nevada does not believe that the Department of Energy will ever submit such a license application, for both legal and technical reasons. Nevertheless, these comments are submitted in keeping with the State's significant oversight responsibilities, and continuing interest in all matters related to the potential licensing of a geologic repository.

Nevada also wishes to preface its remarks at the outset with a reminder of the State's duel responsibility in this process. The State not only has a right and a responsibility to participate itself under the Nuclear Waste Policy Act, in order to protect its own interest and the interest of its citizens, it also has the correlative responsibility to help individuals or interested groups of its citizens to do so, and

to insure that procedures are available to facilitate that process. All of this, of course, is in keeping with the spirit of §111(a)(6) of the NWPA, 42 USC 10131(a)(6), which we remind the Commission at the outset states as follows:

> "State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel . . . "

The Commission should adopt no procedural rules which hinder, rather than facilitate, the kind of public participation which the Congress has declared in clear and unequivocable terms to be essential to this entire process. If competition were to exist between completing an NRC review of a DOE construction authorization within three or four years, and effective and meaningful public participation, then Congress has, quite beyond any argument, declared that the winner must be public participation. The State's comments here are directed, for the most part, at that problem.

BACKGROUND

The proposed amendments would make changes in Subpart J of Part 2 of 10 CFR. Subpart J was drafted by a negotiated rulemaking committee in which Nevada participated in good faith. The final product of that negotiation was adopted as a final rule (the LSS Rule) and published at 54 F.R. 14944 on April 14, 1989. The stated need for that rule was to enable the Commission to expeditiously meet its three year time frame for initial licensing established by §114(d) of the NWPA. In those proceedings Nevada contended that the notice of

rulemaking which initiated the process included only the "licensing support system" itself, the computerized system for management, reproduction and distribution of the documents and data to be utilized in the licensing proceeding, and as well as computerized discovery from that system. The parties representing the nuclear utility industry, and the NRC staff, argued that amendments to procedures applicable to the balance of the geologic repository licensing process should also be negotiated. Reluctantly, and as part of a good faith compromise, Nevada did so. The utility industry, represented by EEI and UNWMG, made sweeping proposals, the adoption of which would have resulted in significant drawbacks from the adversarial process generally contained in Subpart G of Part 2, applicable to reactor licensing proceedings.

Some of the changes proposed by the utilities representatives, and the staff, were accepted by the parties to negotiated rulemaking proceeding. The object of those changes, as well as the licensing support system (LSS) itself, was to make it possible for the Commission to accomplish its congressionally mandated goal of completion of the construction authorization proceeding within a three to four year period, while maintaining intact the Commission's ultimate and overall responsibility under the Atomic Energy Act to protect the public against undue radiological risk. The NRC staff, the State of Nevada, Nevada local governments, represented environmental groups, Indian tribes, and the Department of Energy (the potential applicant) all agreed to the negotiated

package. Only the utilities withheld their endorsement of the rule, partly because their sweeping alterations to the procedural rules had not been adopted in total by the negotiating committee.

Now, it appears that most of the EEI/UNWMG proposal has found its way back into these proposed amendments. We recognize that they are probably offered, almost as a quid pro quo, principally by the NRC staff, in exchange for the Commission's not removing the so called "non-LSS provisions" of the negotiated LSS rule. That is not, however, by any means sufficient reason for their adoption.

The parties negotiated the "non-LSS provisions" in the context of the overall LSS negotiations in good faith. As is the case in any successful negotiation, compromises were made; by the State, environmental groups, Nevada local governments, the utilities, Indian tribes, DOE, and the NRC staff itself. Provisions were accepted by one or another party, including DOE and the staff, in order to avoid more undesirable provisions and to facilitate the adoption of a package acceptable to the major competing interests in any prospective licensing proceeding. They were also accepted because they would accomplish the major stated objectives of all parties; that is, to allow the NRC to meet the three or four year time table while at the same time facilitating a full exposure of all health, safety and environmental issues so as to completely inform the Licensing Board, and ultimately the Commission

itself, before any construction authorization decision was reached.

To retreat from that compromise now, and thus deny some of the parties the benefit of that bargain is wholly unwarranted, and would severely and unduly chill any willingness to engage in such future negotiated rulemakings, or similar mutual undertakings. This is particularly true when under the circumstances there is no compelling reason whatsoever to elevate the licensing time table over careful and informed decision making. We refer, of course, to the Commission's proposed revisions to its Waste Confidence Decision published on September 28, 1989. 54 F.R. 39767. It is also true where, as here, there is absolutely no reason to believe that the LSS rule, which after all was designed to expedite the licensing process in order to meet Congress's goal, cannot itself produce that result without further changes.

The Commission is certainly aware that no deadline established in the Nuclear Waste Policy Act, or in the Nuclear Waste Policy Amendments Act, has yet been met. The Commission has also clearly expressed its preference for greater attention to quality and safety then to schedule requirements.

> "It is in the same spirit of timely repository operation that the Commission is urging greater attention to quality then to meeting the schedule for submittal of the license application." 54 F.R. 39788.

Indeed, the Commission acknowledges the reality that the underlying reasons for a tight time frame for repository development have not materialized. No date, for example, has

been identified by which a repository must be available for health and safety reasons. 54 F.R. 39787. In light of these developments there is really no conceivable reason for the Commission to adopt procedures which impede in any way the ability of Nevada citizens, or interested groups, to participate in any licensing proceeding. The Commission's overall statutory duty to protect the public health and safety, and Congress's clear finding that public participation in the process is essential, dictate that most of the proposed changes to the procedural rules be abandoned.

With those introductory and background remarks in mind, we will now proceed to some specific comments on the proposed amendments themselves.

§2.1014 Intervention

While this proposed change does not impact the State itself, as Nevada will be a party from the outset, rather than an intervenor, it will potentially have a significant impact on the ability of individual members of the public, or interested groups, to participate in a meaningful way. The requirement that a proposed intervenor must show a genuine dispute on a material issue of law or fact with reference to specific documentary material that provides a basis for their contention is far too burdensome. While Nevada will know, probably years in advance of any licensing proceeding, what its contentions will be, and will have possession of or access to the critical documents, this is not the case at all with members of the public or interested groups of citizens. The

proposed rule regarding initial contentions of intervenors establishes a much more rigorous standard then that imposed upon even the applicant itself. That is unwarranted.

§2.1014(4)

The proposed amendment would require that any contentions proposed after the initial contentions have been filed must satisfy a higher standard. A proponent of late filed contentions would need to demonstrate that the contention address a significant new safety or environmental issue, or that the contention raises a new material issue related to the performance evaluation required by 10 CFR 60.112 and 60.113. The existing rule, which was adopted as part of the negotiated rulemaking, only applies the higher standard to contentions submitted more than forty days after the issuance by the NRC staff of its Safety Evaluation Report (SER). The parties negotiating the current rule, including the NRC staff, agreed that is was appropriate to permit any party participating in the proceeding to review the NRC staff's SER, including any new issues which that evaluation identified. For that reason the committee agreed that a forty day period during which parties could amend their contentions to incorporate issues raised by the staff was appropriate. The proposed rule in effect deletes this. The advantage of the existing rule over the proposed change is that it permits parties, and intervenors, to lend their support to NRC staff positions without the necessity of raising questions of "significance," "materiality" or "performance assessment." Those concepts would come

into play only when the forty day period immediately following the publication of the SER had expired. There is simply no reason for the proposed amendment, other then the protection of the applicant's posture in the proceeding against support being added to the criticism of NRC's own staff. Adopting the proposed change would deny the parties the benefit of their bargain in the LSS rule, and for that reason alone should be rejected.

§2.1014(c)(4)

Nevada supports this proposed amendment. Adding it merely reflects the original intent of the LSS negotiating committee, before its deletion prior to final adoption by the Commission.

§10 CFR 2.1024

This section would add a new requirement that parties present direct testimony on each of the contentions they have raised. The apparent intent is to prohibit any party from presenting its case on any individual contention exclusively by cross examination of other party's witnesses, or by arguing inferences or conclusions to be drawn from documents alone.

There is no clear or apparent reason for any requirement that direct testimony be presented in every case. A clear effect of such a rule would be to impose upon intervenors expenses which they might not otherwise have to bear, when all that might be necessary to the presentation of their case is cross examination of the applicant's or the NRC staff's witnesses, or argument from documents already in the record.

Indeed, the proposed rule would be counterproductive, and would have the effect of potentially increasing the length of an evidenciary hearing beyond that necessary, rather than reducing it.

§2.1026 Schedule

This proposed section would make mandatory the hearing schedule adopted by the LSS negotiating committee as a workable target for conducting the proceeding. The Commission should not be locked into compliance with the three year statutory time frame. Unreasonable commitment to that schedule, which the Commission itself in the context of its proposed Waste Confidence revisions now finds to be unnecessary, might compromise the overall statutory obligation to protect the public health and safety against undue radiological risk. It would also tend to preclude effective participation by the public. It will certainly not "promote the public confidence in the safety of disposal of such wasted spent fuel." (NWPA §111(a)(6), 42 USC 10131(a)(6).)

§2.1027 Sua sponte

The proposed rule takes away from the ASLB, or the ASLAB, a basic and essential attribute of judicial or quasi judicial activity: the ability of a judge or panel to recognize issues in a proceeding effecting the public's health and safety which the contesting parties themselves do not raise. The amendment, deleting the licensing board's or appeal board's sua sponte authority might suggest to some that the Commission is prepared to compromise its primary statutory responsibility to

protect the public's health and safety in favor of an essentially artificial and mechanically applied deadline. We do not believe that the Commission is really prepared to do that and thus suggest that it is in the Commission's own interest to drop this proposed amendment.

GENERAL COMMENTS

Even though they go somewhat beyond the package accepted by the LSS negotiating committee some of the proposed changes appear beneficial, and in keeping with the spirit of the compromise reached by the committee, and thus Nevada supports those changes. The proposed amendment, for example, to 10 CFR 2.1003(h) would require that the LSS Administrator's evaluation of DOE's compliance at six month intervals be submitted to all potential parties for comment in order to identify disputes concerning the Administrator's findings. The proposal is a good one and Nevada supports it.

The proposed amendment to substitute a prelicense application presiding officer for a prelicense application licensing board is also good, and Nevada supports it as well.

Nevada supports the Commission's concept of selecting technical members of the hearing licensing board from a wide pool of external and internal candidates, including members of the Commission's Atomic Safety and Licensing Board Panel. Nevada agrees that engineering, geoscience and performance assessment expertise are important basic qualifiers for service on such a licensing board.

Nevada opposes the idea of setting time limits on cross examination in order to meet the hearing schedule. This concept ignores entirely the fact that sufficient authority already exists in licensing boards, and their presiding officers, to limit or otherwise control cross examination. Such cross examination should only be limited by relevance to the facts or issues in material dispute in the proceeding, and the parties contentions. Within those parameters the board's current authority, which has been responsibly and judicially exercised in the past, should be retained.

Nevada strongly opposes the institution of the so called "lead intervenor" concept for the proceeding, and urges the Commission not to include that in its Notice of Hearing. Nevada's rights to participate in the licensing proceeding are clearly recognized. The State cannot and will not agree to permit its participation to be subordinated in any way to a "lead intervenor." At the same time, Nevada is sensitive to the rights of all other parties to the proceedings, and does not wish to be placed in the position of compromising in any way those rights by having other party's participation subordinated to the State's.

Nevada does not object to the limitation of the scope of redirect and recross examination to the issues raised on cross examination and redirect examination, respectively, except that redirect and recross examination should be permitted freely to the extent that they are not repetitive and raise material issues related to the performance evaluation

anticipated by §60.112 and 113. Licensing boards currently have ample authority to accomplish this.

Nevada has no objection to, and finds merit in the board and parties agreeing on the order of hearing issues so that related issues can be addressed at the same time and, to the extent practical, in a logical sequence.

Nevada has no objection to the NRC staff refraining from becoming involved in procedural disputes between other parties in which the staff does not have an interest. Likewise, Nevada has no objection to the Commission defining, in advance, the general scope of the hearing, outlining appropriate general issue areas to be considered in the proceeding, and defining the boundaries of the licensing board's jurisdiction in the notice of hearing, so long as sufficient flexibility is retained. As with the proposed deletion of sua sponte authority in the licensing board, this proposal, if rigidly or inflexibly applied, could significantly undercut the value of a quasi judicial proceeding. It could potentially remove the party's ability to raise legitimate issues which come to light only during the course of the hearing, and could thus significantly undermine the public's confidence in the objectivity of the entire proceeding. While we do not suggest that this idea should be abandoned completely, we urge that it be evaluated with caution, and sensitivity to the flexibility which this wholly unique and first of its kind proceeding demands.

DOCKET NUMBER
PROPOSED RULE PR 9
(54FR39387)

Department of Energy
Washington, DC 20585

(5)

NOV 2 7 1989

'89 NOV 28 P2:06

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attention: Docketing and Service Branch
Washington, D.C. 20555

Dear Mr. Secretary:

On September 26, 1989, the Nuclear Regulatory Commission (NRC) published in the Federal Register a notice of proposed rulemaking to amend its Rules of Practice for the licensing proceeding on the disposal of high-level radioactive waste at a geologic repository (10 CFR Part 2, Subpart J). The proposed rule makes changes to 10 CFR Part 2, Subpart J which would expedite and streamline the licensing process and would facilitate the NRC's ability to comply with the 3-year review of the application for construction authorization as required by Section 114(d) of the Nuclear Waste Policy Act, as amended.

The Department of Energy (DOE) has reviewed the proposed rule and supports the NRC's efforts in providing changes to Subpart J. The DOE also supports the NRC's efforts to resolve issues related to the management of the geologic repository licensing hearing. The DOE appreciates that the changes are consistent with the DOE proposal outlined in my February 16, 1989, letter to the NRC. The DOE has three comments related to submission of material to the licensing support system, the compulsory hearing schedule, and Issue (2) under Notice of Hearing. Our specific comments are included in the enclosure.

We appreciate the opportunity to comment on the proposed rule. If you have any questions, please feel free to contact Ralph Stein (586-6046) of my staff.

Sincerely,

Samuel Rousso, Acting Director
Office of Civilian Radioactive
Waste Management

Enclosure:
Department of Energy Comments on
10 CFR Part 2, Subpart J, (54 FR 39387)

cc:
R. Bernero, NRC
R. Loux, State of Nevada
D. Bechtel, Clark County, NV
M. Baughman, Lincoln County, NV
S. Bradhurst, Nye County, NV

ENCLOSURE

DEPARTMENT OF ENERGY
COMMENTS ON 10 CFR PART 2, SUBPART J
(54 FR 39387)

Section 2.1003-Submission of Material to the Licensing Support System (LSS)

Under the present Section 2.1003(h)(2)(i) the "LSS Administrator shall evaluate the extent of the DOE's compliance with the provisions of this section" and under Section 2.1003(h)(2)(ii) the "LSS Administrator shall issue a written report of his or her evaluation of DOE compliance under paragraph (h)(2)(i)." [Emphasis supplied.] Potential parties, under Section 2.1003(h)(2)(iii), may submit comments on the report to the LSS Administrator.

As a participant in the negotiated rulemaking which resulted in Section 2.1003, DOE does not agree with the NRC interpretation, as explained in the Supplementary Information to the proposed rule, that the evaluation and written report are separate documents. Such an interpretation would require the LSS Administrator to prepare two documents, an evaluation and a written report, every 6 months. It is the DOE understanding of paragraphs (h)(2)(i) and (h)(2)(ii) that the first requires an evaluation to be performed while the second specifies the method of recording that evaluation, i.e., a single written report.

The DOE agrees with the requirement in the proposed change that comments or objections not filed within 30 days of the written report should be waived. This will allow the LSS Administrator to respond as necessary, while remaining on a reasonable timetable for preparation of the next evaluation and its written report.

Section 2.1026-Compulsory Hearing Schedule

The NRC, in proposed Section 2.1026(b)(1), has provided that:

> "the Hearing Licensing Board may approve extensions of no more than 15 days beyond any required time set forth in this subpart for a filing by a party to the proceeding. Except in the case of exceptional and unforeseen circumstances, requests for extensions of more than 15 days must be filed no later than 5 days in advance of the required time set forth in this subpart for a filing by a party to the proceeding." [Emphasis supplied.]

It is unclear precisely what is meant by "exceptional and unforeseen circumstances . . . ," and what deadlines, if any, a party requesting such an extension would have to meet. The DOE suggests that the NRC

DEPARTMENT OF ENERGY
COMMENTS ON 10 CFR PART 2, SUBPART J
(54 FR 39387)

provide a few examples of "exceptional and unforeseen circumstances" for the guidance of potential parties and the Hearing Licensing Board.

Comment on Issue 2, Under Notice of Hearing (54 FR 39390)

The DOE is in agreement with the NRC effort to provide a Hearing Licensing Board with the expertise appropriate to the licensing of a geologic repository. We have two comments with respect to the proposed backgrounds for the technical members of the panel. First, the DOE believes that it is important that at least one of the technical members have some previous experience in the NRC licensing process. Second, the DOE is concerned that requiring both technical members to have a background in performance assessment may unnecessarily limit the NRC pool of available candidates. A requirement for a background in performance assessment for one technical member, with a preference for such background in the second technical member would provide NRC with more flexibility.

DOCKET NUMBER
PROPOSED RULE PR 2
(54 FR 39387)

DOCKETED
USNRC

'89 NOV 30 P1:11

(6)

LORING E. MILLS, Vice President

**EDISON ELECTRIC INSTITUTE** The association of electric companies

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Washington, D.C. 20036-3691
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November 27, 1989

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rule on Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository [54 FR 39387]

Dear Mr. Chilk:

The attached comments on the above-referenced document are submitted by the Edison Electric Institute/Utility Nuclear Waste and Transportation Program (EEI/UWASTE). EEI is the association of the nation's investor-owned electric utilities. UWASTE is a group of electric utilities providing active oversight of the implementation of federal statutes and regulations related to radioactive waste management and nuclear transportation.

Together, EEI/UWASTE represent most of the holders of contracts with DOE for disposal of spent nuclear fuel under the Nuclear Waste Policy Act (NWPA), as amended. To date, electric utilities have contributed the vast majority of the $ 4 billion that has been paid into the Nuclear Waste Fund and are currently paying for the entire civilian nuclear waste program, including the NRC's regulatory review. These funds are collected from electricity consumers. It is extremely important that the nuclear waste program is carried out in an efficient, fair and cost-effective manner, and that those being funded by the Nuclear Waste Fund carry out their responsibilities, recognizing the duty that is owed to those funding the program.

EEI/UWASTE participated in the negotiated rulemaking that resulted in the promulgation of Subpart J to 10 CFR Part 2. EEI/UWASTE opposed the promulgation of Subpart J as originally proposed. Among the reasons for our opposition was the NRC's need to address procedural changes that would be needed to meet the statutorily prescribed licensing schedule. During that rulemaking, we identified a number of additional modifications to the Rules of Practice that should be adopted, including:

- Resolution of substantial numbers of technical issues by generic rulemaking well in advance of the hearing.
- The establishment of a more appropriate threshold for admitting contentions.
- Tighter standards for late-filed contentions.
- Limitations on other discovery mechanisms beyond those in the proposed Licensing Support System (LSS) rule.

On September 26, 1989, the Nuclear Regulatory Commission published in the Federal Register a notice of proposed rulemaking to amend 10 CFR Part 2 [54 Fed. Reg. 39387]. The proposed rule would amend the Commission's Rules of Practice as they apply to the licensing of a geologic repository for the disposal of spent fuel and high-level radioactive waste. These changes to Subpart J and other portions of 10 CFR Part 2 are intended to assist the NRC in meeting the mandate of Section 114(d) of the NWPA. That provision requires the NRC to make a decision on the issuance of a construction authorization for the repository within three years after the Department of Energy ("DOE") files its application (with a one year extension for good cause).

When the Commission adopted Subpart J, it specifically reserved the right to make further improvements to existing procedures, including further changes to the rules contained in the negotiated rulemaking [54 Fed. Reg. 14925, 14930 (1989)]. The Commission's current rulemaking implements that reservation.

EEI/UWASTE commend the NRC for following through on its earlier promise and seeking to implement its "commit[ment] to do everything it can do to streamline its licensing process and at a the same time conduct a thorough safety review of the Department of Energy's application to construct a high-level waste repository" [Id.]. Almost all of the proposed changes are clearly beneficial and will improve the licensing process. For example, the compulsory schedule for the hearing provides an appropriate mix of flexibility and predictability. However, the Commission must go beyond the current proposals in several areas if it is to seek to comply with the licensing schedule in Section 114(d). These further changes include:

- o A threshold for admitting contentions that better reflects the enormous volume of information that will be available prior to the hearing.

- o Limitations on other discovery mechanisms beyond those in the proposed LSS rule.

- o Codification in Subpart J of the procedures that the Commission has promised to incorporate in the notice of hearing for the high-level waste proceeding.

- o Generic rulemaking on technical issues. Although such rulemaking does not fall within the scope of 10 CFR Part 2, it is nevertheless a key to reducing the overall repository licensing timetable.

The contention threshold and notice of hearing issues are discussed at length in the detailed comments attached hereto. The generic rulemaking issues and discovery limitations were discussed in our earlier comments on Subpart J.

We would also urge that the Commission continue to assess its Rules of Practice to identify other areas for improvement. We look forward to working with the Commission and with other interested parties to further the NRC's goals of achieving the statutory licensing timetable, providing a thorough technical review, and affording equitable treatment to all parties in the repository licensing proceeding.

EEI/UWASTE appreciate the opportunity to submit these comments, including the detailed comments attached hereto. EEI/UWASTE generally support the changes proposed by the Commission, but believe that additional changes should be made that will increase the likelihood that the Commission will be able to meet the licensing schedule set forth in Section 114(d) of the NWPA.

Sincerely,

Loring E. Mills

Loring E. Mills

LEM/cjl
Enclosure

# UWASTE

**Utility Nuclear Waste and Transportation Program**
**A Program Administered by the Edison Electric Institute**

# DETAILED COMMENTS ON PROPOSED REVISIONS TO 10 CFR 2

**November 27, 1989**

## Table of Contents

## SUMMARY OF
## EEI/UWASTE's
## RECOMMENDATIONS/CONCLUSIONS
## ON PROPOSED REVISIONS TO 10 CFR 2

1. Given the history of 10 CFR 2 and commitments by the Commission to revisit the rule, it is highly desirable for the Commission to propose further revisions to 10 CFR 2 Subpart J.

2. The new language in Section 2.1014 with respect to the threshold for the admission of contentions does not add much to current NRC requirements. The Commission should adopt a more substantial threshold for the admission of contentions. The NRC should require at least a proffer in affidavit or other evidentiary form to demonstrate that a genuine dispute exists of a material issue of law or fact.

3. Although the proposed revision to Section 2.1014(a)(4) makes a significant and fully justified change to that provision by removing the automatic "good cause" for late-filed contentions that are based on information or issues raised in the Staff Safety Evaluation Report, further modifications should be made. As a minimum, late-filed contentions should raise a "new" and "significant" issue.

4. EEI/UWASTE support the hearing schedule provisions of proposed Section 2.1026 Appendix D. They represent an appropriate blending of firmness and flexibility. However, Appendix D and/or proposed Section 2.1026 should reflect the fact that some of the actions may occur in parallel/or prior to the time specified in Appendix D.

5. The Commission is certainly entitled to rethink the usefulness of the sua sponte provision. In the repository proceeding, there is simply no need for the licensing board to have this authority. No less that four other governmental entities will be scrutinizing the application -- a fifth level of review is unnecessary. The Hearing Licensing Board will have more than enough to do in the repository hearing without having to concern itself with issues that have not been raised by the parties.

6 The Commission proposes to modify 10 CFR Section 2.1010 to give itself the authority to use a variety of presiding officer options in the pre-license application phase. While EEI/UWASTE appreciate the Commission's desire to have available to it options other than a three member licensing board, in this particular case the rule should continue to specify the use of such a board.

7. The proposed rule would also add a provision on summary disposition (Section 2.1025). Proposed Section 2.1025 requires that an answer opposing a summary disposition motion accompanied by supporting affidavits must itself be supported by supporting affidavits. We support this change and would also suggest that proposed Section 2.1025 require that answers supporting a summary disposition motion also be accompanied by supporting affidavits.

8. The Supplementary Information accompanying the proposed rule announces the Commission's intent to include in the notice of hearing for the repository proceeding several issues relating to management of the hearing. With one exception (see #9), EEI/UWASTE supports the Commission's position on the issues identified. However, these issues should be included in Subpart J as Commission regulations.

9. The one issue identified for inclusion in the notice of hearing with which EEI/UWASTE does not agree, is the instruction to the NRC Staff to refrain from procedural disputes "between other parties in which the Staff does not have an interest," absent a request from the Hearing Licensing Board. For several reasons discussed herein, we see no reason for the Staff to be instructed to stand clear of these disputes.

# EDISON ELECTRIC INSTITUTE
# UTILITY NUCLEAR WASTE AND TRANSPORTATION PROGRAM
# DETAILED COMMENTS ON THE PROPOSED REVISIONS TO PROCEDURES APPLICABLE TO PROCEEDINGS FOR THE ISSUANCE OF LICENSES FOR THE RECEIPT OF HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLOGIC REPOSITORY

The following comments on the Nuclear Regulatory Commission's proposed amendments to 10 CFR Part 2 [54 Fed. Reg. 59387 (1989)] are offered by the Edison Electric Institute (EEI) and the Utility Nuclear Waste and Transportation Program (UWASTE, the successor to Utility Nuclear Waste Management Group). EEI is the association of the nation's investor-owned electric utilities. UWASTE is a group of electric utilities providing active oversight of the implementation of federal statutes and regulations related to radioactive waste management and nuclear transportation.

## I. PROPRIETY OF CURRENT RULEMAKING

In promulgating the initial version of Subpart J to 10 CFR Part 2, the Commission explicitly anticipated that it would revisit the adequacy of its Rules of Practice as they apply to the licensing of the high-level waste repository [54 Fed. Reg. 14925, 14930 (1989)]. The Commission also explicitly committed to further evaluate the contentions threshold issue in view of an on-going rulemaking involving Subpart G to 10 CFR Part 2 [id. at 14931] and to give further consideration to the issue of requiring an intervenor to provide an affirmative case

[id.]. Commissioner Curtiss suggested an even broader look at those provisions of Subpart J that did not directly relate to the Licensing Support System [Id. at 14932-33].

It is, therefore, highly desirable for the Commission to propose further revisions to Subpart J. The fact that Subpart J had its genesis in a negotiated rulemaking in no way undermines the Commission's proposal. The Commission did not bind itself forever to the positions adopted in the negotiated rulemaking. As explicitly stated in the notice establishing the negotiating committee, the NRC agreed only to issue for comment any proposed rule resulting from a consensus of the negotiating committee (unless inconsistent with NRC's statutory authority or not appropriately justified.) The final rule was to be based on consideration of comments received on the proposed rule and other materials in the rulemaking record [52 Fed. Reg. 29024, 29027 (1987)]. Since there was no consensus within the negotiating committee [54 Fed. Reg. at 14926], the NRC was not even bound by the product of the negotiations. In any event, the Commission is always entitled to modify its regulatory scheme, so long as it articulates permissible reasons for any changes.[1] Indeed, an agency is required to continually reexamine significant policies.[2]

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[1] Black Citizens for Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983).

[2] Environmental Defense Fund v. EPA, 465 F.2d 528 (D.C. Cir. 1972).

## II. STANDARDS FOR INITIAL CONTENTIONS

In Subpart J, the Commission adopted a threshold for admitting initial contentions[3] [10 CFR Section 2.1014(a)(2)]. EEI/UWASTE in their comments on Subpart J had urged the adoption of a more substantial threshold for the admission of contentions, particularly in view of the enormous volume of data and documents that would be available years in advance of the time for filing contentions.

At the same time that it was issuing Subpart J, the NRC noted that it was considering changes to Subpart G, including changes to the contentions threshold standards of 10 CFR Section 2.714, and stated that it would reexamine the provisions of Section 2.1014(a)(2) in light of these changes. On August 11, 1989, the Commission issued its final rule revising Subpart G and adopting a modified contentions threshold.[4]

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[3] The threshold for admitting initial contentions requires: a) the bases for each contention set forth with reasonable specificity; b) reference to the specific documentary material (or the absence thereof) that provides a basis for each contention; c) the specific regulatory or statutory requirement to which the contention is relevant. Like the initial Subpart J rule, the contentions requirement applies to all persons seeking to participate as a party, including the host State or affected Indian Tribe. The Commission may wish to consider whether it is necessary to amend 10 CFR Section 60.63(a) so that there can be no dispute that the "unquestionable legal right to participate" referred to in that provision relates to the issue of standing, and not the independent requirement to submit contentions [50 Fed. Reg. 27158, 27160 (1986)].

[4] The new contention threshold provisions of (Subpart G) 10 CFR Section 2.714 requires: a) a specific statement of the issue of law or fact to be raised or controverted; b) a brief explanation of the bases of the contention; c) a concise statement of the alleged facts or expert opinion that support the contention and on which petitioner intends to rely

The proposed revision to Subpart J [Section 2.1014(a)(2)] generally tracks the revised Section 2.714. Under proposed Section 2.1014(a)(2), each contention must include:

- a specific statement of the issue of law or fact to be raised or controverted;
- a brief explanation of the bases of the contention;
- a concise statement of the alleged fact or expert opinion that supports the contention and on which petitioner intends to rely in proving the contention;
- references to the specific sources and documents on which petitioner intends to rely to establish the facts or expert opinion;
- sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact;
- references to the specific documentary material that provides a basis for the contention (or if petitioner believes that any documentary material fails to contain information relevant and required information, identification of each failure and supporting reasons for this belief.)

As in the case of revised Section 2.714, the Supplementary Information accompanying the proposed revision to Section 2.1014 states that the rule would not require a petitioner to make its case at the contentions stage of the proceeding. The petitioner need only indicate the facts or expert opinion of which it is aware that provides the basis for its contention [54 Fed. Reg. at 39388].

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in proving the contention; d) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; and e) references to the specific portion of the application that petitioner disputes (or if petitioner believes the application fails to contain relevant and required information, identification of each failure and supporting reasons for this belief).

The proposed Section 2.1014 as well as the revised Section 2.714 are clearly permissible exercises of the Commission's discretion.[5] However, the Commission should go beyond the proposed change. The new language in Section 2.1014 adds little to current NRC requirements. As the Commission itself noted in describing the revised Section 2.714:

> "Nor does the Commission believe that this requirement represents that substantial a departure from existing practice"

[54 Fed. Reg. at 33170]. Quoting with approval from several Appeal Board decisions, the Commission appears to summarize both existing practice and the revised Section 2.714 as requiring only that a petitioner "provide some sort of minimal basis indicating the potential validity of the contention" [Id.]. The factual support need not even be in affidavit or formal evidentiary form [54 Fed. Reg. at 33171]. Indeed, the Commission quotes with apparent approval an Appeal Board decision that requires only "a brief recitation of the fact underlying the contention or references to documents and texts that provide such reasons" [54 Fed. Reg. at 33170].

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[5] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543 (1977), "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties" (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965)). See BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

While Subpart G requirements provide a useful starting point for procedures to be applied to the repository licensing proceeding, the availability of the Licensing Support System with its enormous, accessible data base, and the availability of certain types of discovery during the pre-license application phase [Section 2.1018(b)(1)] warrant a more substantial threshold for contentions in the repository proceeding than in proceedings under Subpart G. Other agencies have required more rigorous showings before a hearing is invoked.[6] The NRC should require at least a proffer in affidavit or other evidentiary form to demonstrate that a genuine dispute exists of a material issue of law or fact. Such showing is authorized by law and is fully justified by the massive amounts of data that will be available well in advance of the time for filing contentions.

Another aspect of the initial contentions test that should be improved is the "no consequences" finding. The proposed rule states that the determination of whether a genuine dispute exists "shall consider whether the contention, if proven, would be of no consequences in the proceeding because it would not entitle the petitioner to relief" [(Section 2.1014(a)(2)(iii)(D)]. While it makes sense to exclude contentions that, even if petitioners prevailed, would not entitle them to any relief, the Commission's proposed language only requires that the Commission or presiding officer consider the lack of any consequences in

[6] See, e.g. Cerro Wire & Cable v. FERC, 677 F.2d 124, 129 (D.C. Cir. 1982) (mere allegations of disputed facts insufficient; adequate proffer of evidence required); cf. Consumers Federation of America v. U.S. Consumer Product Safety Commission, 883 F.2d 1073, 1076 (D.C. Cir. 1989) (upheld threshold of proffer of preliminary data to justify initiation of rulemaking).

determining whether a genuine dispute exists. If the contention is of no consequence, that fact itself should mandate the contention's rejection.[7]

## III. LATE-FILED CONTENTIONS

The proposed revision to Section 2.1014(a)(4) makes a significant and fully justified change to that provision by removing the automatic "good cause" for late-filed contentions that are based on information or issues raised in the Staff Safety Evaluation Report ("SER"). In NRC hearings, the adequacy of the Staff's safety review is not at issue, only the license application.[8] Therefore the SER should not constitute good cause for late contentions.

Further modifications should be made to the proposed late filed contentions rule. As currently written, a late-filed contention need not address a new issue. Nor is a late-filed contention required to raise a significant safety or environmental issue so long as it involves

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[7] One minor change that we would suggest in proposed Section 2.1014 would be in proposed Section 2.1014(a)(3). The existing language deals with the failure of a petitioner to comply with "paragraphs (a)(2)(ii), (iii) and (iv) of this section" [54 Red. Reg. at 14950]. The proposed version only covers the failure to satisfy "paragraph (a)(2)(iii) of this section." Since no change is proposed to the two subsections, (a)(2)(ii) and (iv), that would be dropped from Section 2.1014(a)(3), there does not appear to be any reason to delete the reference to these two provisions and and we would suggest that they be reinstated.

[8] See Louisiana Power & Light Co., (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 56 (1985).

a "material" issue related to the 10 CFR Sections 60.112 or 60.113 performance evaluation. Allowing insignificant issues or issues that are not new to be added late in the process will likely imperil the schedule contemplated by the Commission. At a minimum, late-filed contentions, whether or not they relate to the 10 CFR Sections 60.112 or 60.113 performance evaluation, must raise a "new" and "significant" issue. A more appropriate standard would be one requiring that:

> (1) there is significant new information that would require modification in facility design, construction, or operation to protect the public health and safety (or the common defense and security); and
>
> (2) such modification would substantially enhance such protection by improving overall safety.

The late-filed contention portion of the rule must also clearly adopt the requirements for timely-filed contentions. As currently written, Section 2.1014(a)(4) does not appear to incorporate the requirements of Section 2.1014(a)(2)(ii)-(iv). While this must certainly have been the NRC's intent, Section 2.1014(a)(4) should be clarified to specifically incorporate those requirements.

## IV. COMPULSORY HEARING SCHEDULE

EEI/UWASTE support the hearing schedule provisions of proposed Section 2.1026 and Appendix D. They represent an appropriate blending of firmness and flexibility. Given the

flexibility in that provision, it seems incorrect to label the schedule as "compulsory" [54 Fed. Reg. at 39388]. There is, however, one aspect of the schedule that we would recommend modifying. As written, the schedule proceeds in a linear fashion. In practice, the Licensing Board(s) must have the authority to conduct portions of the proceeding in parallel. For example, Appendix D has the evidentiary hearing begin at day 720. In fact, some issues may be ripe for hearing at a much earlier point. Appendix D and/or proposed Section 2.1026 must reflect the fact that some of the actions may occur prior to the time specified in Appendix D. Unless there is a recognition of the possibility that some actions take place before the specified time, some parties may try to use Appendix D to delay those actions.

## V. SUA SPONTE AUTHORITY

Proposed Section 2.1027 would limit the scope of the repository hearing to issues placed in controversy by the parties. Under Subpart G, licensing boards may raise issues on their own if they determine that a "serious safety, environmental or common defense and security matter exists" [10 CFR Section 2.760a]. That provision was added to the Commission's Rules of Practice in 1975 to codify a 1974 decision by the Commission.[9] Although the Commission's

[9] Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7 (1974). See 40 Fed. Reg. 2973 (1975).

decision and the rule as initially adopted cautioned licensing boards to use the sua sponte[10] authority only in "extraordinary circumstances" and "sparingly" [id.], the Commission subsequently eliminated these constraints [44 Fed. Reg. 67088 (1979)].

The Commission adopted the sua sponte rule as an exercise of its discretion [Consolidated Edison, supra]. The Commission is certainly entitled to rethink the usefulness of that provision. The wisdom and usefulness of the sua sponte authority has been questioned on numerous occasions. In the repository proceeding, there is simply no need for the licensing board to have this authority. No less than four other governmental entities will be scrutinizing the application -- the Department of Energy, the State of Nevada, the NRC Staff, and the Advisory Committee on Nuclear Waste. A fifth level of review is unnecessary. The Hearing Licensing Board will have more than enough to do in the repository hearing without having to concern itself with issues that have not been raised by the parties.

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[10] The new contention threshold provisions of 10 CFR Section 2.714 requires: a) a specific statement of the issue of law or fact to be raised or controverted; b) a brief explanation of the bases of the contention; c) a concise statement of the alleged facts or expert opinion that support the contention and on which petitioner intends to rely in proving the contention; d) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; and e) references to the specific portion of the application that petitioner disputes (or if petitioner believes the application fails to contain relevant and required information, identification of each failure and supporting reasons for this belief).

## VI. PRE-LICENSE APPLICATION LICENSING BOARD

Section 2.1010, as initially adopted, contemplates that a Pre-License Application Licensing Board ("PLALB") would be appointed to resolve disputes relating to the Licensing Support System during the period prior to DOE's filing of the construction authorization application [54 Fed. Reg. at 14936]. The Commission now proposes to modify 10 CFR Section 2.1010 to give itself the authority to use a variety of presiding officer options in the pre-license application phase.

While EEI/UWASTE appreciate the Commission's desire to have available to it options other than a three member licensing board, in this particular case we believe that the rule should continue to specify the use of such a board. One of the reasons for favoring the PLALB approach during the original rulemaking proceeding was to expose prospective members of the Hearing Licensing Board to the repository proceeding at an early stage. Although the Commission would not be obligated to name members of the PLALB to the Hearing Licensing Board, it was hoped that at least some of the PLALB members would eventually serve on the Hearing Licensing Board. Given the expected complexity of both the pre-license application and hearing phases, we see significant benefits in the early exposure to repository issues that the PLALB would provide to potential Hearing Licensing Board members. EEI/ UWASTE therefore respectfully request that the Commission not modify Section 2.1010.

## VII. SUMMARY DISPOSITION .

The proposed rule would also add a provision on summary disposition (Section 2.1025) that somewhat modifies the summary disposition language in Subpart G (Section 2.749). The Subpart J summary disposition provision tracks its Subpart G counterpart except that the proposed Section 2.1025 requires that an answer opposing a summary disposition motion accompanied by supporting affidavits must itself be supported by supporting affidavits. EEI/UWASTE endorse this change and would also suggest that proposed Section 2.1025 require that answers supporting a summary disposition motion also be accompanied by supporting affidavits. This could be accomplished by adding the underscored language to the fifth sentence of proposed Section 2.1025(a):

> If the motion was accompanied by supporting affidavits, any answer opposing or supporting the motion must be accompanied by affidavits in support of such answer.

A conforming change should also be made in the eighth sentence of proposed Section 2.1025(a) to reflect that affidavit requirement for responses to answers in support of summary disposition motions.

> The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any answer filed in support of the motion, provided that such response shall be accompanied by supporting affidavits if the answer was accompanied by supporting affidavits.

## VIII. NOTICE OF HEARING

The Supplementary Information accompanying the proposed rule announces the Commission's intent to include in the notice of hearing for the repository proceeding several issues relating to management of the hearing [54 Fed. Reg. at 39390]. With one exception (discussed below), we support the Commission's position on the issues identified. However, these issues should be included in Subpart J as Commission regulations. The Commission's intent, as reflected in the Supplementary Information (and presumably in the Supplementary Information that will accompany the final rule), is not binding on future Commissions -- nor even on this Commission. There seems no reason why such concepts as "lead intervenor," limitations on scope of cross-examination, authority of the Hearing Licensing Board to appoint subsidiary boards, and composition of the Board, could not be incorporated in Subpart J.

The one issue identified for inclusion in the notice of hearing with which we do not agree is the instruction to the NRC Staff to refrain from procedural disputes "between other parties in which the Staff does not have an interest," absent a request from the Hearing Licensing Board. Many of these procedural disputes may affect the timing, scope, or even outcome of the hearing, even though in a narrow sense they do not directly affect the Staff. Such issues could include interpretation of contentions and standing requirements, discovery disputes, and questions involving interpretation of NRC substantive rules. While the Staff might not have a direct interest in the outcome of a particular dispute, the precedent

established may have subsequent impact far greater than the original dispute. The views of the Staff on these issues should be brought to the Hearing Licensing Board's attention rather than depending on the Board in any particular situation to specifically request them. We see no reason for the Staff to be instructed to stand clear of these disputes.

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