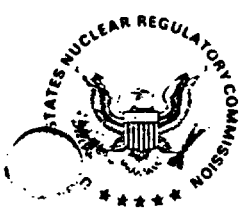

OFFICE OF THE SECRETARY

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

August 1, 1989

MEMORANDUM FOR: William C. Parler, General Counsel

James M. Taylor, Acting Executive Director for Operations

Lloyd J. Donnelly, Administrator Licensing Support System

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-89-186 - CONSIDERATION OF REVISIONS TO THE COMMISSION'S RULES OF PRACTICE IN ORDER TO FURTHER STREAMLINE THE HIGH-LEVEL WASTE LICENSING PROCESS

This is to advise you that the Commission (with all Commissioners agreeing) has approved the recommendations in SECY-89-186, including the proposed amendment to Part 2, subject to the following comments:

a. The attached comments 1-7 from Commissioner Curtiss which have been agreed to by all Commissioners should be incorporated, except as noted below in b and c;

b. With regard to Item 7 of Commissioner Curtiss' comments, the Commission understands that the current rule, in Section 2.1003(A)(2) requires six month evaluations by the LSS Administrator of the extent of DOE's compliance with the LSS requirements. The Commission believes that this is reasonable; however, the rule should be clarified to make it clear that these evaluations will be circulated for comment by potential parties who must timely file any objections they may have to the Administrator's evaluation or risk waiving such objections.

c. The effort to review, clarify and modify the topical guidelines as requested in Item 7 of Commissioner Curtiss' comments should proceed in conjunction with the task assigned in the next to last paragraph in the April 7, 1989 SRM on SECY-89-027.
(OGC/EDO/LSS) (SECY SUSPENSE: 10/1/89)

d. The "raised expectations" argument should be addressed. (Reference the 6/29/89 memorandum from Judge Cotter to the Commission which states that: "In negotiating the rule [LSS], the parties contemplated the traditional three-member board.") The Commission should be advised prior to publication of the proposed rule whether the Commission is free to change the number of members of the Pre-License Application Licensing Board (or Boards).

(OGC) (SECY SUSPENSE: 9/1/89)

The proposed rule should be revised as noted above, reviewed by the Regulatory Publications Branch, Office of Administration, for consistency with Federal Register requirements and forwarded for signature and publication.

(OGC) (SECY SUSPENSE: 9/15/89)

Attachment:
As Stated

cc: Chairman Carr
Commissioner Roberts
Commissioner Rogers
Commissioner Curtiss

Commissioner Curtiss' comments on SECY-89-186:

I approve publication of the proposed rules to streamline the High Level Waste (HLW) Repository licensing process, subject to the following modifications to the notice and proposed rules that are set forth in SECY-89-186:

1. The new section 2.1025 on summary disposition motions generally follows 10 CFR 2.749 -- the current Subpart G summary disposition provision -- except that it requires affirmative responses by affidavits. In a manner similar to existing 10 CFR 2.749(c), proposed section 2.1025(c) would allow a party to defeat, or at least obtain a continuance to respond to, a motion for summary disposition by asserting that such party is unable to "present . . . facts essential to justify his or her position . . . ." While such a provision may be appropriate for the normal 10 CFR Part 2, Subpart G type of proceeding, it is not justified for the HLW repository proceeding conducted under Subpart J. Prior to the filing of motions for summary disposition in the repository proceeding, all parties will have had access, through the LSS, to large amounts of information and data to support their positions on contentions. In addition, each party will be required, and must be prepared, to present an affirmative case on the issues that party has raised. In view of these special features of the repository proceeding, the parties to such proceeding can and should be ready affirmatively to oppose summary disposition motions at the time those motions are filed. Accordingly, I would delete proposed section 2.1025(c) which would otherwise allow a party to avoid summary disposition of an issue based on the party's claim that it is not yet ready to state the basis for its opposition.

2. Proposed section 2.1026 imposes a mandatory schedule for the HLW Repository proceeding. The schedule that is proposed is essentially that which is set out in the Statement of Considerations accompanying the LSS rule with some modifications to remove the provision in that earlier schedule for amending contentions after the staff's SER is completed. Although the proposed rule no longer allows amended contentions based on the SER, the schedule retains a 70-day interval (formerly provided to accommodate the filing of amended contentions on the SER and answers to amended contentions) between the filing of the staff's SER and the final prehearing conference. Since we will no longer invite new contentions based on the SER, I would remove the 40 days that are built into the current schedule to accommodate the filing of those contentions. Thus, the second prehearing conference

should be moved to "day 578" and the remainder of the schedule adjusted. Consistent with this change, I would modify existing section 2.1022(a) by replacing "seventy days after the Safety Evaluation Report . . ." with "thirty days after the Safety Evaluation Report . . . " and deleting subsection (a)(1) which refers to "amended contentions submitted under section 2.1014(a)(4)."

3. In the section soliciting comments on matters to be addressed in the the Notice of Hearing on the HLW Repository proceeding, there is a provision which would direct the staff to refrain from participating in procedural disputes in which it has no interest. As a practical matter, adjudicatory boards sometimes need the assistance that the staff's substantial institutional and procedural expertise and independent judgment can provide in resolving procedural disputes. Accordingly, I would suggest that the adjudicatory boards be permitted to request the staff's views on procedural disputes when the boards perceive a need for the staff's assistance. For this purpose, I would add "unless the Hearing Licensing Board specifically requests the staff's views on the matter" as shown on the attached p. 13 of the proposed notice.

4. Under a long line of NRC cases, the Notice of Hearing is the mechanism used to establish the adjudicatory board's jurisdiction and define the scope of the issues that may be considered in the proceeding. See, e.g., Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976); 10 CFR 2.707; see also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), ALAB-739, 18 NRC 335, 339 (1983); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979). The discussion on the topics for the Notice of Hearing on the HLW repository is silent on this matter. I believe that the Commission should make it clear that the Notice of Hearing on the repository will clearly define the precise scope of the hearing, outline the appropriate general issues to be considered in the proceeding and define the boundaries of the Hearing Licensing Board's jurisdiction. I would add a provision to this effect on the attached p. 13 of the proposed notice.

5. In the initial draft of the final LSS rules proposed in SECY-89-027, the LSS Negotiating Committee recommended that proposed section 2.1014(c) include a number of

factors for an adjudicatory board to consider in ruling on the standing of petitioners to intervene in the HLW repository proceeding. Among those factors was:

> "2.1014(c)(4). The petitioner's participation as a potential party under section 2.1008(c) of this subpart."

Under this proposal, a petitioner's prior participation in the LSS would have a bearing on the petitioner's subsequent standing to intervene in the repository licensing proceeding. The purpose of this proposal, according to the Negotiating Committee, was to provide an inducement to individuals to participate in the pre-licensing phase of the high-level waste proceeding by directing the Board to consider an individual's <u>failure</u> to participate in the pre-licensing phase as one of the relevant factors in deciding whether that individual should be granted standing in the formal proceeding. In short, if you fail to participate in the pre-licensing phase, you will have a more difficult time establishing standing in the formal licensing phase. This provision was <u>not</u>, however, according to the Negotiating Committee, intended to say that if an individual <u>does</u> participate in the pre-licensing phase, that fact can be invoked as a favorable factor in support of a claim of standing in the subsequent formal hearing. Unfortunately, the language proposed by the Negotiating Committee allowed for this latter interpretation as well. In an effort to cure this latter problem, subsection 2.1014(c)(4) was deleted altogether from the final version of the rule that was adopted by the Commission when it approved the LSS rule. In so doing, we have inadvertently deleted that portion of this section that I think everyone, including the Negotiating Committee, agrees should be retained: If you fail to participate in the pre-licensing phase, that failure will make it more difficult for you to establish standing in the formal hearing phase. Accordingly, I would propose that we take this opportunity to modify section 2.1014 by adding "the failure of the petitioner to participate as a potential party" in the LSS as a factor to be considered in determining a petitioner's standing to intervene in the HLW repository proceeding.

6. Editorial comments and additions are noted on the attached pages from the proposed notice.

7. Finally, although this proposed rulemaking properly and appropriately deals only with the procedures that will govern the HLW repository hearing, I believe that the LSS portion of Subpart J also needs further rulemaking attention. Specifically, the topical guidelines set out in the Statement of Considerations that accompanied

the LSS rules should be reviewed and modified to better conform the topical guidelines to the substantive issues that will be considered in the HLW Repository proceeding. This is particularly important now that we have completed action on SECY-89-140, establishing the framework for litigation of environmental issues in NRC's proceeding. It is also necessary to clarify any confusion that might exist with regard to whether issues such as national transportation routing, alternate sites, and alternatives to geologic disposal will be litigable in the NRC proceeding. In addition, I believe that we should amend the LSS rules to require periodic certifications by the LSS Administrator that DOE is properly entering documents into the LSS and timely objections to such certifications by the other parties. Thus, I would direct the staff and OGC to begin work on a paper -- (1) analyzing the issues or topics that will need to be addressed in the repository licensing proceeding in order to evaluate the compliance of the proposed repository with 10 CFR Part 60; (2) reviewing the topical guidelines to determine whether there are topics on that list that will clearly not be the subject of litigation in our proceeding; and (3) proposing for Commission consideration the approach that the staff would recommend that the Commission take to clarify any ambiguity in the topical guidelines on such issues.

The Proposed Rule:

Standards for initial contentions (Section 2.1014)

On , 1989, the Commission promulgated a final rule amending the provisions of general applicability in Subpart G of the Commission's Rules of Practice ("final rule on regulatory reform"). 54 Fed. Reg. . The final regulatory reform rule addresses standards for the admission of contentions (2.714), the elimination of unnecessary discovery against the parties (2.740), the discretionary use of cross-examination plans (2.743), and motions for summary disposition (2.749), and limitations on intervenors' filings of proposed findings (2.754) and appeals (2.762). Section 2.1000 of Subpart J cross-references those sections of general applicability in subpart G that will continue to apply to the HLW licensing proceeding. As such, all but one of the provisions in the final regulatory reform rule - section 2.714, which requires contentions to show that "a genuine dispute exists on a material issue of law or fact" - will automatically apply to the HLW proceeding. However, Subpart J contains a new provision on contentions, section 2.1014, and section 2.714 would therefore not apply to the HLW proceeding. Consequently, the proposed revisions to Subpart J would amend section 2.1014 to incorporate a similar standard for contentions to that contained in section 2.714 of the final regulatory reform rule.

The proposed amendments to 10 CFR § 2.1014 would 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 a material 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 on to establish the facts or expert opinion. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinion, be it one fact or many, of which it is aware at this point in time which provide the basis for its contention. In determining whether there is a genuine dispute on a material issue of law or fact, the Commission or the presiding officer will consider whether the information presented prompts reasonable minds to inquire further as to the validity of the contention. Absent ~~such~~ a showing that there is a genuine dispute on a material issue of fact or law, the contention will not be admitted. Under the proposed amendments, admission of a contention may also be refused if it is determined 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 proposed 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/or oral argument.

In addition to providing a statement of facts and sources, the proposed rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant on a material issue of fact or law. This will require the intervenor to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view. Where the intervenor believes the application and supporting material do not address a

or construction that substantially enhances the protection of public health and safety would result if the contention were to be admitted. The later in the proceeding that a contention is raised, the greater the burden in showing its significance or materiality. The extensive interaction between NRC, DOE, and affected parties such as the State of Nevada in the pre-license application phase, as well as the early availability of relevant documents through access to the LSS before initial contentions must be filed, should substantially reduce the need for late-filed contentions. ~~The Commission would emphasize that the proposed revision does not prohibit late-filed contentions, but rather establishes criteria to ensure that the contention involves an issue that is material or significant to the licensing decision.~~ By identifying the issues in controversy, to the extent practicable, at the outset of the hearing, the proposed revision will contribute to an efficient hearing process.

Direct testimony on contentions (Section 2.1024)

The proposed rule would add a new section 2.1024 to Subpart J that would require a party that sponsors a contention to present direct testimony on the contention. Past NRC practice has been to allow a proponent of a contention to prove its case solely by cross-examination of the license applicant's or the NRC staff's witnesses. The proposed amendment would require a party sponsoring a contention to put forth direct expert testimony in support of the contention. However, a party could subpoena a witness of the applicant or the NRC staff to satisfy this requirement, in effect, calling a "hostile" witness. Under proposed Section 2.720(a), a party seeking to subpoena a hostile

result in the dismissal of the contention. In terms of the ultimate burden of proof, the license applicant would still have to satisfy the NRC staff that the issue involved has been acceptably resolved, as is the case with all uncontested issues.

Compulsory hearing schedule (Section 2.1026)

In order to facilitate compliance with the NWPA schedule, the Commission set forth a model hearing schedule in the Supplementary Information of the LSS rule. 54 Fed. Reg. 14924, 14939. Several of the milestones in the model schedule are already required by virtue of the provisions in Subpart J. The proposed rule would make the entire schedule mandatory, while still providing some flexibility to the Board to address mitigating circumstances. For the filings required of the parties, the Board may grant extensions for any individual milestone of up to 15 days. Any approval by the Board of extensions in excess of 15 days would be referred to the Commission. If the Commission did not act to disapprove the extension within 10 days, the Board's extension would be effective. Barring exceptional and unforeseen circumstances, a party who seeks an extension beyond 15 days must file the request for the extension no later than 5 days in advance of the scheduled date for the milestone.

For Board issuances, the Board would have a grace period of thirty days to comply with the milestone. If the Board anticipates that such a milestone will be exceeded by more than thirty days, the Board is required to notify the Commission of the delay at least ten days in advance of the scheduled date for the milestone, and to provide a justification for the delay. This will allow the Commission to track the cumulative effect of individual delays on its ability to meet the NWPA schedule.

Sua sponte (Section 2.1027)

The proposed rule specifically prohibits the Hearing Licensing Board or the Appeal Board from raising issues that have not been placed in controversy by the parties to the proceeding. The Commission does not believe that sua sponte authority is necessary in a proceeding, such as the HLW proceeding, where a hearing is required on the decision to authorize construction of the repository, and where the parties will include entities that should be well-prepared and have had substantial involvement in the HLW licensing process, and therefore, there is little likelihood that a significant issue will be overlooked. ~~The Commission always retains the discretion to add any significant issue of which it becomes aware.~~

Conforming Amendments

The proposed rule also contains several conforming amendments. Section 2.1000 as been revised to delete Sections 2.749 and 2.785(b)(2). The proposed rule adds a new Section 2.1025 on summary disposition for the HLW proceeding. Therefore, the summary disposition provision, in the general applicability provisions of Subpart G, Section 2.749, no longer need to be cross-referenced

in Section 2.1000. Section 2.785(b)(2) in Subpart G allows the Appeal Board to consider serious matters that have not been raised by the parties. This would conflict with proposed Section 2.1027 which prohibits sua sponte review and therefore has been deleted from Section 2.1000. Finally, proposed Section 2.4(p) clarifies that for purposes of Section 2.1018, "NRC Personnel" includes NRC consultants.

Notice of Hearing

In addition to the procedures set forth for the HLW proceeding in Subpart J, the Commission intends to also address several issues related to the management of the hearing in the Commission's Notice of Hearing for the HLW proceeding. Under the current schedule, the DOE license application will not be submitted until early 1995. However, the Commission is now evaluating, and seeks comment on, the following issues that it plans to include in the Notice of Hearing--

- The Commission itself will designate the members of the Hearing Licensing Board. This 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.

- encourage the Board and parties to reach agreement on the order of hearing issues, so that related issues can be addressed at the same time, and to extent practicable, in a logical sequence.

- 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 Hearing Licensing Board specifically requests the staff's views on the matter.

Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commision. The draft analysis is available for inspection in the NRC Public Document Room, 1717 H Street NW, Washington, DC. Single copies of the analysis may be obtained from F.X. Cameron, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: 301-492-1623.

The Commission requests public comment on the draft regulatory analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the ADDRESSES heading.

- 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 Hearing Licensing Board's jurisdiction in the Notice of Hearing.

(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 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, the Commission or the presiding officer shall consider whether the information presented prompts reasonable minds to inquire further as to validity of the contention, or whether the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

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 depositions, answers to interrogatories or further affidavits. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his or her answer; his or her 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, shall be rendered.

(c) Should it appear from the affidavits of a party opposing the motion that he or she cannot, for reasons stated, present by affidavit facts essential to justify his or her opposition, the presiding officer may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

APPENDIX D - SCHEDULE FOR THE PROCEEDING ON APPLICATIONS FOR A LICENSE TO RECEIVE AND POSSESS HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLOGIC REPOSITORY OPERATIONS AREA

Day		Regulation	Action
0	10 CFR	2.101(f)(8) 2.105(a)(5)	Fed. Reg. Notice of Hearing
30		2.1014(a)(1)	Pet. to intervene/request for hearing, w/ contentions
		2.715(c)	Pet. for status as interested govt. participant (IGP)
50		2.1014(b)	Answers to intervention & IGP 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) 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			AB order ruling on appeals from 1st Prehearing Conference Order
548			NRC staff issues SER
~~578~~ 578		2.1022	2nd Prehearing Conference
648			2nd Prehearing Conference Order: ~~rules on amended contentions, sets any further discovery schedule, and~~ sets schedule for prefiled testimony and hearing → finalizes issues for hearing and

~~658~~	2.1015(b)	Appeals from 2nd Prehearing Conference Order, w/ briefs
~~668~~	2.1015(b)	Briefs in opposition to appeals
~~698~~		AB order ruling on appeals from 2nd Prehearing Conference Order
~~700~~	2.1025 ~~2.749~~ (set by LB)	Final Motions for summary disposition
~~720~~	2.1025 ~~2.749~~	Replies to final motions for summary disposition
~~730~~	Supp. Info.	Discovery complete
~~740~~		LB order on final motions for summary disposition
~~750~~	2.1015(b)	Appeals from final summary disposition order, w/ briefs
~~760~~		Evidentiary hearing begins
	2.1015(b)	Briefs in opposition to appeals from final summary disposition orders
~~790~~		AB order on appeals from final summary disposition orders
~~850~~		Evidentiary hearing ends
~~880~~	2.754(a)(1)	Applicant's proposed findings
~~890~~	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings
~~900~~	2.754(a)(2)	NRC staff's proposed findings
~~905~~	2.754(a)(3)	Applicant's reply to proposed findings
~~995~~	2.760	Initial Decision

1005	2.788(a) 2.762(a) 2.1015(c)	Stay motions to AB Notices of Appeal
1015	2.788(d)	Replies to stay motions
1035		AB ruling on stay motion
	2.762(b)	Appellant's briefs
1045	2.788(a)	Stay motions to Commission
1055	2.788(d)	Replies to stay motions
1065	2.762(c)	Appellee's brief
1075	2.762(c)	NRC staff brief
1095	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
1105	2.763	Oral argument on appeals
1165		Appeal Board decision
1180	2.1015(e) 2.786(b)(1)	Petitions for Commission review
1190	2.786(b)(3)	Replies to petitions

Dated at Rockville, Maryland,
this day of 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.

HLW/Repository

C/R Distribution: Chm, Cmrs, GPA, GC, CA, PDR, Historian, SECY, Records.

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No. 89-157
Tel. 301/492-0240

FOR IMMEDIATE RELEASE
(Wednesday, October 4, 1989)

NRC PROPOSES REVISIONS TO LICENSING PROCESS FOR HIGH-LEVEL RADIOACTIVE WASTE REPOSITORY

The Nuclear Regulatory Commission is proposing amendments to its regulations which would govern the licensing process for a high-level radioactive waste repository to be built and operated by the Department of Energy.

The proposed revisions would be in addition to new basic procedures for the proceeding which were put in place earlier this year and would:

-- Raise the threshold for the admission of contentions to require that the proponent of a contention demonstrate the existence of a genuine dispute with the license applicant on a material issue of law or fact and to indicate what facts or expert opinion provide the basis for the contention.

-- Require that contentions proposed after initial contentions have been filed meet the existing higher standard for late-filed contentions and that the proponent of a late-filed contention demonstrate that it addresses a significant new safety or environmental issue or that it raises a new issue material to the evaluation of repository performance.

-- Require a party sponsoring a contention to present direct testimony on that contention and not rely solely on cross examination of the license applicant and/or the NRC staff to prove its case.

-- Make mandatory the entire hearing schedule set forth in a model hearing schedule which was a part of the earlier rulemaking on basic procedures.

-- Prohibit the Commission's Licensing Board or Appeal Board from raising issues which have not been placed in controversy by the parties to the proceeding.

In addition to seeking comments on the proposed amendments, the Commission also is asking for comments on issues it plans to include in the Notice of Hearing when the Department of Energy's license application is received, now expected in early 1995. These issues include:

-- The Commission itself will designate members of the Licensing Board which, in turn and as necessary, may establish subsidiary boards to hear and decide discrete issues.

-- The Commission is contemplating the selection of technical members of the Hearing Licensing Board from a wide pool of external and internal candidates, not just from members of the Commission's Licensing Board Panel. The Hearing Licensing Board is expected to be composed of three members--a lawyer-chairman experienced with NRC procedures and two technical members--one with engineering expertise, one with geoscience expertise and both with a background in performance assessment.

-- The Commission will: encourage the Board to set time limits on cross examination, if necessary to meet the hearing schedule; direct the Board to institute the "lead intervenor" concept; direct the Board to limit the scope of re-direct and re-cross examination; encourage the Board and the parties to reach agreement on the order of hearing issues; and instruct the NRC staff not to become involved in procedural disputes between other parties and in which the staff does not have an interest.

Written comments on the proposed amendments to Subpart J of Part 2 of the Commission's regulations as well as the Commission's proposals in regard to the Notice of Hearing should be received by November 27, 1989. They should be addressed to the Secretary of the Commission, Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch.

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HLW/Reposition

[7590-01]

NUCLEAR REGULATORY COMMISSION

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: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its Rules of Practice for the licensing proceeding on the disposal of high-level radioactive waste at a geologic repository (HLW proceeding). The proposed revisions are intended to facilitate 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, while providing for a thorough technical review of the license application and the equitable treatment of the parties to the hearing. For the HLW proceeding, the proposed rule would establish a new standard for the admission of initial contentions, would define "late contentions" as any contention proposed after the initial contentions were submitted, would require parties to present direct testimony on contentions, would establish a compulsory hearing schedule, and would eliminate sua sponte review by the Commission's adjudicatory boards. The Commission is also proposing a change to the regulations to clarify that the LSS Administrator's periodic evaluation of, and written report on, DOE's

~~89 1/66 5/19~~

compliance with the LSS requirements will be circulated to potential parties who must timely file any objections they may have to the Administrator's evaluation or risk waiving such objections. In addition, the Commission is proposing to amend its regulations to clarify its authority to designate a presiding officer to resolve disputes during the period prior to receipt of a formal application for construction of the high-level waste repository. The proposed amendments would also clarify that the Commission will specify the jurisdiction of the presiding officer in designating the presiding officer pursuant to these amendments.

DATES: The comment period expires [INSERT DATE SIXTY DAYS AFTER PUBLICATION]. Comments received after this date will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington DC 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Bradley W. Jones, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555, Telephone: 301-492-1637.

SUPPLEMENTARY INFORMATION:

Background

In the final rule on the Licensing Support System (LSS), promulgated on April 24, 1989 (54 FR 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. As the Commission noted in the Supplementary Information to this rule--

> ...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 FR 14925, 14930.

Accordingly, the Commission has evaluated the need for any further modifications to the procedures for the HLW proceeding. This evaluation has focused on the need to modify or supplement, through rulemaking or other procedural mechanisms, the provisions contained in the new Subpart J. The objective of the proposed revisions is to enable the Commission to conduct the HLW licensing proceeding in the most efficient manner possible and to facilitate compliance with Section 114(d) of the Nuclear Waste Policy Act, as amended, which requires the Commission to make a decision on the issuance of

the construction authorization for the repository within three years after the submission of the DOE license application, while still providing for a thorough technical review of the license application and equitable participation in the HLW proceeding by affected parties. For the HLW proceeding, the proposed rule would establish a new standard for the admission of initial contentions, would define "late contentions" as any contention proposed after the initial contentions were submitted, would require parties to present direct testimony on contentions, would establish a compulsory hearing schedule, and would eliminate sua sponte review by the Commission's adjudicatory boards.

In conducting its evaluation of the need for further changes to the HLW licensing process, it has come to the Commission's attention that there is some question as to whether the Commission is required to use a three member Licensing Board to resolve disputes during the pre-license application phase of the HLW proceeding. It was never the Commission's intention that it have less flexibility for resolving disputes during the pre-license application phase of the HLW proceeding than exists for other NRC licensing proceedings. Accordingly, the Commission is proposing clarifications to the regulations to provide the Commission with the same options for resolution of disputes during the pre-license application phase of the HLW proceeding as exist in other NRC licensing actions.

The Proposed Rule:

Standards for initial contentions (§ 2.1014)

On August 11, 1989, the Commission promulgated a final rule amending the provisions of general applicability in Subpart G of the Commission's Rules of Practice ("final rule on regulatory reform"). 54 FR 33168. The final regulatory reform rule addresses standards for the admission of contentions (§ 2714), the elimination of unnecessary discovery against the parties (§ 2.740), the discretionary use of cross-examination plans (§ 2.743), motions for summary disposition (§2.749) and limitations on intervenors filings of proposed findings (§ 2.754) and appeals (§ 2.762). Section 2.1000 of Subpart J cross-references those sections of general applicability in Subpart G that will continue to apply to the HLW licensing proceeding. As such, all but one of the provisions in the final regulatory reform rule - § 2.714, which requires contentions to show that "a genuine dispute exists on a material issue of law or fact" - will automatically apply to the HLW proceeding. However, Subpart J contains a new provision on contentions, § 2.1014, and § 2.714 would therefore not apply to the HLW proceeding. Consequently, the proposed revisions to Subpart J would amend § 2.1014 to incorporate a similar standard for contentions to that contained in § 2.714 of the final regulatory reform rule.

The proposed amendments to 10 CFR 2.1014 would 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 a material 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 on to establish the facts or expert opinion. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinion, be it one fact or many, of which it is aware at this point in time which provide the basis for its contention. Absent a showing that there is a genuine dispute on a material issue of fact or law, the contention will not be admitted. Under the proposed amendments, admission of a contention may also be refused if it is determined 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 proposed 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/or oral argument.

In addition to providing a statement of facts and sources, the proposed rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant on a material issue of fact or law. This will require the intervenor to read the pertinent portions of the license application, state the applicant's position and the petitioner's opposing view. Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.

Late-filed contentions (§ 2.1014)

The proposed rule would amend § 2.1014 to require that any contentions proposed after the initial contentions have been filed must satisfy the higher standard for admission that is currently set forth in § 2.1014(a)(1) of Subpart J. In addition to the standards in § 2.1014(a)(1), a proponent of a late-filed contention would need to demonstrate that the contention addresses 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 proposed revision would retain the standard for late filed contentions that is in § 2.1014(a)(1) of the existing rule, but would apply that standard to any contention filed after the initial contentions are submitted. The existing rule only applies the higher standard to contentions submitted more than 40 days after the issuance of the NRC Staff Safety Evaluation Report (SER). The Hearing Licensing Board is to interpret the "good cause" criterion in § 2.1014(a)(1)(i) strictly; the mere issuance of the SER would not constitute "good cause" for late filing under § 2.1014(a)(1)(i).

In evaluating whether the contention raises "significant" or "material" issues, the Board could consider such factors, among others, 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. The later in the proceeding that a contention is raised, the greater the burden in showing

its significance or materiality. The extensive interaction between NRC, DOE, and affected parties such as the State of Nevada in the pre-license application phase, as well as the early availability of relevant documents through access to the LSS before initial contentions must be filed, should substantially reduce the need for late-filed contentions. By identifying the issues in controversy, to the extent practicable, at the outset of the hearing, the proposed revision will contribute to an efficient hearing process.

Participation in the LSS (§ 2.1014)

The Negotiating Committee had originally proposed that a factor to be considered under § 2.1014(c) governing admission to the high level waste proceeding would be the petitioner's participation as a potential party under § 2.1008(c) of Subpart J. The Commission deleted this provision in the final version of the Subpart J rulemaking because, the Commission did not believe that pre-license application access would have any meaningful effect on a Licensing Board's determination on intervention petitions. Thus, participation in the LSS would not be given weight as a factor in favor of granting an intervention petition.

In deleting that provision, however, the beneficial effect of encouraging participation in the LSS was also deleted. Because participation in the LSS is an important component of the procedural mechanisms adopted by the Commission to meet its statutorily dictated deadline for consideration of the application for construction of the high-level waste repository, the

Commission does wish to encourage participation in the LSS. While it still does not believe that participation in the LSS should be a favorable factor affecting the Licensing Board's decision on granting an intervention petition, the Commission does believe a failure to participate in the LSS should weigh against the granting of an intervention petition. Accordingly, the Commission has decided to add as an additional factor under 10 CFR 2.1014(c), to be considered by the Licensing Board in determining whether a petitioner has met the requirements for participation as a party to the high-level waste proceeding, the failure of a petitioner to participate in the LSS.

Direct testimony on contentions (§ 2.1024)

The proposed rule would add a new § 2.1024 to Subpart J that would require a party that sponsors a contention to present direct testimony on the contention. Past NRC practice has been to allow a proponent of a contention to prove its case solely by cross-examination of the license applicant's or the NRC staff's witnesses. The proposed amendment would require a party sponsoring a contention to put forth direct expert testimony in support of the contention. However, a party could subpoena a witness of the applicant or the NRC staff to satisfy this requirement, in effect, calling a "hostile" witness. Under proposed § 2.720(a), a party seeking to subpoena a hostile witness, other than from the NRC staff, would be required to demonstrate the general relevance of the testimony to the contention. However, under proposed § 2.720(h)(2)(v), the presiding officer is directed to not issue a subpoena requiring the testimony of named NRC personnel

unless a showing is made that the particular named NRC employee has direct personal knowledge relevant to the contention, and that the testimony sought is not reasonably obtainable from another source. This will reduce the potential for the direct case requirement to divert critical NRC staff resources from other functions. The cost of obtaining the necessary testimony from another source will not be a relevant factor in making the determination required under proposed § 2.720(h)(2)(v).

The proposed requirement for a direct case would also apply to replies to motions for summary disposition as well as to contentions. Summary disposition motions that are supported by evidentiary material in the form of affidavits would also necessitate a reply to the summary disposition motion that is supported by affidavits.

Although the proposed amendment deviates from current NRC practice, the Commission believes that the expedited hearing schedule required by the NWPA, the extensive pre-license application consultation process, and the early availability of relevant licensing material through the LSS, justifies a requirement of a direct case from those who seek to participate in the proceeding. The sanctions for failing to present a direct case on a contention at the hearing will be dismissal of the contention. Failure to respond in kind to a motion for summary disposition of a contention would also result in the dismissal of the contention. In terms of the ultimate burden of proof, the license applicant would still have to satisfy the NRC that the issue involved has been acceptably resolved, as is the case with all uncontested issues.

Compulsory hearing schedule (§ 2.1026)

In order to facilitate compliance with the NWPA schedule, the Commission set forth a model hearing schedule in the Supplementary Information of the LSS rule. 54 FR 14924, 14939. Several of the milestones in the model schedule are already required by virtue of the provisions in Subpart J. The proposed rule would make the entire schedule mandatory, while still providing some flexibility to the Board to address mitigating circumstances. For the filings required of the parties, the Board may grant extensions for any individual milestone of up to 15 days. Any approval by the Board of extensions in excess of 15 days would be referred to the Commission. If the Commission did not act to disapprove the extension within 10 days, the Board's extension would be effective. Barring exceptional and unforeseen circumstances, a party who seeks an extension beyond 15 days must file the request for the extension no later than 5 days in advance of the scheduled date for the milestone.

For Board issuances, the Board would have a grace period of thirty days to comply with the milestone. If the Board anticipates that such a milestone will be exceeded by more than thirty days, the Board is required to notify the Commission of the delay at least ten days in advance of the scheduled date for the milestone, and to provide a justification for the delay. This will allow the Commission to track the cumulative effect of individual delays on its ability to meet the NWPA schedule.

Sua sponte (§ 2.1027)

The proposed rule specifically prohibits the Hearing Licensing Board or the Appeal Board from raising issues that have not been placed in controversy by the parties to the proceeding. The Commission does not believe that sua sponte authority is necessary in a proceeding, such as the HLW proceeding, where a hearing is required on the decision to authorize construction of the repository, and where the parties will include entities that should be well-prepared and have had substantial involvement in the HLW licensing process, and therefore, there is little likelihood that a significant issue will be overlooked.

Conforming Amendments

The proposed rule also contains several conforming amendments. Section 2.1000 has been revised to delete §§ 2.749 and 2.785(b)(2). The proposed rule adds a new § 2.1025 on summary disposition for the HLW proceeding. Therefore, the summary disposition provision, in the general applicability provisions of Subpart G, § 2.749, no longer needs to be cross-referenced in § 2.1000. Section 2.785(b)(2) in Subpart G allows the Appeal Board to consider serious matters that have not been raised by the parties. This would conflict with proposed § 2.1027 which prohibits sua sponte review and therefore has been deleted from § 2.1000. Finally, proposed § 2.4(p) clarifies that for purposes of § 2.1018, "NRC Personnel" includes NRC consultants.

Clarification to LSS Regulations

The Commission is also proposing a change to 10 CFR 2.1003(h) to clarify that the periodic evaluations of, and written report on, DOE's compliance with the LSS requirements, required by § 2.1003 (h)(2)(i) and (ii), will be circulated to the potential parties for comment. While the current regulations provide at § 2.1003(h)(2)(iii) that a party may comment on the report required under § 2.1003(h)(2)(ii), the regulations are silent concerning comments on the evaluations required by § 2.1003(h)(2)(i). In order to assure early identification of any disputes concerning the LSS administrator's findings on DOE's compliance with the LSS requirements, the Commission is amending § 2.1003(h)(2)(iii) to specify that both the evaluations required under § 2.1003(h)(2)(i) and the written report required under § 2.1003(h)(2)(ii) will be circulated to the potential parties in the high level waste proceeding for comment and that objections to the Administrator's findings on DOE's compliance must be filed within 30 days of the Administrator's report or be waived.

In addition, the Commission is proposing clarifications to 10 CFR 2.1010 governing resolution of disputes during the pre-license application phase of the HLW proceeding. Current NRC regulations, at 10 CFR 2.1010, provide that a "Pre-License Application Licensing Board" will decide certain disputes which arise during the pre-license application phase associated with licensing of the high-level waste repository. The regulations at 10 CFR 2.1000 also provide that the provisions of 10 CFR 2.704 will apply to the high-level waste repository licensing proceeding. Although 10 CFR 2.704 provides that the Commission may, in a Notice of Hearing, provide for 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, to preside over NRC hearings, the Notice of Hearing associated with the high level waste repository construction application will post-date designation of a Presiding Officer to rule on issues during the pre-license application phase of the High Level Waste Repository proceeding. In addition, the language in 10 CFR 2.1010 has raised some question as to whether the Commission is limited to use of a three member licensing board during the pre-license application phase of the high level waste repository proceeding.

The Commission, in adopting 10 CFR 2.1010, did not intend to limit the Commission's options to use of a three member licensing board during the pre-license application phase of the high-level waste repository licensing proceeding. While the Commission may, in fact, decide to use a three member licensing board to resolve pre-license application disputes, the Commission did not intend that its options for resolution of these issues would be more limited then for other NRC proceedings. Accordingly, the Commission is adopting amendments to the language of 10 CFR Part 2, which clarifies that the Commission retains the full range of options, similar to the options delineated in 10 CFR 2.704 for other NRC proceedings, for resolution of disputes during the pre-license application stage of the high-level waste licensing proceeding.

In addition, the jurisdiction of a Presiding Officer designated under 10 CFR 2.704 is normally contained in the Notice of Hearing for the proceeding over which the officer will preside. Because no Notice of Hearing will have issued in the pre-license application stage of the high-level waste

proceedings, the Commission is also adopting an amendment that clarifies that the Commission will, in designating a Presiding Officer under 10 CFR 2.1010 for the pre-application phase of the HLW proceeding, specify the jurisdiction of the Presiding Officer.

Notice of Hearing

In addition to the procedures set forth for the HLW proceeding in Subpart J, the Commission intends to also address several issues related to the management of the hearing in the Commission's Notice of Hearing for the HLW proceeding. Under the current schedule, the DOE license application will not be submitted until early 1995. However, the Commission is now evaluating, and seeks comment on, the following issues that it plans to include in the Notice of Hearing--

(1) The Commission itself will designate the members of the Hearing Licensing Board. This 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 is contemplating the selection of 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) Encourage the Board to set time limits on cross-examination if necessary to meet the hearing schedule.

(4) Direct the Board to institute the "lead intervenor" concept for the proceeding.

(5) Direct the Board to limit the scope of re-direct and re-cross examination to the issues raised on cross-examination and re-direct examination, respectively.

(6) Encourage the Board and parties to reach agreement on the order of hearing issues, so that related issues can be addressed at the same time, and to extent practicable, in a logical sequence.

(7) 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 Hearing Licensing Board 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 boundries of the Hearing Licensing Board's jurisdiction in the Notice of Hearing.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation 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 proposed regulation.

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1989 (44 U.S.C. 3501 et Seq.).

Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commision. The draft 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 B. W. Jones, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: 301-492-1637.

The Commission requests public comment on the draft regulatory analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the ADDRESSES heading.

Regulatory Flexibility Certification

This proposed 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 FR 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 proposed rule will not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

This proposed 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 proposed rule.

List of Subjects

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 proposing 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. 114f, 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). Subpard 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 contractural 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 2.720 is amended by revising paragraph (a) and adding paragraph (h)(2)(v) to read as follows:

§ 2.720 Subpoenas.

(a) On application by any party, the designated presiding officer or, if he or she is not available, the Chairman of the Atomic Safety and Licensing Board Panel, the Chief Administrative Law Judge, or other designated officer will issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence. The officer to whom application is made may require a showing of general relevance of the testimony or evidence sought or, in the case of a subpoena requested for purposes of providing direct testimony pursuant to § 2.1024, a showing of general relevance to the contention, and may withhold the subpoena if such a showing is not made, but the officer may not attempt to determine the admissibility of evidence.

(h) * * *

(2) * * *

(v) For purposes of § 2.1024, the presiding officer may not issue a subpoena requiring the testimony of named NRC personnel unless a showing is made that the particular named NRC employee has direct personal knowledge relevant to the contention, and that the testimony sought is not reasonably obtainable from another source.

* * * * *

4. 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 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, 2.785(a),(b)(1),(c),(d), 2.786, 2.787, 2.788, and 2.790.

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 Licensing Board established for the high-level waste proceeding, hereinafter the "Hearing Licensing Board"; provided, however, that

the time for submittal under this paragraph will be stayed pending Board action on a motion to extend the time for submittal.

7. Section 2.1006 is amended by revising the introductory text to paragraph (b) 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 Hearing Licensing Board, must be submitted by the party, interested governmental participant, or potential party that asserted the claim to-

* * * * *

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

§ 2.1008 Potential parties.

* * * * *

(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.

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 the LSS Administrator's decision on substantial compliance pursuant to § 2.1003(h); discovery disputes; 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 non-disclosure) 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 issued pursuant to this paragraph, 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 Presiding Officer.

10. Section 2.1[illegible]12 is amended by by revising paragraphs (c) and (d) to read as follows:

§ 2.1012 Compliance.

* * * * *

(c) The Hearing Licensing Board may 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 established 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 Hearing Licensing Board 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 Hearing Licensing Board or the requirements of this subpart.

11. In § 2.1014, paragraphs (a)(2)(iii), (a)(3), and (a)(4) are revised and paragraphs (c)(4) and (h) are added to read as follows:

§ 2.1014 Intervention.

(a) * * *

(2) * * *

(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 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, 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.

* * * * *

(3) Any petitioner who fails to satisfy paragraph (a)(2)(iii) of this section with respect to at least one contention may 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 Hearing Licensing Board 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) * * *

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

* * * * *

(h) If the Commission or presiding officer designated to rule on the admissibility of contentions 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 to a schedule determined by the Commission or presiding officer.

15. In § 2.1015, the introductory text of paragraph (b) and paragraph (b)(1) are revised to read as follows:

§ 2.1015 Appeals.

* * * * *

(b) A notice of appeal from (1) a Pre-license Application Presiding Officer order issued pursuant to § 2.1010,

* * * * *

13. Section 2.1022 is amended by revising paragraph (a) to read as follows:

§ 2.1022 Second prehearing conference.

(a) The Commission or the Hearing Licensing Board in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geological respository 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:

(1) Simplification, clarification, and specification of the issues;

(2) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

(3) Identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(4) The setting of a hearing schedule;

(5) Establishing a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in Section 114(d) of the Nuclear Waste Policy Action of 1982, as amended, 42 U.S.C. 10134(d); and

(6) Such other matters as may aid in the orderly disposition of the proceeding.

* * * * *

14. Section 2.1024 is added to Subpart J to read as follows:

§ 2.1024 Evidence.

A party who sponsors a contention under § 2.1014 is required to present direct testimony in support of the contention.

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

§ 2.1025 Authority of presiding officer to dispose of certain issues on the pleadings.

(a) Any party to a proceeding 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 serve an answer supporting or opposing the motion, within twenty (20) days after service of the motion. If the motion was accompanied by supporting

affidavits, any answer opposing the motion must be accompanied by affidavits in support of such opposition. 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 served by the moving party will be deemed to be admitted unless controverted by the statement required to be served 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 must set forth such facts as would be admissible in evidence and must 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 depositions, answers to interrogatories or further affidavits. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his or her answer; his or her 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, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, 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.

16. 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 Hearing Licensing Board shall adhere to the schedule set forth in Appendix D of this Part.

(b)(1) Pursuant to § 2.711, 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.

(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.

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

(2) If the Board 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 Board shall notify the Commission at least ten days in advance of the scheduled date for the milestone and provide a justification for the delay.

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

§ 2.1027 Sua Sponte.

In any initial or appellate decision in a proceeding on a application to receive and possess waste at a geologic repository operations area, the Board 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.

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

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

Day	Regulation (10 CFR)	Action
0	2.101(f)(8) 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
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) 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		Appeal Board 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 prefiled 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		Appeal Board order ruling on appeals from 2nd Prehearing Conference Order
660	2.1025 (set by LB)	Final Motions for summary disposition
680	2.1025	Replies to final motions for summary disposition
690	Supp. Info.	Discovery complete
700		Licensing Board order on final motions for summary disposition
710	2.1015(b)	Appeals from final summary disposition order, w/ briefs
720		Evidentiary hearing begins
	2.1015(b)	Briefs in opposition to appeals from final summary disposition orders
750		Appeal Board order on appeals from final 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) 2.762(a) 2.1015(c)	Stay motions to Appeal Board Notices of Appeal
975	2.788(d)	Replies to stay motions

995		Appeal Board 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		Appeal Board decision
1140	2.1015(e) 2.786(b)(1)	Petitions for Commission review
1150	2.786(b)(3)	Replies to petitions

Dated at Rockville, Maryland, this 19th day of Sept 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.

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

FPL

(1)

DOCKET NUMBER PR 2
PROPOSED RULE [illegible]

(54 FR 39387)

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

L-89-430

DOCKETED
'89 DEC 15 P4 5:28

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:

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(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

(3)

ENVIRONMENTAL DEFENSE FUND

405 Arapahoe Avenue
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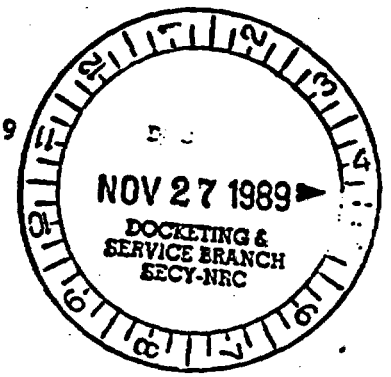
DOCKET NUMBER
PROPOSED RULE PR 2
(54 FR 39387)

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

CKET NUMBER
OPOSED RULE PR 2
(5 FR 39387)

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'89 NOV 28 P3:23

(4)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

DEC 11 1989
Acknowledged by card.

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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 -2
(54FR39387)

Department of Energy
Washington, DC 20585

(5)

NOV 27 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

DEC 11 1989
Acknowledged by card.

8911300156

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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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.

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DEC 11 1989

Acknowledged by card.

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:

- o a specific statement of the issue of law or fact to be raised or controverted;
- o a brief explanation of the bases of the contention;
- o 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;
- o references to the specific sources and documents on which petitioner intends to rely to establish the facts or expert opinion;
- o sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact;
- o 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.

[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.

I. 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.

DOCKET NUMBER PR -2
PROPOSED RULE (54FR 39387)

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November 27, 1989

Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
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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

DEC 11 1989
Acknowledged by card.....

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Procedures Applicable to Proceedings for the Issuance of Licenses for High-Level Radioactive Waste Repositories	10 CFR Part 2 54 Fed. Reg. 39387

COMMENTS OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

> "The Great White Father promises that if you agree to stay on this reservation, it will be yours for as long as the sun shines and the river flows."

Statements such as this were made time after time by United States agents while "negotiating" treaties with Indian tribes during the nineteenth century. More often than not, such promises were broken within a very short time, as minerals were discovered or simply because white settlers demanded more land.

On September 26, 1989, the Commission published in the Federal Register a 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 Fed. Reg. 39387. Following are the comments of the National Congress of American Indians ("NCAI") on that proposed rule, which harkens back to the specter of broken treaties alluded to above. For the reasons stated below, NCAI urges the Commission to withdraw this proposed rule.

The Pillaging of Regulatory Negotiations

The Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.*, requires the NRC to decide on a construction authorization for a high-level waste repository within 36 months of the docketing of an application, with a possible 12 month extension for good

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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Dated: November 27, 1989