No. 04-1145

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.,
Petitioners

and

NATIONAL WHISTLEBLOWER CENTER and
COMMITTEE FOR SAFETY AT PLANT ZION,
Petitioners' Interveners

-v-

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA,
Respondents

and

NUCLEAR ENERGY INSTITUTE,
Respondents' Intervener

PETITION FOR REVIEW OF AGENCY ACTION

BRIEF OF PETITIONER
CITIZENS AWARENESS NETWORK, INC.

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Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

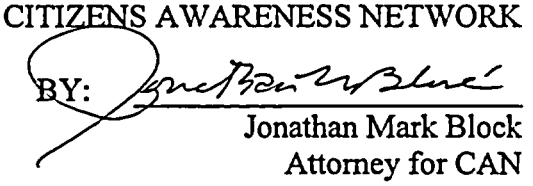
CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervenor* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervenor*	No. 04-1145 June 7, 2004

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Petitioner Citizens Awareness Network, Inc.[CAN], hereby discloses that it is a non-profit, public interest organization incorporated under the laws of the Commonwealth of Massachusetts. CAN has members throughout the Commonwealth of Massachusetts, Connecticut, Maine, New Hampshire, New York, and Vermont. Many live within the evacuation zones around nuclear reactor sites. CAN has neither parent company nor subsidiaries, nor does it hold or issue stock.

Respectfully submitted:

CITIZENS AWARENESS NETWORK

BY: 

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I. JURISDICTIONAL STATEMENT

A. Basis for Agency's Subject Matter Jurisdiction

Citizens Awareness Network, Inc., is petitioner in case, 04-1145, consolidated by this court with 04-1359, in an order on April 28, 2004. These cases seek this court's review of final agency rules. The United States Nuclear Regulatory Commission [NRC] made these rules pursuant to authority under the Atomic Energy Act, 42 U.S.C. §2201 et seq., and the Administrative Procedure Act, 5 U.S.C. §551 et seq., applicable to agency proceedings under §181 of the Atomic Energy Act, 42 U.S.C.§2231.

B. Basis for the Court of Appeals Jurisdiction

Citizens Awareness Network, through representative members, an aggrieved party to a federal agency rule-making as defined under 5 U.S.C. §702, claims that the NRC acted *ultra vires* enacting final agency rules interpreting the Atomic Energy Act as not providing CAN and its members with a full, fair "on the record" public hearing under §189a of the Atomic Energy Act, 42 U.S.C. §2239. CAN invokes this Court's jurisdiction pursuant to Article III and Amendments I and V of the United States Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 702-706, and the Atomic Energy Act, 42 U.S.C.§2239(b). The Atomic Energy Act provides, through the Hobbs Act, for review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) [of section 2239]." *Id.* The

Hobbs Act states, in pertinent part, that "the court of appeals has . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --- [a]ll final orders of the Atomic Energy Commission [now Nuclear Regulatory Commission] made reviewable by section 2239 of title 42. 28 U.S.C. §2342(4); *see also Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 737 (1985).

1. CAN's Standing

CAN must address the issue of standing before this court may undertake review. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998); *accord Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Establishing Article III standing, CAN must meet three requirements. *See, e.g., Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000).

CAN must demonstrate "injury in fact". The harm must be both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). CAN must establish a causal link "fairly ... trace [able]" between the "injury in fact" as alleged and defendant's alleged conduct. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Third, CAN must demonstrate there is a "substantial likelihood" requested relief will remedy the njury in fact, and

the Court can take action to redress CAN's harm. *Id.* at 45. CAN must also demonstrate the three requisites of standing through a member authorizing the organization to represent that member's interests in the proceeding.[1] *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."); *accord, Service Employees Intern. Union, AFL-CIO, CLC v. Local 1199 N.E., SEIU, AFL-CIO, CLC*, 70 F.3d 647, 654 (1st Cir. 1995).

Citizens Awareness Network [CAN] predicates standing on declarations of representative members Deborah Booth Katz and Jean-Claude van Itallie supported by the declarations of an expert in hydrogeology, Robert J. Ross, and an expert in public health and epidemiology, Richard Clapp. Addendum to Petitioner's Brief [Addendum] at A-102 to A-118.

The "injury in fact" that is "concrete" and "actual or imminent" in this case is predicated on declarants Jean-Claude van Itallie and Deborah Booth

[1] The NRC requires that 'affected' persons who want a hearing must demonstrate Article III standing in order to be eligible for a hearing. *See, e.g. Northern States Power Co*. (Monticello Nuclear Generating Plant; Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37 (2000); *Private Fuel Storage L.L.C.*, CLI-99-10, 49 NRC 318, 323 (1999).

Katz wanting to participate in an NRC adjudicatory hearing on the recently submitted license termination plan [LTP] for the Yankee Rowe Nuclear Power Station in Rowe, Massachusetts [Yankee Rowe]. Even though they both reside within six miles of the contaminated Yankee Rowe site, they will not be offered a full and fair, "on the record" public hearing on their otherwise legitimate concerns over the need for extensive site clean-up beyond what is called for in the License Termination Plan. Due to the changes in the NRC rules at issue, a full and fair, "on the record" public hearing will not be offered to them. Declarations at, respectively, ¶¶1-3, 1-2, Addendum at A-102, A-105.

Mr. van Itallie and Ms. Katz are both aware of the findings of hydrogeologist Robert J. Ross concerning the tritium contamination of three aquifers below the Yankee Rowe Reactor site. *Compare* declarations of Mr. van Itallie at ¶14 and *Ms. Katz* at ¶15 *with* Declaration of Robert J. Ross, Addendum at A-109-112, ¶¶4-20. Mr. Ross states that based upon the current data available, Yankee Atomic Electric Company cannot provide assurances that the tritium contamination is contained on the Yankee Rowe reactor site. Ross Declaration at ¶18. He also states that the observed contamination is above the EPA action level for drinking water. *Id.* at ¶¶7, 19.

The Declaration of Richard Clapp states that tritium is carcinogenic,

and that a person who drinks water containing tritium may get cancer and will suffer damage to some genetic material in the cells of his or her body. Declaration of Richard Clapp at ¶6, Addendum at A-114. Mr. van Itallie and Ms. Katz are aware of this danger. It interferes with the quiet use and enjoyment of their respective homes and properties. It interferes with their rights to freely roam and enjoy the local countryside without fear they may encounter radioactive contamination from the Yankee Rowe site. *Compare* Declarations of Mr. van Itallie at ¶¶5, 8 *with* Ms. Katz at ¶¶7-10. They are both concerned that a radioactively contaminated site near their homes has an adverse effect on the value of their property in addition to lessening their abilities to use and enjoy it. Both are in imminent danger of harm if they drink contaminated water. This is the kind of harm they should be able to raise in a full and fair public hearing on the LTP, if the NRC still offered such hearings as required under §189a of the Atomic Energy Act.

The harms Ms. Katz and Mr. van Itallie raise are concrete and actual, and stem from the fact that the Yankee Rowe site, under regulatory control of the NRC, is contaminated as described in the Declaration of Robert J. Ross. Contamination, which neither Yankee Atomic Electric Company nor the NRC can assure is contained on the site, is from a substance that causes damage to the cells of persons such as Ms. Katz and Mr. van Itallie when ingested. Ross Declaration, Addendum at A-111, ¶18; Clapp Declaration,

Addendum at A-114-115, ¶¶5-9.

Mr. Ross believes that the LTP needs to be modified to assure proper monitoring and abating tritium contamination, and provide an adequate assurance public health and safety are protected. Ross Declaration at ¶20. Mr. Clapp believes that an environmental impact study needs to be done on the Yankee Rowe site to assess the extent of hazards and the potential for remediation of the tritium contamination. Clapp Declaration at ¶9. These expert assessments, with the declarations of Ms. Katz and Mr. van Itallie, meet the Article III standing requirements of the NRC and form the basis of a litigable contention of a material defect in the Yankee Rowe LTP.

The causal link between the "injury in fact" described above and the NRC's conduct is through the new hearing process available to Ms. Katz and Mr. van Itallie as the only way to seek remedies for the radioactive contamination in their community. Mr. van Itallie and Ms. Katz want an opportunity to obtain discovery from Yankee Atomic Electric Company concerning the extent of radioactive pollution at the Yankee Rowe site. The new rules truncate discovery. They want to be able to control presentation of their witnesses Ross and Clapp, experts providing testimony in their case. They also want to cross-examine witnesses for Yankee Atomic Electric Company and others who may appear at hearing. The new NRC rules do not permit them, as intervenors under § 189a, to control presentation or cross-

examination of witnesses. *Compare* declaration of Mr. van Itallie at ¶¶15-20 *and* Ms. Katz at ¶¶4-6, 11-16; *with* portions of the Final Rules in Addendum at A-17 to A-25, A-27 to A-30; given the gravity of the harms confronting them, the basic elements of due process at hearing should be available to them in seeking agency remedies. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978) ("emission of non-natural radiation into . . . environment would also seem a direct and present injury").

The expert opinions of Mr. Ross and Mr. Clapp support the concerns of Mr. van Itallie and Ms. Katz and their desire to have a full and fair hearing on these issues. *Compare* declaration of Ross ¶¶18-20 *with* Clapp ¶¶5-9. The current NRC rules have a presumption that in hearings, such as the one Mr. van Itallie and Ms. Katz want on the Yankee Rowe LTP, there will be no discovery, presentation of witnesses or cross-examination of witnesses, except as conducted by the hearing officer. *Compare* Final Rule, "Changes to NRC Adjudicatory Process," 69 FR 2182 (January 14, 2004, eff. February 13, 2004), Addendum at A-6, 7, 8, 13, 14, 27, 30, 32, 45 *with Bellotti v. United States Nuclear Regulatory Com'n*, 725 F.2d 1380, 1385-88 (D.C. Cir. 1983) (Wright, J., dissenting) (Commission deliberately trying to exclude public from statutory hearing).

The Atomic Energy Act was intended to protect the health and safety of

persons such as Mr. van Itallie and Ms. Katz from the dangers of radiation produced by the NRC's licensees. *Rockford League of Women Voters v. NRC*, 679 F. 2d 1218, 1222 (7th Cir. 1982) (NRC regulations intended to protect public from dangers of nuclear accidents); *see generally* Atomic Energy Act, 42 U.S.C. §2011 et seq. (2003), as amended by ERA, 42 U.S.C. §5801 et seq. (2003). Congress also intended to provide a full, fair, public hearing process for interested persons who may be affected by the NRC's licensing of nuclear facilities.

They are entitled to seek a hearing on such matters before the NRC under §189a of the Atomic Energy Act, 42 U.S.C. §2239, and may appeal adverse decisions in such public hearings or rule making proceedings under 42 U.S.C. §2239(b). Thus, the harms at issue in this case are within the zone of interest, protections and remedies available under the Atomic Energy Act. If this court declares that the NRC's new hearing rules are illegal and vacates them, there is a substantial likelihood that Mr. van Itallie and Ms. Katz will be able to get a full and fair "on the record" public hearing--it may even reach the subject matter of the aborted one in which they participated at the pre-hearing stages in 1998-1999. *Compare* declarations of Mr. van Itallie ¶¶4, 9,10-14, 18-20 *and* Ms. Katz ¶¶3, 11-16. The court should declare that no hearing may take place on the Yankee Rowe LTP until it has completed adjudication of this matter. Only in that way can CAN's representative

members' public hearing rights be protected.

CAN satisfies the requisites of standing through members who authorize the organization to represent their interests in the proceeding, as both Mr. van Itallie and Ms. Katz have standing to bring this case in their own rights. CAN's purposes are germane to the representation of Mr. van Itallie and Ms. Katz, as CAN's members live in communities near nuclear facilities, and want to learn about the effect that continued reliance on the nuclear fuel chain has upon their lives. They want to participate in full, fair, "on the record" public proceedings before the agency that makes decisions concerning the disposition of such facilities as have a direct impact on their lives and property. Declaration of Ms. Katz at ¶¶3-8, 11, 14-16. Neither the adjudication of Mr. van Itallie's and Ms. Katz's claims nor the relief they request requires their participation in this case. Mr. van Itallie and Ms. Katz, both members of CAN, have authorized CAN and CAN's attorney to represent them in this matter. Declarations of Mr. van Itallie at ¶4 and Ms. Katz at ¶4.

C. Timeliness of the Petition for Review

CAN filed this petition for review with the Clerk of the United States Court of Appeals for the First Circuit on January 27, 2004. The Hobbs Act provides for an appeal of a final agency action within sixty days of the date that action becomes final. 28 U.S.C. §2344. The rules were published in the

Federal Register on January 14, 2004. CAN's petition was timely filed.

D. Finality of Agency Action

The Final Rule in this case was published in the Federal Register on January 14, 2004 with an effective date of February 13, 2004. 69 FR 2182 (January 14, 2004), Addendum at A-1 to A-101. The Final Rule was published at the Commission's authority over the signature of its Secretary Annette Vietti-Cook, dated December 24, 2003, and appeared in the Federal Register on January 14, 2004. *Id.* at A-100 to A-101.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the Congress' guarantee of the right to a public hearing under §189a of the Atomic Energy Act is a fundamental right to participation in democratic process under the 1st Amendment that warrants treatment as such, and subjects the NRC's actions in the rule making at issue to this court's strict scrutiny for a denial to CAN and its members of Equal Protection of the law under the 5th Amendment?

B. Whether Congress' implicit and explicit meaning of §189a of the Atomic Energy Act requires the NRC to provide a formal hearing to affected persons (CAN) upon request?

III. STATEMENT OF THE CASE

Petitioner, Citizens Awareness Network, filed a petition for review in the United States Court of Appeals for the First Circuit on January 27, 2004.

The petition requested this court to review a rule making by the NRC that eliminates the availability of formal, "on the record" public hearings in NRC nuclear facilities license adjudications otherwise subject to the hearing requirement of §189a of the Atomic Energy Act. CAN contends that the NRC's rulemaking is illegal in that it deprives CAN and its members of the right to a public hearing under §189a, and that the public hearing opportunity denied by the new rules is a right to be able to participate in government decision making that is protected under the First Amendment to the United States Constitution. Because Congress provided that right to interested persons 'affected' by the NRC's licensing adjudications, elimination of that right for CAN's and its members is a denial of Equal Protection of the Law under the 5th Amendment to the United States Constitution.

CAN also argues that this court should accord the NRC's current views of the meaning of §189a no discretion, as the statute implicitly and explicitly requires full, fair, "on the record" public hearings for interested persons 'affected' by NRC licensing decisions.

IV. STATEMENT OF FACTS

The NRC considered the issues underlying the provision of adjudicatory hearings pursuant to §189a of the Atomic Energy Act in 1989 a

number of times during its history. The first time this issue arose was in the context of Congressional hearings on the 1957 amendments to the Atomic Energy Act, then again in 1962. *See infra* at 39-41, 44-48. Another was in the course of analyzing legal issues relating to extending operating licenses beyond their original terms. William Parler, General Counsel, NRC, memo to Victor Stello, *OGC Analyses of Legal Issues Relating to Nuclear Power Plant Life Extension* (1989), 2 J.A. at 798-830. The most recent was prefatory to the rule-making at issue. 1 J.A. 1-85.

Until the analysis in the Cyr memo of 1999, the analysis in the Parler memo was the prevailing agency interpretation of §189a. The NRC's administrative law judges believe that the Parler memo of 1989 correctly explains the Congressional intent to provide formal "on the record" hearings under §189a of the Atomic Energy Act. 1 J.A at 87-95, 97-99 and 2 J.A. at 551-578.

The NRC chose to proceed with the rule making, risking an unfavorable court decision rather than going to Congress for an amendment to §189a. 1 J.A. at 101, 104, 106-107, 109-111, 115.

The rule making process advanced to an "invitation only" meeting at NRC Headquarters exclusively for those persons the agency chose as representatives of the affected public who would be entitled to a hearing under §189a. 1 J.A. 121-298, 299-378.

At those hearings, the NRC's chosen representatives of the affected public raised numerous concerns and objections about the NRC's plan to eliminate formal public hearings, discovery, presentation of witnesses, and cross-examination, and shorten the time intervenors have to prepare contentions. *See, e.g.*, 1 J.A. at 140-141, 147-148, 155-157, 167 and 212. One of the persons present, Attorney Anthony Z. Roisman remarked, significantly, that he was

> surprised when [he] finally got around to reading [the] material .... that ... no study [was] done of the licensing process to determine, based on real cases, not anecdotes, actual case stud[ies], how many cases work[ed], how many didn't....

1 J.A. at 160e-160g.

On April 16, 2001, the NRC issued its proposed rules. 2 J.A. 614-675. CAN, along with 51 other organizations represented by Attorneys Jonathan M. Block and Stephen Saltonstall, filed timely comments on the proposed rules. 2 J.A. at 685-743. The comments were detailed and extensive, raising issues of the legality of the NRC going forward with the process without any broad-based, meaningful public participation prior to formulating a proposed rule. The comments attacked the legal basis for eliminating formal public hearings and the inherent unfairness in the NRC's reliance on access to computers to permit persons to have reasonable notice of NRC actions and obtain NRC documents. 2 J.A. 690-694, 700-717, 723, 725. The comments

are hereby incorporated into this brief by reference, including the arguments contained therein. 2 J.A. 685-743.

The NRC published the final rule in this case earlier this year. Final Rule, 69 FR 2186 in Addendum at A-1 to A-101. The effective date of the rules was February 13, 2004. Addenum at A-100-101. CAN filed a petition seeking this court's review of the NRC rules at issue on January 27, 2004.

V. SUMMARY OF THE ARGUMENTS

CAN contends that:

A. The NRC's new rules on adjudicatory process deprive nuclear opponents or safety conscious intervenors such as CAN and its members of their 1st Amendment right to participate in their government. The burden of this denial of a fundamental right takes the form of invidious discrimination against CAN and its members in violation of the Equal Protection of the Law the 5th Amendment guarantees to CAN and its members. Strict scrutiny applies to this court's review of the NRC's new rules. Under strict scrutiny review, the rules must be vacated as unconstitutional.

B. This court need not yield any discretion to the NRC's current interpretation of §189a of the Atomic Energy Act because the AEA explicitly and implicitly requires that full, fair, "on the record" public hearings be provided to interested persons 'affected' by NRC licensing decisions.

VI. ARGUMENTS

A. NRC'S INTERPRETATION OF THE ATOMIC ENERGY ACT, §189a, b and §181, DISCRIMINATES AGAINST THE CLASS OF AFFECTED PERSONS UNDER § 189a, WHO WOULD EXERCISE THE RIGHT TO REQUEST AND OBTAIN A FULL, FAIR, "ON THE RECORD" PUBLIC HEARING AS CONGRESS PROVIDED; 'STRICT SCRUTINY' APPLIES TO THIS COURT'S REVIEW OF THE NEW RULES; THE NRC'S INTERPRETATION AND RULES PROMULGATED THEREUNDER CANNOT SURVIVE SUCH REVIEW.

1. Standard of Review.

The standard of review to be applied in this Equal Protection claim is "strict scrutiny" of the NRC's rules and the interpretative justification underlying those rules as argued below. *D.C. Federation of Civic Associations, Inc. v. Volpe*, 434 F. 2d 436, 339-448 (D.C. Cir. 1970).

2. The NRC's Rules Violate The 1st and 5th Amendments.

The Atomic Energy Act of 1954 [AEA],[2] §181, §189a, and §189b, require that the NRC "shall" grant an "on the record" public hearing upon request by "affected" persons. That, pursuant to subsection 'b', there shall be judicial review available for the decisions at hearing, and, under §181, NRC proceedings are subject to the Administrative Procedure Act, 5 U.S.C. §§551 et seq. By these enactments, Congress established a statutory right applying equally to all affected, interested persons under §189a, so that the

[2] *See* CAN's supplied pamphlet of statutes for the text with explanatory notes at 3, 7-9.

NRC is compelled to see that such persons receive a full, fair, "on the record" public hearing that addresses the harms caused to them by NRC licensing actions, and provide them, thereby, with an opportunity to seek redress of their grievances. This right to a public hearing to redress grievances falls under both the guarantees of the 1st and 5th amendments to the United States Constitution; it is fundamental, partaking as it does of the very essence of ordered liberty: the right to speak ones grievances and, more importantly, seek redress in a public forum in which one will be heard. Therefore,

> The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). These rights, according to the Court, are "individual and personal," *id.* at 561, they touch a "sensitive and important area of human rights," *id.* at 561 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942)) and they involve the "basic civil and political rights," *Reynolds v. Sims*, 377 U.S. at 562, of citizens. Any classification which "might invade or restrain" these "fundamental rights and liberties . . . must be closely scrutinized and carefully confined." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966).

D.C. Federation of Civic Associations v. Volpe, 434 F.2d 436, 441 (1970) (citations omitted). Tracking the language of the decision, like the petitioners therein who were affected by the potential construction of a highway through their neighborhood and wanted to avail themselves of the full, fair, "on the record" public hearing that the Transportation Agency was supposed to

provide to them, CAN and its members have only the NRC forum in which they may directly participate in decisions about nuclear licensing that will have a more direct effect upon their lives than almost any other action by their government. "Public hearings are the forum ordained by Congress" in which citizens such as CAN and its members may participate in nuclear licensing decisions.

CAN contends that the decisions cited above must guide this Court's analysis of the language of Section 189a and other relevant portions of the Atomic Energy Act and the Administrative Procedure Act. *D.C. Federation of Civic Associations v. Volpe*, 434 F.2d at 441-442. These provisions provide essential safeguards that Congress chose to provide on a national basis to insure that in the course of licensing nuclear facilities to advance the Congressional purposes of the Atomic Energy Act of 1954, 42 U.S.C. §2011 et seq., such activities would not be allowed to take place unless the NRC took into account the concerns of persons affected by the licenses it grants. §189a of the AEA, 42 U.S.C. §2239.

The NRC's new regulations governing the provision of hearings to 'affected' persons still require such persons to demonstrate that they are in harms way due to the licensing action at issue, in order to meet the NRC's standing requirements. Final Rule, Addendum at A-6, A-8, A-17, A-19. 'Affected' persons must also prove before hearing that they can establish at

least one 'litigable' contention. A-20 to A-21; *see generally, also*, 10 CFR 2.309. That requires proof, supported by documents and, in almost all circumstances, expert declarations, that there is a material fact in dispute over some aspect of the license. The material fact in dispute cannot question a matter already determined by NRC rules and regulations. Addendum at A-21. Thus, to be admitted to a proceeding that will no longer be a full and fair public hearing with all the formalities that attach to such a hearing, 'affected' persons must still demonstrate Article III standing.

The new rules have eliminated the right to discovery, presentation of one's own witnesses and evidence, and the cross-examination of witnesses--except in enforcement proceedings in which the public may not participate. Final Rule, Addendum A-6 to A-8, A-13 to A-14, A-27, A-30, A-32 and A-45; *see also Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C.Cir. 1983) (no public hearing required under §189a in enforcement proceedings).

The net effect of the NRC's new rules is to discriminate only against those persons who oppose the NRC granting a particular nuclear license. CAN discerns that this takes place in several ways--doubtless this court, employing strict scrutiny of the regulations in relation to the guarantees of §189a, will unearth others. First, of the members of the class that includes both opponents and proponents of a nuclear license who demonstrate standing, a material issue (controversy), and request a hearing--only the

opponents are harmed by loss of full, fair, "on the record" public hearings. Proponents--whose views are already represented by the applicant and the NRC staff (which announces its intended approval of the license when noticing a hearing opportunity to members of the §189a class)--support the new informal proceedings. No proponent members filed comments opposing the elimination of full, fair, "on the record" public hearings.

Prior to the new rules, both proponents and opponents of nuclear power had the same rights to hearings. Proponents, other than licensees, did not need discovery or cross-examination, although it was available to them. They were, if they chose to intervene at all, present at hearing in order to support the NRC and the licensee moving forward on a proposed license with all due speed. Under the new rules, only the proponents have what they want: their opponents are muffled by having access only to informal, legislative-type proceedings. Proponents still have the hearing opportunity they want: participation in a hearing process that permits their effective support of the proposed licensing action.

Opponents do not fare so well. They will still be able to speak, only for them it will be a version of the old adage about 'free speech'--you can speak freely when you want, where you want, for as long as you want--so long as no one listens. The need to obtain information for hearing through liberal discovery of the opponent and make one's points from expert testimony

through cross-examination of opponent's expert witnesses is absolutely necessary to individual citizens and public interest groups (such as petitioner CAN in this case) who lack the resources of the NRC and the nuclear industry licensees. *Compare* comments of Attorney Anthony Z. Roisman, 1 J.A. at 160h-160i, *with* the NRC's responses in the Final Rule, Addendum at A-6 to A-7, A-14, A-30, A-32. In proceedings in which opponents cannot have discovery, control of their witnesses, and cannot conduct cross-examination, it is almost impossible for an opponent intervenor to prevail at hearing. *Compare* comments on Attorney Robert Backus, 1 J.A. 164-165. *with* comments of B. Paul Cotter, Jr., then-Chief Administrative Judge, to Karen Cyr, General Counsel, 1 J.A 88-95, *and* comments of G. Paul Bollwerk, III, Acting Chief Administrative Judge, to the Commissioners (January 19, 1999), *id.* at 97-99; comments of G. Paul Bollwerk, III, Chief Administrative Judge, to the Commissioners, 2 J.A. 551-566 (February 10, 2000).

A second form of discrimination under the new rules occurs to both opponents and proponents as members of the same class of otherwise affected persons. Under the new rules, of that class, those who want a hearing in the same proceeding, but on differing issues, could find themselves in two different proceedings--one receiving, due to the "complexity" of the issues, a full panoply of hearing rights, the other only the

new informal hearing described above. *Compare* NRC explanation of the new rules, Final Rule in Addendum at A-1 to A-35 *with* comments of CAN, Public Citizen, NIRS, and National Whistleblower Center and Committee for Safety an Plant Zion, 1 J.A. at 677-830; *see also* comments of Judges Cotter and Bollwerk cited above. The decision will be entirely up to the NRC without any criteria to control or structure the decision and there will be no basis to exercise the right to appeal under §189b.

A third form of discrimination will occur whenever licensees, vendors, or other nuclear proponents obtain hearings in which one opposes the license at issue. Both opponents and proponents in the affected class may be treated to a hybrid hearing in which their participation is limited and that of the other parties is not. Here, the rules are not clear at all, per the Judges' comments cited above. It appears that the licensees will always be entitled to full, fair, "on the record" hearings in which no intervention is permitted. *Bellotti v. NRC,* 725 F.2d 1380, 1383 (D.C.Cir. 1983) (no public hearing required under §189a in enforcement proceedings). Again, although both proponents and opponents may not intervene in such proceedings, it is only the opponent members of the §189a class of affected persons who would want to prosecute an enforcement action against a licensee.

Strong similarities exist between the voting rights cases cited herein and the public hearing that the NRC is required to provide to affected

persons under §189a. As the D.C. Circuit noted in relation to the similarities between the right to hearing under the highway act and the franchise, "[b]oth are designed to elicit the wishes of the 'electorate'." *D.C. Federation of Civic Associations v. Volpe*, 434 F. 2d 436 at 432.

Tracking the logic therein, Congress could have given persons affected by nuclear licensing the right to vote on the licenses, instead it chose to provide full, fair, "on the record" public hearings to "channel the criticisms of individual citizens concerning" nuclear licenses "into a public hearing." *Id.* at 442. Due to the economic benefit often bestowed upon neighboring communities by nuclear licensees, the affected persons opposing or even questioning such licenses form a discrete and insular minority who are, without rights to full, fair, "on the record" hearings, almost voiceless. They may take to the streets and protest, but their numbers will always be small, their resources and access to public fora limited compared to the advantages flowing to the class of proponents and the holders of the privileges of the license.

Congress, in attempting to remedy this iniquity, gave the minority opponents a "public hearing" voice that cannot lawfully be silenced without discriminating solely against nuclear safety advocates or nuclear license opponents. *See D.C. Federation of Civic Associations, Inc., v. Volpe*, 434 F.2d at 443 (citing cases supporting the finding of opponents being a discrete

and insular minority among persons with the right to hearings parallel to the pubic hearing right at issue here).[3]

CAN recognizes, in asking the court to consider the effects of the new rules, that Congress may allow some forms of discrimination between similarly situated groups of persons that do not violate the Constitutional guarantee to Equal Protection of the Law under the Fifth Amendment. However, the Atomic Energy Act, 42 U.S.C. 2201 et seq., does not have the same objects as the discriminatory regulatory schemes that the Supreme Court has upheld. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (economic regulation of the kind that will be upheld on a showing of any reasonable set of facts); *see also McGowan v. Maryland*, 366 U.S. 420 (1961).

The Supreme Court has, historically, taken a very different approach when fundamental, personal and individual rights--such as the right to a full and fair, "on the record" public hearing--are implicated. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Harper v. Virgina Board of Elections*, 383, U.S. 663, 667 (1966); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). A legislative

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[3] *McLaughlin v. Flo*rida, 379 U.S. 184, 192 (1964), *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966);*United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938); *see also Loving v. Virginia*, 388 U.S. 1, 9 (1967). CAN contends that Congress intended the discrete and insular minority of 'affected' persons opposing nuclear licenses to have access to the same public hearing rights afforded to the nuclear licensees.

enactment may only be sustained by meeting a 'very heavy burden of justification' when personal, fundamental rights are at stake. *Loving v. Virginia*, 388 U.S. 1, 9 (1967). For a statute or regulation enacted thereunder, allegedly pursuant to authority granted in the statute, to be found constitutional under such a test, the form of discrimination inherent in the statute or regulation "must be shown to be necessary to the accomplishment of some permissible state objective." *Id.* Any reading of the Atomic Energy Act of 1954, as amended by the ERA in 1974, reveals that the regulation at issue arose from the need to separate the promotion of nuclear power into the Department of Energy [then ERDA] and the regulation of nuclear facilities of all kinds and nuclear materials into the Nuclear Regulatory Commission. The Act, particularly at Chapter 16--see Petitioner's pamphlet of statutes--makes it evident that Congress intended to protect persons who are 'affected' members of the public through the availability of a full, fair, "on the record" hearing AND appeal process. As that right applies, as we have explained herein, to a discrete minority of persons, any infringement upon that right is seriously suspect and "correspondingly calls for more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

When Congress enacted the public hearing rights provisions of §189a of the Atomic Energy Act, it intended that the benefited persons would be

those, like CAN and its members, whose lives, property and freedom to roam about freely were, potentially and actually, in "harms way" of the dangers inherent in NRC licensed nuclear facilities. *See* 3 *Legislative History of the Atomic Energy Act of 1954* at 3073 (1955), remarks of Senator Anderson, and in discussion with Senators Gore and Hickenlooper, 100 Cong. Rec. [Sen.] at 10,000 (July 14, 1954). In these remarks, Senator Anderson expresses concern that the provisions of the Administrative Procedure Act would not be triggered unless there is a requirement for a hearing, and states, "I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects." *Id.* Later, responding to Senator Hickenlooper, Senator Anderson states:

> To return to section 181 and the portion on page 85 reading, 'Upon application, the Commission shall grant a hearing to any party materially interested in any "agency action" '--Let me say I think it is important to tell who may be interested, and therefore the widest publicity is necessary. For example, if the Commission were going to grant a franchise to enable someone to establish a new plant inside the Chicago area, there might be many persons who would be interested, but they would not know that the matter was under consideration.

Id. Although the legislative history of the act, in the contemporary usage, looks to the final conference report, given Senator Anderson's pivotal role in seeing the 1954 amendments through Congress, and the great respect he garnered from the Senate, these remarks should be accorded some weight in analyzing the legislative intent. That appears to be affording "on the record"

public hearings to the largest number of interested persons.

Two days later, Senator Hickenlooper read into the record the proposed amended section 182 as "Sec. 189. Hearings and judicial review" which sets forth essentially the same language adopted in the final version of the act in section 'a' and, significantly, in the portions similar to the Act today, allows for judicial review subject to the provision of section 10 of the Administrative Procedure Act. In terms of the understanding of the Senate drafters of the 1954 Act as to how the hearings that the Commission "shall grant ... upon the request of any person whose interest may be affected by the proceeding [and who the Commission] shall admit ... as a party to such proceeding", Senator Hickenlooper stated:

> [T]his section reincorporates the provisions for hearings formerly made part of Section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the circumstances in which hearings are to be held. The section also reincorporates the former provisions of section 189 dealing with judicial review.

3 *Legislative History of the Atomic Energy Act of 1954* at 3174-75 (1955), 100 Cong. Rec. 10170-71 (July 16, 1954). After this amendment was agreed to and another discussed and agreed to, the Presiding Officer read into the record the amended section 181, which is essentially the same as that in the current version of the Act. Senator Hickenlooper then made the following remarks, after which the amendment was immediately agreed to:

> [T]he change in section 181 relating to the Administrative Procedure Act is to provide the Commission with a little more flexibility in dealing with procedures than was provided in this section of the bill[.]
> But the procedures are such as to protect against the wrongful dissemination of restricted data and defense information while at the same time preserving as many of the normal procedures as is possible. The section in the bill required the Commission to have identical but secret proceedings.

Id. at 3175; Cong. Rec. at 10171 (emphasis added). CAN contends this shows the Congressional intent that the procedures for adjudicatory hearings under the Administrative Procedure Act were intended, as they were, by 1954, "the normal procedures" for conducting hearings in federal administrative agencies. In interpreting these passages, one should keep in mind that

> The statements of proponents are much more likely to portray an accurate representation of Congress' intent than are view of the opponents. "We have often cautioned against the danger, when interpreting a statute, of reliance upon the view of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach . . . It is the sponsors that we look to when the meaning of the statutory words are in doubt."

D.C. Federation of Civic Associations v. Volpe, 434 F.2d 436, 445 (*quoting Schwegman Bros. v. Calvert Distillers Corp*, 341 U.S. 384, 394-395 (1951); *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964) (citations omitted).

CAN also contends that the arguments below in section VI. B on implicit and explicit interpretations of the Atomic Energy Act support the

position that Congress intended formal public hearings conducted, at a minimum, pursuant to the requirements of the Administrative Procedure Act. CAN asks that the Court, under this argument, apply strict scrutiny to the analysis of the NRC's new interpretation used to support discrimination against the class to which CAN and its members belong. Given that interested, 'affected' persons (such as those upon whom CAN predicates standing in this matter) must demonstrate 'harm' and a 'material issue' in dispute, they deserve a higher level of Due Process protection that would require the NRC to provide them with full, fair, "on the record" public hearings. These would be warranted under the prevailing standards of decency, justice and equity emanating from the same Constitutional sources that protect CAN and its members from the NRC's discriminatory application of §189a.

The court should also take cognizance of the other forms of discrimination the NRC's new rules impose upon persons who do not have access to the internet. The NRC's elimination of the local Public Document Rooms in nuclear facility communities was coupled with the agency's dismantling of its bibliographical database, NUDOCS. They replaced access to printable microfiche copies of all licensing documents with a computer system, ADAMS, that is very difficult to use. Only persons with DSL or high speed data lines can effectively use ADAMS.

ADAMS is now the only index to current NRC documents available to affected persons in nuclear facility communities (such as are CAN and its members). Many CAN members live in areas of rural poverty and isolation, and often do not have access to computers. Thus, the NRC choice to remove all fiche collections from nuclear facility communities discriminates against CAN members by preventing them from having access to NRC documents and hearing notices which are now posted on the NRC website. Some CAN members in the rural areas of Western Massachusetts are also African Americans or Native Americans who, according to government studies, have far less access to computers than similarly situated white citizens. So, in this regard, these CAN members bear the brunt of additional discrimination. CAN raised these issues in its comments. The NRC's reply does not adequately address the charge of violating fundamental rights to access and participate in government process. 2 J.A. 692 (CAN raises this issue and cites a government document supporting its concern); *see also id. at* 720, 725.

B. THIS COURT OWES NO DEFERENCE TO THE NRC'S INTERPRETATION OF THE ATOMIC ENERGY ACT IN THE RULE MAKING AT ISSUE BECAUSE §189a OF THE ATOMIC ENERGY ACT, 42 U.S.C. §2239, IMPLICITLY AND EXPLICITLY REQUIRES FORMAL HEARINGS; MOREOVER, FOR FORTY FIVE YEARS THE AGENCY HELD THAT POSITION; THE COURT SHOULD DECLARE THE NRC'S RULE MAKING NOT AUTHORIZED BY THE STATUTE AND VACATE THE RULES PROMULGATED THEREUNDER.

1. Standard of Review

The authority of administrative agencies has Constitutional limitations:

> The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law ... but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Dixon v. United States, 381 U.S. 68, 74 (1965) (*quoting Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936)); *see also United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated"); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in judgment) (explaining that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ"). CAN contends that examination of the regulations at issue here, regulations that sweep away half a century of uniform agency procedure, practice and precedent, eliminate discovery, party control of witnesses and evidence, and the right to conduct cross-examination, are "out of harmony" with the purposes of §189a of the Atomic Energy Act. As this court has recognized:

> The less important the question of law, the more interstitial its

> character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive experience, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the questions themselves") (citations omitted).

Mayburg v. Secretary of Health and Human Services, 740 F.2d 100, 104-107 (1st. Cir. 1984). The questions raised by the NRC's actions in this rule making are among the "larger" questions of law. They are questions about the sincerity of our commitment to providing due process and fundamental fairness in proceedings our government conducts. The answer to the large questions will determine, among other matters, whether the NRC will be required to offer CAN and its members full, fair, "on the record" public hearings on the License Termination Plan for Yankee Rowe.

In answering these questions, this court will have to determine whether Congress intended to provide full and fair "on the record" public hearings in NRC proceedings under §189a of the Atomic Energy Act, as it is not the NRC but

> the courts [who] are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981)

(citing *SEC v. Sloan*, 436 U.S. 103, 118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965)); *accord Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n9. *Quinn v. City of Boston*, 325 F.3d 18, 34 (2003) (*citing Chevron* at *id.*) (emphasis added).

In determining the answer to this question, the court should look carefully at the actions of Congress in three instances during nearly thirty years of AEC/NRC public avowal that Congress intended formal hearings under §189a. Significantly, the AEC's contemporaneous explanation of the statute should be viewed as having great weight in interpreting the intention of the enacting Congress, as "subsequent legislative history is less authoritative than contemporaneous explanation...." *Roosevelt Campobello International Pk. Comm'n v. U.S. EPA*, 711 F.2d 431, 436-37 (1st Cir. 1983). However, in looking the evidence in Congressional enactments subsequent to the Atomic Energy Act of 1954, while the "views of subsequent Congresses cannot override the unmistakable intent of the enacting one ... such views are entitled to significant weight ... and particularly so when the precise intent of

the enacting Congress is obscure." *U.S. v. Ven-Fuel, Inc.*, 758 F.2d 741, 758 (1st Cir. 1985). *Roosevelt Campobello International Pk. Comm'n v. U.S. EPA*, 711 F.2d 431, 436-37 (1st Cir. 1983) ("subsequent Congressional declaration of an act's intent is entitled to great weight in statutory construction").

Finally, in reviewing the NRC's rulemaking, no deference is due if this court finds that the NRC's interpretation of §189a is an exercise of discretion that Congress did not delegate under the statute. *U.S. v. Mead,* 533 U.S. at 218, 226-27 (2001) (*Chevron* deference due only when agency acts pursuant to "delegated authority"); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.,* 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear...."). Respect is especially due when an administrative practice at issue, "involves a contemporaneous construction of a statute by the men charged with setting its machinery in motion, of making the parts work more efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co. v. International Union of Electricians,* 367 U.S. 396, 408 (1961) (*quoting Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933)). Certainly, the NRC owes more respect to the interpretations of the AEA §189a of its predecessors at the AEC who put the entire statute in motion and believed that full, fair, "on the record" public hearings is what

Congress intended in all nuclear license adjudications.

These considerations are all the more important in this case, as NRC's denigration of CAN's Due Process and Equal Protection rights under the statute are before this court, and "when Congress creates a procedure that gives the public a role in deciding important questions of public policy, that procedure may not lightly be sidestepped by administrators." *Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 594 (D.C.Cir.1971).]

2. Congress implicitly intended the NRC to hold formal hearings.

Under the *Chevron* line of cases, no deference should be applied to an agency's interpretation of the statute it administers when Congress has "spoken" as to the meaning of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). The Congressional intent behind the Atomic Energy Act's implicit requirement for "on the record" hearings pursuant to the Administrative Procedure Act may be discerned beginning with an examination of the plain language of the two statutes.[4] The hearing requirements under the Atomic Energy Act state, in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest

[4] For nearly half a century, the AEC/NRC interpreted the statute as either implicitly or explicitly requiring formal, APA "on the record" hearings in licensing proceeding under §189a. This practice, from 1954 to 1982, also applied in materials licensing cases. *See Kerr-McGee Corp.* (West Chicago Rare Earths Facility), Addendum at 131-133 (Dissent of Commissioner Bradford).

may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

§189a Atomic Energy Act of 1954 as amended (AEA), 42 U.S.C. 2239(a).

The provisions of §181 of the AEA require the NRC to adhere to the Administrative Procedure Act in agency proceedings.[5] An agency applying the Administrative Procedure Act must first determine whether the proceeding is rule making or adjudication. Significantly, under the APA's definitions, 'licensing' and 'license amendments' are adjudications.[6] Following the definitions section, §554 is entitled "adjudications". The requirements for formal, adjudicatory hearings are established in that section in conjunction with §556 and §557.

The requirement of §554 is that it applies "in every case of adjudication required by statute to be determined "on the record" after opportunity for an agency hearing."[7] Therefore, whether §189a of the AEA can be said to

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[5] Section 181 permits the NRC an exception in cases involving restricted data or defense information to "provide by regulation for such parallel procedures" necessary to safeguard that information. However, this is to be done "with minimum impairment of the procedural rights which would be available if restricted data and defense information were not involved." *Id.*

[6] 5 U.S.C. §551 definitions states:

(6) "order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter of other than rule making but including licensing (emphasis added)

(7) "adjudication" means agency process for the formulation of an order

* * *

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitationamendment, modification or conditioning of a license (emphasis added).

[7] There are five stated exceptions to the adjudicatory hearing requirements that are irrelevant to the issues in this case.

require "on the record" hearings to be held upon request in license amendment adjudications will determine if the APA formal hearing requirements apply. There is an explicit requirement that the NRC provide an opportunity for an agency hearing. The requirement that such a hearing be "on the record" is implicit and may be verified in the legislative history of the amendments to §189 of the Atomic Energy Act.

The formal hearing requirements of the APA may be implicit and still trigger APA "on the record" procedures. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978); accord *U.S. Steel Corp v. Train*, 556 F.2d 822, 833 (7th Cir. 1977), *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253, 1262-1263 (9th Cir. 1977). An adjudicatory hearing is required in contested cases where the determination of material facts in dispute and application of laws and regulations thereto is subject to judicial review of the hearing record. In such cases, the APA mandates a formal, "on the record" proceeding subject to the requirements of the APA. *Seacoast Anti-Pollution League*, 572 F. 2d at 877; *Marathon Oil*, 564 F.2d at 1263 (*citing Attorney General's Manual on the Administrative Procedure Act* at 41).

Clearly, the Administrative Procedure Act--and the adjudicatory nature of a license granting, modifying or amending proceeding held pursuant to its terms-- council for a full, fair, "on the record" public hearing requirement to

be read implicitly into the Atomic Energy Act at §189a and§189b through the requirements of §181. Moreover, §189b calls for judicial review to be of final orders entered in the proceedings set forth in §189a on the basis of the hearing record. That does rather strongly suggest that the drafters thought the proceedings would all be "on the record" per the terms of the APA for full and fair public hearings as mandated in all AEC/NRC proceedings under §181(and mostly executed in that way until the *Kerr-McGee* case).

Finally, there is the fact that the agency's longstanding interpretation and rule making and practice based thereon must be considered *prima facie* evidence that the AEC/NRC were doing what Congress intended---at least until *Kerr-McGee Corp.* There is also the evidence in case law that the Commission attorneys represented to reviewing courts that the agency's practice was consistent with the statutory requirements of the Atomic Energy Act. For example, in *Siegel v AEC*, 400 F.2d 778 (D.C. Cir 1968), the court acknowledged that the agency had always differentiated legislative and adjudicatory rulemaking by the purposes of the kinds of hearings each requires, and viewed the license hearings held pursuant to §189a as adjudications--"on the record" adjudications.

The reason CAN questions the validity of the *Kerr-McGee/West Chicago* cases--in addition the structural reasons set forth herein--rests upon the fact that, as Commissioner Bradford pointed out in his dissent in *Kerr-*

McGee, formal hearings used to be held in materials licensing cases. *See, e.g., Walker Trucking Company*, 1 AEC 55 (1958) and *Hamlin Testing Laboratories v. United States Atomic Energy Commission*, 357 F.2d 632, 638 (6th Cir. 1966). When these early cases took place, and in subsequent proceedings, the formal hearing requirements of Subpart G of 10 CFR Part 2 applied: full, fair, "on the record" public adjudications, offering, in some instances, a level of due process tracking the Federal Rules of Civil Procedure, and higher than that mandated by the APA. In this regard, it is also important to look at early Commission adjudications, such as *Edlow International*, 3 NRC 563, 570 (1976). In *Edlow* the Commission took the position that, while offering formal hearings was less appropriate in dealing with a foreign company, they were duty-bound to follow APA procedures, stating:

> The petitions to intervene filed on behalf of these organizations...require...holding...adjudicatory, or trial-type, hearing[s] subject to appropriate modifications...in accordance with the "foreign policy" exception [under the APA].

Id. Thus, the further back one goes into the history of the AEC/NRC, the closer one gets to an agency interpretation of the AEA's hearing provisions worthy of deference due to its rationality and consistency, cleaving to the intent of Congress that §189a is intended to provide 'affected' persons with a full, fair, "on the record" public hearing adjudicating their contentions with

the nuclear license at issue. The practice applied to materials licensees and their respective interested, affected persons, as well as all other kinds of nuclear licensees. Even foreign corporations, as in the *Eldow* case, were treated equal to domestic licensees in an entitlement to the protections of agency process under the APA.

Evaluating the adequacy (and honesty) of the NRC's interpretations §189a of the Atomic Energy Act, 42 U.S.C. 2239, requires an examination of the agency's historic (and public) promulgation of those interpretations. While the record of the 1954 Amendments to the Atomic Energy Act is silent as to the meaning of 'hearing' under § 189a, there is ample evidence that the agency's position prior to 1957 was based upon the then-prevailing views concerning the effects of the Administrative Procedure Act.

Attorney General Tom Clark wrote a manual setting forth the United States Department of Justice's interpretations of the workings of the Administrative Procedure Act. In pertinent part it states:

> It is believed that with respect to adjudication, the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of evidence adduced at the hearing. [I]t is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, such specific requirement of a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing.

Tom C. Clark, *Attorney General's Manual on the Administrative Procedure*

Act at 42-43 (1947) (citing H.R. Rep. p.51, fn. 9 (Sen Doc. p, 285). (emphasis added). If there is a decision on record evidence, and the agency, as applies to the NRC, is bound by the APA, there must be formal procedure to assemble that record in order that there can be a meaningful review. At about the same time, Robert W. Ginnane, then an attorney in the Assistant Solicitor General's Office of the Department of Justice, stated:

> The situations just discussed demonstrate that in the future legislative draftsmen must use the word "hearing" with full appreciation of the procedural consequences which may follow from the Administrative Procedure Act. Where it is desired to provide for informal hearings as an opportunity merely for the expression of views, it is suggested that the phrase "informal hearing" be employed together with an explanation in the Committee reports that such phrase is intended to preclude application of Sections 5, 7 and 8 of the Administrative Procedure Act.

Robert W. Ginnane, *'Rule Making,' 'Adjudication' and 'Exemptions' under the Administrative Procedure Act*, 95 U. Pa. L. Rev. 621, 634-637(1947). Thus, it is readily apparent that in the pre-Kenneth C. Davis era--if we may call it that--exactly the opposite of his view prevailed from the one Davis urged upon the Joint Committee on Atomic Energy between 1957 and 1962.

Two years after the amendments to the Atomic Energy Act of 1954 expanded the role of the Atomic Energy Commission by permitting the licensing of private companies to mine, mill, fabricate and utilize nuclear materials, a high-ranking attorney in the AEC Office of General Counsel,

Herzel H.E. Plaine, wrote:

> Nothing in the text or history of section 189 indicates that Congress intended to depart from the dichotomy under the Administrative Procedure Act between adjudication and sublegislation. The AEC has therefore quite properly followed the accepted interpretation that an "on the record" requirement is implied in adjudicative proceedings, but not in sublegislative proceedings involving rule-making.[8]

This was AEC's position on interpreting the AEA until the post-1957 period. The agency's position was consistent with the Attorney General's approach to construing statutes to which the Administrative Procedure Act applied, but in which, as with §189a, the magic words "on the record" were absent. Such statutes governed the provision of "adjudication" in "contested cases " where rights or privileges would be determined by the outcome--as in the granting, suspending or revoking of licenses as defined and regulated under the APA.[9]

It has long been held that "an established statutory right [to a license] requires adjudicatory disposition, and the procedure which is sufficient for the rule-making is not sufficient for that purpose[.]" *Zenith Radio Corporation v. Federal Communication Commission,* 211 F.2d 629, 633-634 (D.C. Cir. 1954). This could not be more evident in the context of discerning the implicit and explicit Congressional intent behind §181 and 189a, b:

The fact that Section 189a of the 1954 act does not contain the

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[8] Herzel Plaine, *The Rules of Practice of the Atomic Energy Commission*, 34 Tex. L. Rev. 801, 811 (1956).

[9] *See also* E. Blythe Stason, Samuel D. Estep and William J. Pierce, *Atoms and the Law* at 1228 and n97, 98 (1959).

> words "on the record" should be immaterial in the context of the provisions for adjudication and judicial review contained in therein and the broad interpretation placed upon Section 5 of the Administrative Procedure Act, 5 U.S.C.A. § 1004, prescribing opportunity for a hearing in cases of adjudication "required by statute to be determined on the record" and upon Section 4(b), 5 U.S.C.A. §1003(b), requiring a formal hearing for rule making "required by statute to be made on the record after opportunity for an agency hearing." (*Wong Yang Sung v. McGrath*, 339 U.S. 33, 48 (1950), *as modified*, 339 U.S. 908 (1950)).[10]
>
> As provided under the Administrative Procedure Act and the procedure of the Commission, a "formal" rule-making procedure includes the use of a hearing officer or of the agency itself, the conduct of the hearing along lines of judicial procedure where practicable, and the rendering of a decision by such presiding officer, with appropriate review by the agency and by a court. The inclusion of the requirement for "formal" rule making in areas in which that process closely resembles adjudication represents a salutary legislative policy. This policy does much to protect the interests of atomic energy licensees in administrative due process, as well as to advance the interests of the Commission in orderly procedures which inspire public confidence.[11]
>
> Section 181 [of the Atomic Energy Act] provides that the "provisions of the Administrative Procedure Act shall apply to all agency action taken under this act." Licensing under the Atomic Energy Act clearly constitutes adjudication under the Administrative Procedure Act.[12]

Where, as here, the NRC proposes to do away with the protections of formal adjudication through its new rules, it has violated the Atomic Energy Act and the Administrative Procedure Act. Informal procedures may be fine for collecting information and establishing rules that do not affect substantive

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[10] Courts Oulahan, *Federal Statutory and Administrative Limitations Upon Atomic Activities* in *supra*, *Atoms in the Law* at 1228, n98.

[11] *Id.* at 1228-1229.

[12] *Id.* at 1281.

rights. Such informality, however, is not appropriate in the context of APA defined "license" proceedings as required upon request to be adjudicatory, full and fair, "on the record" public hearings under the conditions enumerated in §189a of the Atomic Energy Act and the applicable sections of the APA. *See generally CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995).

Beginning with the positions taken by AEC Commissioner Olsen in testimony before the Joint Committee on Atomic Energy, the AEC/NRC's position was quite clear:

> I think that the basic error assumed by Professor Davis is that there is no issue here. I think it is pretty clear that there is an issue. It is the interest of the applicant versus the interest of the public. I sincerely believe that it is an issue that has to be adjudicated.
>
> All of our technical people have told us unequivocally "You cannot have absolute safety." All of them have told us that additional safety costs additional dollars. We have those that are interested in promotion exclusively because those are their assigned functions. Each time a reactor license is granted upon the basis of an application, some new risk is imposed upon some people or some group of people, and a fairly large group of people.
>
> I want to emphasize that the risk is small, but there is, nevertheless, some risk imposed. The risk within the exclusion area is of sufficient magnitude so that we keep out all those except the ones that are employed. Within the evacuation area there are private citizens who live, but it is recognized that we must be able to move them within a certain period of time. Certainly the person who lives within the evacuation area has had some new factor injected into his life without choosing it to be so injected. He may not be aware of it.
>
> I have always felt that it was the Commission's function to represent that member of the public who was affected[,] upon whom addition risk was being imposed, but who may have been

> unaware of it. It is indisputable that the amount of risk can be adjusted by dollars. Piqua is one of our best examples, where to reduce the risk to the public, $1 million was added for containment.
>
> Therefore, it seems to me that there is, in fact, something to be adjudicated here. I think, for example, that the element of judgment in the SL-1 as to whether the design was satisfactory, the element of judgment as to whether the supervision was satisfactory, were all elements of judgment that affected three individuals who died.
>
> I think that this is illustrative of the adjudication that is presented in a regulatory case where this is the record. True, the SL-1 was not a regulatory case. That was a Government-owned reactor. This is our basic difference, Professor Davis. I think there is something to be adjudicated.

Testimony of Loren Olsen, AEC Commissioner, *Radiation Safety and Regulation,* Hearings before the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., at 374-375 (June 12-15, 1961); *see also AEC Memorandum Concerning Mandatory Hearing Requirements Under Atomic Energy Act, id.* at 382-383.[13]

The AEC memorandum also contains a statement by Senator Anderson, one of the 'fathers' of the Atomic Energy Act of 1954, introducing the 1957 amendments to the Atomic Energy Act mentioned above:

> When the Atomic Energy Act was amended three years ago, I

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[13]Commissioner Olsen also stated, in pertinent part:

> Applying these general standards [from the Attorney General's report of 1941], the licensing of reactors could be considered of far-reaching importance to so many interests and therefore warrant formal public proceeding. Similarly, the denial of an application for a reactor license might be regarded as the type of situation in which the differences between private and public interests and public officials required settlement through formal proceedings including public hearing.

Id.

made the following statement on the floor of the Senate on July 14, 1954, expressing my opinion as to the advisability of public hearings on reactor license applications:

> But because I feel so strongly that nuclear energy is probably the most important thing we're dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everyone can see it.
>
> Although I have no doubt about the ability or integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take: and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.

Almost three years have now passed and I believe my words of 1954 are still applicable.

Congressional Record at 4093-4094 (March 21, 1957) (emphasis added). This is a part of the implicit evidence that Congress intended §189a of the AEA to require formal hearings for persons affected by the agency's licenses.

That argument is developed further below, but the gist of it should also be applied here in considering the kind of process a statute must provide to survive strict scrutiny when the persons affected have their lives and properties at risk, and their liberty to move about freely and enjoy their property and the natural environment around them without fear and danger. Moreover, where such 'affected' persons--as to whom §189a provides mandatory hearing opportunities--are required to prove standing and a material issue prior to being permitted to actually have that opportunity,

fundamental fairness requires that the statute be read as contemplating "full and fair" hearing opportunities.

3. Congress explicitly intended the NRC to hold formal hearings.

The AEC and the Joint Committee on Atomic Energy developed a plan to provide indemnification to the nascent nuclear industry and encourage thereby more rapid development of nuclear energy resources.[14] By the late 1950s, the Joint Committee "began a review of the AEC regulatory procedures" due to critics decrying the "trial-type proceedings then held before hearing examiners" who "lacked the scientific expertise necessary to examine the technical work of the Commission's staff and the utilities applying for licenses."[15]

Subsequently, in 1962, a bill was passed amending the AEA to include §191, creating the Atomic Safety and Licensing Board which appeared to ratify the requirement of full, fair, "on the record" public hearings in adjudicating licenses. "The legislative history for Section 191 made it clear that all other requirements of the Administrative Procedure Act were and are fully applicable to the hearings authorized."[16] The AEC and its successor

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[14] Steven Mark Cohen, *Too Cheap to Meter: An Economic and Philosophical Analysis of the Nuclear Dream* at 66-67 (1997).

[15] B. Paul Cotter, Jr. , *Nuclear Licensing: Innovation Through Evolution In Administrative Hearings*, 34 Admin. L. Rev. 497, 499 (1982).

[16] *Id.* at 500 (citing S. Rep No 1677, 87th Cong., 2d Sess. 6-7, reprinted in [1962] U.S. Cong. & Ad. News 2207, 2212-1; *see also* Howard K. Shapar and Martin Malsch, *Proposed Changes in the Nuclear Power Plant Licensing Process: The Choice of Putting A Finger in the Dike or Building a New Dike*, 15 Wm. & Mary l. Rev. 539, 544 n28 (1974) (citing 42 U.S.C. 2231, 2239(a) for the

NRC, the understanding that, beyond the "implicit" argument for formal hearings, there was manifest Congressional intent that all licensing adjudications required formal hearings, passed down this interpretation through the Office of General Counsel from about 1962 onward.

Significantly, in attempting to wriggle out of some 45 years of agency precedent, the NRC chose to cite *Kerr-McGee Corp.* for the "official history" of their argument that §189a does not require formal hearings. They fail to mention, however, that the case includes a scathing dissent by Commissioner Peter Bradford. Commissioner Bradford's dissent is included in the Addendum to this brief at A-131-133. It is not in the Joint Appendix. Commissioner Bradford's dissent is extremely useful in tracing the history of this issue and revealing that there were and are some people within the NRC who have tried to prevent it from straying too far from what Congress' intended meaning for §189a 'hearings'.

Following up on the references contained in the footnotes to the Bradford dissent, CAN requested that the NRC Public Document Room at NRC Headquarters in Rockville, Maryland, provide copies of the documents referenced therein. This request produced a memorandum from the-Litigation Director Howard K. Shapar to NRC Commissioner Ahearne (June

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formal, "on the record" hearing requirement, and stating that the hearing must comply with APA §§554, 556. 557.

19,1980). Addendum at A-120 to 125. In the memo, at footnote 4, Shapar states, in pertinent part:

> Section 189(a) of the Atomic Energy Act does not specifically state that a hearing shall be "on the record" and in conformity with the Administrative Procedure Act provisions governing adjudications (sections 5, 7, and 8). However, the legislative history of section 189 indicates that such a hearing was intended and the Commission has consistently interpreted the provision to require a trial-type hearing. The rationale for this interpretation was discussed at length in my note to Joseph Hennessey, AEC General Counsel, dated April 3, 1967. In brief, the Commission took the position that the 1957 amendment to section 189 of the Atomic Energy Act which added a mandatory hearing requirement for the issuance of facility licenses, required the hearing and decision to comply with the provisions of sections 5, 7 and 8 of the APA. This position was articulated, among other times, when Congress was considering some liberalization of the mandatory hearing requirement in 1961. A panel discussion among Professor Kenneth C. Davis, Professor David E. Cavers, Mr. Lee Hydeman and Dr. Theos J. Thompson was held at the conclusion of the hearings which preceded the enactment of the amendments (Radiation Safety and Regulation, Hearings before the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., pp. 372-389). Professor Davis disagreed with the Commission's view that section 189 required a trial-type hearing and the exchange of views between Professor Davis and the Commission continued after the close of the hearings. AEC General Counsel Naiden, in a letter dated September 6, 1961 to Mr. Ramey, Executive Director of the Joint Committee on Atomic Energy, stated that "Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA. For the Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirement." The Commission's interpretation of the mandatory hearing requirement was, in effect, ratified when Congress passed the amendments in 1962. One of these amendments added Section 191 to the Act which authorized the Commission to establish one or more Atomic Safety and Licensing Boards..."notwithstanding

> the provisions of sections 7(a) and 8(a)" of the APA. Section 7 and 8 of the APA apply only to adjudications required to be determined on the record after opportunity for agency hearing which are subject to the provision of section 5. Therefore, the exception to permit the Licensing Boards in lieu of hearing examiners would not have been necessary unless the trial-type procedures of section 5 were considered to apply to such hearings.
>
> Thus, since the adjudicatory provisions of the APA apply to NRC adjudications, the "statutory authority to conduct a legislative hearing in an NRC adjudication" would have to be found in the APA itself.[17]

Id. CAN filed a FOIA request for the "note" from Shapar to Hennessey, the content of which is rather fully elaborated in the footnote. The NRC denied that request under a claim of Attorney-Client privilege. On direct appeal to the Commission, the NRC released a portion of the note. The cover letter and the released portion are reproduced in the Addendum at A-126-130, including the portions that have been blanked out at the bottom of A-129 and the entirety of A-130. Suffice it to say, the visible portions, amplifying Shapar's outline of the argument in the footnote, provide citations, quotations from portions of relevant statutes, and a part of the quotation from Senator Anderson on the need for open public hearings that is reproduced above as Shapar's evidence for Congressional intent.

This is the thread of the AEC's and NRC's consistent policy (up until 1982). That policy justified providing , full, fair, "on the record" formal

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[17] NRC Legislative Director Shapar goes on to describe the six exceptions to the Section 5 requirements for adjudicatory hearings. None of them apply to the NRC's decision in the rulemaking at issue.

public hearings in license adjudications, based upon Congressional ratification of that requirement demonstrating Congress' explicit intent that such hearings be provided as a matter of course. Significantly, this was the practice, prior to the *Kerr-McGee/City of West Chicago* case, in materials licenses as well as reactor licenses. That is why the comments from the Atomic Safety and Licensing Board Chief Judges Cotter and Bollwerk display such concern about the NRC's decision to attempt to expand its discretion absent Congressional authorization. *See* 1 J.A. 87-95 (Cotter); 97-99; 2 J.A. at 551, 552, and n1, and the concerns, e.g., at 557, that intervenors, who often lack resources, now need to engage experts just to file contentions, and the separate attached comments in cross-examination (Bollwerk).

In the aftermath of the March 1979 accident at the Three Mile Island nuclear power station, the NRC made a controversial determination that "No Significant Hazards" were involved in a license amendment to permitting TMI-2 to vent radioactive krypton gas into the local environment. Legislative History, *NRC Authorization*, P.L. 97-415, S.R. 97-113, 1982 U.S. Code Cong. & Admin. News at 3598. The United States Court of Appeals rejected the NRC's interpretation of §189a of the AEA, finding that § 189a "entitles a person who so requests to a hearing before a license amendment becomes effective" even when the NRC determines that the amendment involves "No Significant Hazards." *Id.* Congress, concerned that the NRC needed this

provision, particularly in the event of an emergency, drafted the so-called "Sholly Amendments" to §189a in order to nullify the case before it could be adjudicated by the Supreme Court. *Id., see also Sholly v. NRC*, 651 F.2d 780 (D.C. Cir. 1980) for the reviewing court's perspective.

Congress, in the course of enacting this legislation, had occasion to ratify, based upon the language in the final House-Senate Conferee's report, the Congress' understanding of the type of hearing that was then offered by the NRC, and the kind they believed to be required under § 189a to be provide upon request to affected persons:

> [T]he conferees expect that any administrative remedies adopted [by the NRC] to minimize the need for issuance of TOLs [Temporary Operating Licenses] shall not themselves infringe upon the right of any party to a full and fair hearing under the Atomic Energy Act.

Legislative History, NRC Authorization, P.L. 97-415, H.R. Conf. Rep. 97-884, 1982 U.S. Code Cong. & Admin. News at 3606. This is significant, as it makes plain, after twenty years of the Atomic Safety and Licensing Board formal adjudications and eight years of NRC formal licensing adjudications, Congress did, in fact, believe and ratify the meaning of §189a of the Atomic Energy Act as requiring full and fair "on the record" public hearings in license adjudications.[18]

[18] The General Counsel provides the history of yet another ratification of the formal public hearing requirement under §189 stemming from the 1978 enactment of the Nuclear Non-Proliferation Act. The same type of "notwithstanding" language as used in the 1962 amendments to create an exception to the prevailing practice under the §189a of the AEA again appears to show

This portion of the legislative history does not appear to have had a role in the NRC's considerations during the rule making at issue. Nor did it affect the General Counsel's advice to the Commission on the legality of the new rules to govern adjudicatory procedures.[19]

The standard of review discussed above applies here as well, with the additional consideration that the notion of a "full and fair" hearing also carries Due Process connotations. These are reinforced by the NRC's consistent requirement, even after making its proceedings "informal" under the new rules, that interested persons requesting a hearing must demonstrate to the administrative tribunal Article III standing and a material fact in dispute. The requirement means that a person interested in a hearing under §189a must show that they will be harmed by the effects of the proposed license or license amendment, that the tribunal will be able to provide relief for that harm, and that they have at least one potentially outcome-determinative (i.e., material) contention concerning the proposed license or amendment. Such requirements are the essence of case in controversy, with

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that "Congress thought that without express statutory authorization to use other hearing procedure, the on-the-record formal hearings would be called for by Section 189 of the Atomic Energy Act." Karen Cyr, General Counsel, SECY-99-006, "Re-Examination Of The NRC Hearing Process" (January 8, 1999), 1 J.A. at 3.

[19] The NRC's Chief Administrative Judge was at pains to warn the Commission that a reviewing court might not be as taken with General Counsel's justifications for doing away with formal adjudicatory hearings as was the Commission. He stated, "[W]e ... believe the better legal view is that the AEA section 189a, 42 U.S.C. §2239(a), as it currently exists, requires a formal hearing for power reactor licensing cases" G. Paul Bollwerk, III, Chief Administrative Judge, Memo to the Commissioners, "ASLBP Comments on SECY-00-0017, 'proposed Rule Revising 10 CFR Part 2 -- Rules of Practice'." (February 10, 2000), 2 J.A. at 552 n1.

the added necessity to survive a quasi-summary judgment review before the hearing has even started.

The NRC requires, in this new "informal" arena, that intervenors demonstrate their case is a contested one, and that they have the kind of stake in the outcome historically protected by the constitutional guarantee of Due Process of Law, as it is embodied in the procedural protections of the Administrative Procedure Act, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. Requiring intervenors to make an extraordinary showing at the very outset of the case, allowing no opportunity to amend a contention as complaints may be "liberally amended" to conform with evidence under the Federal Rules of Civil Procedure, tell the affected persons guaranteed a public hearing under §189a, "You are not welcome in this hearing room!"

Can this be the same hearing the agency is required to offer upon request of an interested person? If the person lives in the vicinity of a nuclear facility, is able to show harm "fairly traceable" to a proposed licensing action, harm that can be remedied through a hearing process, and a material fact in dispute---how can a person making that kind of showing still face the prospect of not even getting an informal hearing due to a defective contention?

Surely, this is exactly the kind of Due Process problem that a reviewing

court may resolve by describing the nature of a full and fair "on the record" public hearing (the old 10 CFR Part 2, Subpart 'G' hearing, for example) for which qualifying intervenors were eligible under the old NRC rules. Under those rules, contentions could be amended, right up to the pre-hearing conference, discovery was available, and presentation of witnesses and cross-examination of witnesses were permitted.

There were reasons for the NRC's evolution of these procedures. They provided interested persons requesting a hearing pursuant to §189a of the AEA with a hearing in the event that they had standing and framed at least one litigable contention--i.e. controverted a fact material to the granting of the license or amendment at issue--by the time of the pre-hearing conference. In all likelihood, the reason for these requirements relates directly to the core requirements in any federal civil complaint.

VII. CONCLUSION

For the reasons set forth above, CAN asks this court to declare that the NRC's new rules governing adjudications under 10 C.F.R. Part 2 are illegal, and vacate the rules. CAN further requests that, if a hearing has already begun on the License Termination Plan for the Yankee Rowe Nuclear Power Station Site, the court will order the NRC to halt those proceedings and reinstitute proceedings conducted in a manner not inconsistent with the holding in this case. CAN further requests that this court (1) award CAN its

costs, reasonable attorney's fees and other disbursements in this action; and (2) grant such other and further relief as the court may deem just and proper under the circumstances.

Respectfully submitted:

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June 7, 2004

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Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervenor* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervenor*	No. 04-1145

Certificate of Compliance With Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerferct 12 in 15 pt. Times Roman type.

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ADDENDUM

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 1, 2, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76, and 110

RIN 3150–AG49

Changes to Adjudicatory Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient. The final rule will fashion hearing procedures that are tailored to the differing types of licensing and regulatory activities the NRC conducts and will better focus the limited resources of involved parties and the NRC.

DATES: This final rule is effective February 13, 2004. The rules of procedure in the final rule apply to proceedings noticed on or after the effective date, unless otherwise directed by the Commission.

FOR FURTHER INFORMATION CONTACT: Geary S. Mizuno, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–1639, e-mail *GSM@nrc.gov*.

SUPPLEMENTARY INFORMATION:

Contents

I. Background

Among the very first actions taken by the Nuclear Regulatory Commission (NRC) following its creation in 1975 was an affirmation of the fundamental importance it attributes to public participation in the Commission's adjudicatory processes. Public participation, the Commission said, "is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us." N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI–75–1, 1 NRC 1, 2 (1975). However, the form and formality of the processes provided for public participation have long been debated, well before the NRC was established and well after the foregoing statement was made.

The Commission has taken a number of steps in recent years to reassess its processes to identify ways in which it can conduct its regulatory activities more effectively. This assessment has extended across the full range of the NRC's programs, from its oversight and inspection program to evaluate and assess licensee performance, to its internal program management activities. One of the cornerstones of the NRC's regulatory approach has always been ensuring that its review processes and decisionmaking are open, understandable, and accessible to all interested parties. Its processes for achieving this goal have been part of the reassessment as well. Recently, steps have been taken to expand the opportunities for stakeholder awareness and involvement in NRC policy and decisionmaking through greater use of public workshops in rulemaking, inviting stakeholder participation in Commission meetings, and more extensive use of public meetings with interested parties on a variety of safety and regulatory matters.

The Commission has had a longstanding concern that the adjudicatory (hearing) process in 10 CFR part 2, subpart G, associated with licensing and enforcement actions, is not as effective as it could be. Beginning with case-by-case actions in 1983, and with a final rule in 1989, the Commission took steps to move away from the trial-type, adversarial format to resolve technical disputes with respect to its materials license applications. Commission experience suggested that in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures in subpart G is not essential to the development of an adequate hearing record; yet all too frequently their use resulted in protracted, costly proceedings. The Commission adopted more informal procedures with the goals of reducing the burden of litigation costs, and enhancing the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties. A significant portion of the NRC's proceedings in the past ten years has been conducted under these more informal procedures. Although the Commission's experience to date indicates that some of the original objectives have been achieved, there have also been some aspects of the more informal procedures that have continued to prolong proceedings without truly enhancing the decisionmaking process. Given the Commission's experience, and with the potential in the next few years for new proceedings to consider applications for new facilities, to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, the Commission concluded it needs to reassess its hearing processes to identify improvements that will result in a better use of all participants' limited resources. To that end, the Commission initiated certain actions related to its hearing processes—development of a Policy Statement on the hearing process, and a reexamination of the NRC's hearing process and requirements under the Atomic Energy Act of 1954, as amended (AEA)—as a foundation for possible rule changes.

A. Policy Statement

In 1998, the Commission adopted a new Policy Statement that provides specific guidance for Licensing Boards

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and presiding officers on methods to use, when appropriate, for improving the management and timely completion of proceedings. Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI–98–12, 48 NRC 18 (63 FR 41872; Aug. 5, 1998). The Policy Statement is an extension of the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI–81–8, 13 NRC 452 (46 FR 28533; May 27, 1981), which provided guidance to the Atomic Safety and Licensing Boards (Boards) on methods to improve the timely conduct of licensing proceedings and ensure that hearings are fair and produce adequate records that support decisions made by the NRC.

Among other things, the 1998 Policy Statement urges presiding officers/Licensing Boards to establish schedules for deciding issues before them. It also reminds presiding officers/Licensing Boards of their authority to set schedules, resolve discovery disputes, and take other action required to regulate the course of the proceedings. Case management by the presiding officers and Licensing Boards is an essential element of a fair, efficient hearing process. The Policy Statement also provides that the Commission may set milestones for an individual proceeding. If a presiding officer/Licensing Board determines that it would miss any milestone set by the Commission by more than 30 days, it is to provide the Commission with a written explanation of the reasons for the delay.

The Policy Statement also sets forth the Commission's expectations of the parties in the proceeding. Parties are expected to adhere to the time frames set forth by the presiding officers/Licensing Boards. Petitioners are reminded, among other things, of their burden to set forth contentions that meet the standards of 10 CFR 2.714(b)(2) (§ 2.309(f) in this final rule), and that contentions are limited by the nature of the application and the regulations. This guidance is directed to management and control of adjudicatory proceedings under the existing Rules of Practice. The guidance did not address more basic changes to the hearing process itself.

B. Reexamination of NRC's Hearing Process

In late 1998, the NRC Office of the General Counsel (OGC) undertook a reexamination of the NRC's current adjudicatory practices as conducted under the AEA and the NRC's current regulations, as well as a review of the Administrative Procedure Act (APA) and the practices of other agencies and the federal courts, with a view to developing options for improving the NRC's hearing processes. This effort was documented in a Commission paper, SECY–99–006, January 8, 1999, that was made publicly available.

As part of the analysis of possible approaches, OGC reached the conclusion that, except for a very limited set of hearings—those associated with the licensing of uranium enrichment facilities—the AEA did not mandate the use of a "formal, on-the-record" hearing within the meaning of the APA, 5 U.S.C. 554, 556, and 557, and that the Commission enjoyed substantial latitude in devising suitable hearing processes that would accommodate the rights of participants. In contrast to informal hearings for which agencies have greater flexibility in shaping adjudicatory procedures, "on-the-record" hearings under the APA generally resemble adversarial trial-type proceedings with oral presentations by witnesses and cross-examination.

The key, statutory provision, Section 189.a. of the AEA, declares only that "a hearing" (or an opportunity for a hearing) is required for certain types of agency actions. It does not state that such hearings are to be on-the-record proceedings. Furthermore, the legislative history for the AEA provides no clear guidance whether Congress intended agency hearings to be formal, on-the-record hearings.[1] As a legal matter, where Congress provides for "a hearing," and does not specify that the adjudicatory hearings are to be "on-the-record," or conducted as an adjudication under 5 U.S.C. 554, 556 and 557 of the APA, it is presumed that informal hearings are sufficient. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972), citing *Siegel* v. *AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968); *United States* v. *Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973). Significantly, these Supreme Court decisions occurred more than fifteen years after the period where the Atomic Energy Commission (AEC) first enunciated its position on the hearing requirements in Section 189.a.

The AEC of the 1950s asserted that formal hearings were required by Section 189.a. At that time, the AEC saw benefits in a highly formal process, resembling a judicial trial, for deciding applications to construct and operate nuclear power plants. It was thought that the panoply of features attending a trial—parties, sworn testimony, and cross-examination—would lead to a more satisfactory resolution of the complex issues affecting the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC. One study concluded that the use of formal hearings developed in order to address concerns that the pressures of promotion by the AEC could have an undue influence on the AEC's assessment of safety issues. By use of an expanded hearing process, the Commission could more fully defend the objectivity of its licensing actions. *See* William H. Berman and Lee M. Hydeman, The Atomic Energy Commission and Regulating Nuclear Facilities (1961), reprinted in 2 Improving the AEC Regulatory Process, Joint Comm. on Atomic Energy, 87th Cong., at 488 (1st Sess. 1961). Thus, notwithstanding the lack of explicit language in the statute or clear direction in the legislative history for the 1954 AEA regarding the use of formal, on-the-record hearings, AEC took the official position that on-the-record hearings were not merely permissible under the AEA but required. AEC Regulatory Problems: Hearings before the Subcommittee on Legislation, Joint Committee on Atomic Energy, 87th Cong., at 60 (2d Sess. 1962) (Letter of AEC Commissioner Loren K. Olsen). However, as mentioned above, the AEC's determination in this regard was not informed by the subsequent Supreme Court decisions in *Allegheny-Ludlum Steel Corp.* and *Florida East Coast Railway Co.* The Commission believes, in light of the principles enunciated by the Supreme Court in these two decisions, that the better interpretation of Section 189.a. is that formal, on-the-record hearings are not required by that section.

However, it has been argued that two subsequent amendments to the AEA, both of which involve clauses beginning with the word "notwithstanding," should be read as confirming Congress's understanding that on-the-record adjudications are required by Section 189.a. of the 1954 Act. The first occurred in 1962, when Congress amended the AEA to add a new Section 191, authorizing the use of three-member Licensing Boards rather than hearing examiners, "notwithstanding" certain provisions of the APA. Because those referenced APA provisions dealt with formal, on-the-record adjudication, the "notwithstanding" clause in the statute could be read (and by some, is read) to imply that, by 1962, Congress viewed the Atomic Energy Act as

[1] A detailed discussion of Section 189 and its legislative history can be found in the Commission's decision in *Kerr McGee Corp.* (West Chicago Rare Earths Facility), CLI–82–2, 15 NRC 232 (1982). *See also* Advanced Med. Sys., Inc., ALAB–929, 31 NRC 271, 279–288 (1990).

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requiring on-the-record adjudication. The crux of the argument is that the "notwithstanding" clause would have been unnecessary if an on-the-record adjudication was not mandatory.

In 1978, "notwithstanding" made its second appearance. In that year, Congress enacted the Nuclear Non-Proliferation Act (NNPA), which provided among other things for the NRC to establish procedures for "such public hearings [on nuclear export licenses] as the Commission deems appropriate." NNPA section 304, 42 U.S.C. 2155a(a). The statute said that this provision was the exclusive legal basis for any hearings on nuclear export licenses, adding: "[N]otwithstanding section 189a. of the 1954 Act, [this] shall not require the Commission to grant any person an on-the-record hearing in such a proceeding." 42 U.S.C. 2155a(b). Again, the argument is that the "notwithstanding" clause would be unnecessary unless Congress thought on-the-record formal hearings would be called for by Section 189 of the AEA.

These two subsequent statutes do not explicitly declare the intent of the 1954 AEA, nor do they explicitly require the use of on-the-record procedures in agency proceedings—in fact, they do the opposite. Furthermore, the legislative history accompanying both statutes strongly suggests that rather than agreeing with the Commission's early interpretation of Section 189.a. of the 1954 AEA, the Congresses took the position that the Commission had latitude under the existing language of Section 189.a. to use informal hearing procedures.[2] Seen in this light, the most plausible explanation for the "notwithstanding" clauses, in the Commission's view, is that they were intended not as a means to overcome what were viewed as fatal legal impediments, but rather, to counter and eliminate potential legal objections to the use of informal hearing procedures that may be raised by the Commission. It would have been only prudent of the drafters to eliminate ambiguity on this point when enacting additional provisions, even if they had been convinced that the clauses were unnecessary, given the Commission's insistence that Section 189.a. required on-the-record adjudications.

In any event, the Commission believes that to focus on Congress's thought processes in 1962, when it enacted Section 191 of the AEA, and in 1978, when it passed the NNPA, runs the risk of losing sight of what any reviewing court interested in legislative intent would regard as the central question, which is what Congress intended in 1954, when it enacted Section 189.a. of the AEA. And, as discussed earlier, the Commission now believes that in 1954 Congress did not intend Section 189.a. hearings to be formal, on-the-record adjudications.

For many years, the NRC did not depart from the longstanding assumption that the AEA requires on-the-record hearings despite the fact that this assumption had never been reduced to a definitive holding. Also, consistent with its understanding of Section 189.a., in 1978 the NRC declared that the hearing it would hold on an application to construct and operate a nuclear waste repository for high-level waste (HLW) would be a formal hearing. In a final rule (46 FR 13971; Feb. 25, 1981) now codified at 10 CFR part 2, Subpart J, the Commission provided for a mandatory formal hearing at the construction authorization stage and for an opportunity for a formal hearing before authorizing receipt and possession of HLW at a geologic repository. Subsequently, Congress enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* That law includes no specific hearing requirements. Instead, it seems to contemplate, at Section 114, that the NRC will apply existing laws applicable to the construction and operation of nuclear facilities. In sum, there is no statutory requirement for a formal hearing on a HLW repository, but without a rule change, the NRC's regulations would require a formal hearing. In 1990, Congress also provided that for the licensing of a uranium enrichment facility, the NRC "shall conduct a single adjudicatory hearing on-the-record."[3] This provision can be interpreted in one of two ways: either as one more reflection of Congress's understanding that formal adjudication was the norm in NRC facility licensing proceedings, or as the very opposite, *i.e.*, as showing that Congress understood that because of the presumption against formal hearings, explicit statutory language would be needed to make proceedings for this type of facility "on-the-record," as that term is used in the APA.

In the decades since passage of the AEA, debate over the value of on-the-record adjudication for the resolution of nuclear licensing issues, and indeed for resolving scientific issues generally, has continued. There are now many observers who are skeptical that the use of formal adjudication in NRC licensing cases is the appropriate means to settle a regulatory issue; that whatever validity there may have been to the arguments for formal adjudication from the 1950s to the 1970s, they no longer have merit; and that fewer formalized proceedings could mean not only greater efficiency, but also better decisions, with more meaningful public participation and greater public acceptance of the result. *See, e.g.*, Improving Regulation of Safety at DOE Nuclear Facilities, Final Report of the Advisory Committee on External Regulation of DOE Nuclear Safety, at 39 (Dec. 1995).

However, because of the early interpretation that formal, on-the-record hearings under subpart G were required, as well as NRC's long-standing practice of conducting hearings on reactor licensing actions under subpart G, each time that NRC has explored ways of expanding the use of more informal hearing procedures, it has had to confront its own prior statements and actions on the subject. Even so, no court has rendered a definitive holding on the application of the APA's "on-the-record" hearing requirements to AEA proceedings. Indeed, while some court decisions reflected the agency's early assumption that "on-the-record" hearings were required, other decisions did not. *Compare Union of Concerned Scientists* v. *NRC*, 735 F.2d 1437, 1444 n.12 (DC Cir. 1984), cert. denied, 469 U.S. 1132 (1984) [UCS I] ("there is much to suggest that the Administrative Procedure Act's (APA) 'on-the-record' procedures * * * apply [to section 189]") with *Union of Concerned Scientists* v. *NRC*, 920 F.2d 50, 53 n.3 (DC Cir. 1990) ("it is an open question whether Section 189(a)—which mandates only that a 'hearing' be held and does not provide that such hearing be held 'on-the-record'—nonetheless requires the NRC to employ in a licensing hearing procedures designated by the [APA] for formal adjudications"). The commentary in these and other cases is essentially *dicta*—observations not essential to the court's decision. *See also Siegel* v. *AEC*, 400 F.2d 778, 785 (DC Cir. 1968)(deciding only permissibility of informal rulemaking procedures under section 189); *Porter County Chapter of the Izaak Walton League* v. *NRC*, 606 F.2d 1363, 1368 (DC Cir. 1979) (deciding only NRC's discretion to initiate enforcement proceedings subject to Section 189 hearing); *City of West Chicago* v. *NRC*, 701 F.2d 632, 642 (7th Cir. 1983) (deciding only permissibility of informal procedures in materials licensing adjudication).

[2] See, e.g., H.R. Rep. No. 87–1966, at 6 (1962), quoted in Kerr McGee Corp., CLI–82–2, 15 NRC 232, 251 (1982).

[3] Atomic Energy Act of 1954, as amended, Section 193, 42 U.S.C. 2243.

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In *Chemical Waste Management* v. *EPA*, 873 F.2d 1477, 1480 (DC Cir. 1989), the DC Circuit stated that while the presence of the words "on-the-record" is not absolutely essential in order to find that formal adjudicatory hearings are required, there must be, in the absence of those words or similar language, evidence of "exceptional circumstances" demonstrating that Congress intended to require the use of formal adjudicatory procedures. Although the court suggested, again *in dicta*, that Section 189.a of the AEA might be a case where "exceptional circumstances" dictate formal, on-the-record hearing requirements, that observation has its roots in a *dictum* in UCS I which suggests that in 1961 "the AEC specifically requested Congress to relieve it of its burden of 'on-the-record' adjudications under section 189(a)" and Congress did not do so. 735 F.2d at 1444 n.12. The opposite is more nearly correct: The AEC argued in favor of formal procedures and the Joint Committee on Atomic Energy advised that informal procedures were permissible. *See* H.R. Rep. No. 87–1966, at 6 (1962), quoted in Kerr McGee Corp., CLI–82–2, 15 NRC 232, 251 (1982). More recently, in *Kelley* v. *Selin*, 42 F.3d 1501, 1511–12 (6th Cir.), cert. denied, 515 U.S. 1159 (1995), the court emphasized the NRC's latitude to determine the nature of the "hearing" mandated by the AEA.

The Commission's approach to expanding the use of more informal hearing procedures has been cautious, taking place in slow, incremental steps. One such step came in 1982, when the Commission, in the West Chicago case, granted an informal hearing (*i.e.*, written submissions only) on an amendment to a materials license. In doing so, it observed that the AEA did not specifically require on-the-record hearings, and it called the legislative history "unilluminating" as to Congress's intent in materials licensing cases. The Commission noted that while it held formal hearings in all reactor licensing cases, it had not stated explicitly whether it did so as a matter of discretion or of statutory requirement. In any event, it did not view the AEA as mandating an on-the-record hearing in every licensing case. This decision was upheld by a reviewing court. *City of West Chicago* v. *NRC*, 701 F.2d 632 (7th Cir. 1983). Subsequently, the NRC issued a new subpart L to part 2, setting forth procedures for holding informal proceedings on all materials license applications and amendments (54 FR 8276; Feb. 28, 1989). In Section 134 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10154, Congress specified a set of hybrid procedures for licensing expansions of spent fuel storage capacity at reactor sites. The process called for written submissions, oral argument, and an adjudicatory hearing only after specific findings by the Commission. The Commission promulgated procedures—10 CFR part 2, subpart K (50 FR 41670; Oct. 15, 1985)—to implement this legislation.

The *West Chicago* court's finding that formal hearings were not required for materials licenses opened the door considerably wider for the argument that formal hearings are not necessarily required in reactor licensing cases. The provision of the AEA that establishes the basic statutory entitlement to a "hearing" does not distinguish between reactor licenses and materials licenses. The first significant move toward deformalization of reactor licensing cases came in 1989, when the NRC completed what a reviewing court described as a "bold and creative" effort to foster standardization of nuclear power plant designs, as well as the early resolution of key safety issues. This was the issuance of a new 10 CFR part 52, which provided for issuance of design certifications and "combined licenses" for construction and operation of nuclear power plants (54 FR 15386; Apr. 18, 1989). The rule provided that standard designs could be approved by rulemaking, with an opportunity for an informal hearing conducted by an Atomic Safety and Licensing Board (this would be a "paper" hearing, unless the Licensing Board requested the authority to conduct a "live"—that is, oral—hearing, and the Commission agreed). Subpart G formal hearings would be offered thereafter, before the issuance of the combined construction permit/operating license for a specific facility. When the facility was essentially complete and close to fuel loading and criticality, there would be an opportunity for members of the public to raise any concerns they might have about plant operation. These could fall into one of two categories: Either a claim that the facility as built did not meet the "acceptance criteria" specified in the original combined construction permit/operating license, or a claim that the acceptance criteria themselves (that is, the licensing requirements) were deficient. For claims in the former category, the Commission would determine whether to hold a hearing and whether it would be a formal or informal hearing. A request to modify the terms of a combined license would be handled as a request for action under 10 CFR 2.206.

Part 52 was promptly challenged after its promulgation. A panel of the U.S. Court of Appeals for the DC Circuit issued a decision that upheld some parts of the rule but set aside others, including the provisions governing the opportunities for a hearing after completion of construction and before operation. *Nuclear Info. & Res. Serv.* v. *NRC*, 918 F.2d 189 (DC Cir. 1990), vacated & rehearing *en banc* granted, 928 F.2d 465 (DC Cir. 1991). However, the decision was later vacated by the entire DC Circuit, sitting *en banc*. *Nuclear Information and Resource Service* v. *NRC*, 969 F.2d 1169 (DC Cir. 1992). In its brief to the full court, the NRC argued unequivocally that AEA's hearing requirement for nuclear power plant licensing did not necessarily mean a formal hearing.

The full court upheld part 52 in its entirety. However, on the question of whether hearings must be formal, it reserved judgment on the grounds that the NRC's argument that informal hearings were permissible had not been made in the rulemaking or before the original panel. 969 F.2d at 1180.

The Commission has taken two more steps to further stake out its position that the AEA does not require formal hearings. The first was a rulemaking implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504. This statute authorizes the recovery of attorneys' fees by certain "prevailing" parties in "adversary adjudications." The term "adversary adjudication" is defined in 5 U.S.C. 504(b)(1)(C) to generally mean, for purposes of the EAJA, adjudications conducted under 5 U.S.C. 554, the section of the APA applicable to adjudications required by statute to be determined on-the-record after the opportunity for an agency hearing. "Adversary adjudications" do not include adjudications to consider the grant or renewal of a license.

The NRC decided to authorize the payment of attorneys' fees only for adjudications under the Program Fraud Civil Remedies Act, which by law must be on-the-record, on the grounds that no other NRC adjudications (other than those for the licensing of uranium enrichment facilities under Section 193) must by law be on-the-record. 10 CFR part 12 (59 FR 23121; May 5, 1994). To date, no lawsuit has been filed challenging this determination. The second and more significant step was the recent promulgation of subpart M to part 2 (63 FR 66730; Dec. 3, 1998), to cover transfers of licenses, including those for power reactors. Here again, the rule did not provide for formal proceedings.

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In a Staff Requirements Memorandum issued on July 22, 1999 (which is available to the public), the Commission directed OGC to develop a proposed rulemaking. The Commission also indicated that it would pursue legislation to confirm NRC's discretion to structure its procedures as it deemed necessary to carry out its responsibilities. The Commission further directed that the views of external stakeholders be obtained. In response, on October 26–27, 1999, OGC conducted a facilitated public meeting with stakeholders representing the industry, citizen groups, another Federal agency, academia, and the NRC's Atomic Safety and Licensing Board Panel. The transcribed views of all participants are publicly available. In addition to the broad issue of the degree of formality or informality of the hearing process, the issues addressed at this meeting encompassed matters such as requirements for standing, contentions, discovery, cross-examination, summary disposition, hearing schedules and time limits, the role of the presiding officer, and the number of different hearing "tracks" that might be appropriate, all having been raised directly or indirectly in SECY–99–006. The comments at this meeting are described below and have been considered in this rulemaking.

C. Comments on Policy Statement

The NRC received a number of public comments on its 1998 Policy Statement on the conduct of adjudicatory proceedings (63 FR 41872; Aug. 5, 1998). The NRC is taking this opportunity to address those comments as part of this final rulemaking.

Eleven sets of comments were received on the Policy Statement. Some of the comments came from persons who represented the views of several other named persons. Two of the sets of comments opposed the Policy Statement; the remaining nine generally supported the Policy Statement.

Comment. The Policy Statement and its suggestions for expedited proceedings that allow delays only in extreme and unavoidable circumstances is unfair, inconsistent with due process, violates the Administrative Procedure Act (APA), and emphasizes licensing over health and safety concerns. Expedited schedules are not necessary for nuclear power plant license renewal proceedings. Expedited schedules may not be reasonable for hearings with complex issues. An expedited hearing schedule is harmful to intervener groups who need more time due to their lack of funding.

Response. The NRC is unaware of any judicial decision that holds that the type of hearing procedures being proposed in the Policy Statement guidance violates due process or the APA. In fact, the Policy Statement recognizes that there is a need to balance efforts to avoid delay with procedures that will ensure fair and reasonable time frames for taking action in the adjudication. The Commission believes that the guidance in the Policy Statement strikes a proper balance among all these considerations. The Commission also believes that providing more effective hearing processes will result in a better use of all participants' limited resources.

Comment. Contrary to statements made in the Policy Statement, Licensing Boards do not have total discretion to set schedules in proceedings. For example, Licensing Boards must allow contentions to be filed anytime up to 15 days before the prehearing conference, and a board may not shorten this time.

Response. Under the Commission's existing procedures, as carried forward into this final rule, § 2.319 of the final rule (formerly § 2.718) provides the presiding officer the power to regulate the course of the proceeding. In addition, under § 2.307 of the final rule (formerly § 2.711) a presiding officer may shorten or lengthen the time required for filings for good cause. This provision expressly allows a presiding officer to set deadlines for filings, such as the filing of contentions.

Comment. Multiple Licensing Boards should not be used because it could be too burdensome for intervener groups with limited resources.

Response. The Commission recognizes that, in some instances, the use of multiple Licensing Boards to address multiple separate issues in a single proceeding can place a burden on all parties. For that reason, the NRC is careful to consider and account for the circumstances of each case and to ensure that the use of multiple boards will not prejudice any party. However, it is important to have flexibility to use multiple boards where it will not prejudice any party, as the use of more than one board can allow the effective litigation and resolution of a number of separate issues resulting in a more timely completion of the record and decision for the whole case.

Comment. The guidelines set forth in the Policy Statement should be codified through a rulemaking.

Response. The Commission is codifying appropriate portions of the Policy Statement in this rulemaking. Because the Policy Statement deals primarily with case management and control, it may not be appropriate to convert everything in the Policy Statement to hard and fast requirements. The Commission believes that it is important to retain flexibility to manage proceedings as the situation warrants.

Comment. A Licensing Board should be able to raise any safety issue that is material to health and safety, regardless of whether it is a substantial issue.

Response. If a presiding officer (including a Licensing Board) determines in the course of a hearing that a safety issue exists that has not been raised by a party, it may refer the matter to the Commission with a recommendation on how the issue should be addressed under § 2.340(a) of the final rule. Some issues raised by a presiding officer sua sponte may be addressed appropriately through adjudications, while others may not. In fact, the Commission has a process for considering the presiding officer's recommendation on sua sponte issues and that process can result in the issues being considered in the adjudication or being referred to the NRC staff for review and resolution without litigation. This final rule does not represent a significant departure from its longstanding regulation, 10 CFR 2.760a (now codified in this final rule at § 2.340).

Comment. The Commission's suggestion that the Licensing Boards limit the use of summary disposition motions goes too far.

Response. There are appropriate times for filing summary disposition motions. There may be times in the proceeding where these motions should not be entertained because consideration of the motions would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer (including a Licensing Board) is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings. To further ensure that summary disposition motions are filed and ruled upon in a timely manner that does not detract from preparation for the oral hearing, the Commission is adopting in § 2.710 of the final rule additional requirements on the timing, consideration, and

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decisions on summary disposition motions.

Comment. The limitation of discovery on the NRC staff until after the Safety Evaluation Report (SER) and final Environmental Impact Statement (EIS) is overly broad and could delay the proceeding.

Response. The most fruitful time for discovery of NRC staff review documents is after the staff has developed its position. Subjecting the NRC staff to extensive discovery early in the process will often require the staff to divert its resources from completing its review. In addition, early discovery before the NRC staff has finalized the major part of its reviews may present a misleading impression of staff views. Finally, a focus on discovery against the NRC staff diverts the focus from the real issues in a licensing proceeding, which should be the adequacy of the applicant's/licensee's proposal. Nevertheless, the Commission recognizes the importance of timely completion of the NRC staff's reviews and the staff is making a concerted effort at rigorous planning and scheduling of staff reviews. In this regard, the NRC staff has continued to refine and complete its standard review plans and its review guidance, and has moved to a more performance-goal oriented approach in an effort to improve the timeliness of its reviews. Steering and oversight committees are sometimes formed to direct the course of major technical review efforts and detailed milestone schedules are developed and tracked. NRC managers and staff are held accountable for these schedules. The NRC will continue with these efforts to improve the timeliness of licensing reviews.

Comment. The hearing should not be delayed until after the SER and the final EIS are issued as it could delay the proceedings.

Response. In proceedings where the NRC staff is a party, the staff may not be in a position to provide testimony or take a final position on some issues until these documents have been completed. This may be the case in particular with regard to the NRC staff's environmental evaluation, less so with regard to the staff's safety evaluation. In many cases, it could be unproductive and cumbersome to have a two-pronged hearing with one part of the hearing being conducted before issuance of the NRC staff documents and a second hearing after issuance of the documents.

Nonetheless, the Commission recognizes that where the NRC staff is a party, the staff could prepare testimony and evidence, and take a final position on contested matters if its safety review has been completed in areas relevant to the contested matters. The Commission also recognizes that the current regulations governing submission of the SER and/or EIS are not clear and could be misleading. To address these matters, the Commission is taking a number of actions which are described below in II.A.2.(f) in the discussion of § 2.337.

Comment. Licensing Boards should rule on standing before the submission of contentions.

Response. The Commission expects that standing issues would be among the first issues addressed by a presiding officer in an adjudication, but that does not dictate that the submission of contentions should be delayed. The Commission also expects that concrete issues of concern to the public would be raised on the basis of the application or the proposal for NRC action and can be identified at the same time the petition addresses the matter of standing.

Comment. The Commission should apply the Federal Rules of Evidence with respect to scientific testimony.

Response. Neither this final rule nor the superseded provisions of part 2 contain a special provision for scientific testimony. Scientific testimony can be tested and evaluated in the same manner as other evidence presented at a hearing. Although the Commission has not required the application of the Federal Rules of Evidence in NRC adjudicatory proceedings, presiding officers and Licensing Boards have always looked to the Federal Rules for guidance in appropriate circumstances. The Commission continues to believe that greater informality and flexibility in the presentation of evidence in hearings, rather than the inflexible use of the formal rules of evidence imposed in the Federal courts, can result in more effective and efficient issue resolution.

Comment. The Commission should place limitations on cross-examination.

Response. The final rule does place limitations on cross-examination for the less formal procedures. Under these procedures, the presiding officer may question witnesses who testify at the hearing, but parties normally may not do so. However, parties may submit to the presiding officer written suggestions for questions to be asked. The final rule also allows motions to the presiding officer to allow cross-examination by the parties where the party believes this would be necessary to develop an adequate record. As a general matter, the presiding officer may limit and control cross-examination in appropriate circumstances, under § 2.333 of the final rule. Among other things, the final rule requires the filing and use of cross-examination plans whenever a party cross-examines witnesses.

Comment. The Commission should be actively involved in overseeing proceedings and there should be expedited interlocutory review for novel legal or policy issues.

Response. Providing for a Commission ruling on significant issues before the hearing is completed can focus the issues to be addressed in a hearing, and the final rule provides for presiding officer certification of novel legal or policy issues to the Commission. However, the Commission believes that the additional delay necessarily associated with interlocutory appeals by parties outweighs any potential reduction in hearing time that may come about through a Commission decision in such an appeal, unless a party seeking interlocutory review can also demonstrate that it would be threatened with immediate and serious irreparable harm, or if the basic structure of the proceeding would be affected in a pervasive or unusual manner. Accordingly, the Commission has decided that it should not depart from existing practice by permitting interlocutory appeals by parties based solely on the existence of novel legal or policy issues.

Comment. The Commission should actively review the performance of Licensing Boards and ensure that boards make prompt decisions.

Response. The Commission has been carefully monitoring all adjudicatory proceedings to ensure that they are being appropriately managed to avoid unnecessary delay. The Commission, through its Policy Statements and case-specific orders, has been encouraging presiding officers (including Licensing Boards) to issue timely decisions consistent with presiding officers' independent decisionmaking functions. Section 2.334(b) of the final rule explicitly addresses case management and would require the presiding officers to notify the Commission when there is non-trivial delay in completion of the proceeding. The Commission wishes to emphasize, however, that the Commission's oversight of presiding officers with respect to case management is not intended to intrude on the independence of presiding officers in discharging their decisionmaking responsibilities.

D. Comments From Hearing Process Workshop

The October 26–27, 1999, hearing process workshop involved participants from the nuclear industry, states, citizen

groups, the academic community, administrative judge community, and the NRC. Transcripts from the workshop are available in NRC's Public Document Room, and are available for download on the NRC Web Page, at *http://ruleforum.llnl.gov/cgi-bin/library?source=*&library=CAP_PRULE_lib&file=**. The major comments and the Commission's responses follow.

Comment. In general, the public citizen group participants questioned whether there was a need to make any changes to the current hearing procedures. They also voiced concerns about any limitations on current discovery and cross-examination. Industry representatives advocated changes to the hearing process, which they viewed as becoming increasingly and needlessly time consuming.

Response. The Commission believes that there is a need to take some action to improve the management of the adjudicatory process to avoid needless delay and unproductive litigation. Using less formal hearing processes with simplified procedures for most types of proceedings along with a requirement for well-supported specific contentions in all cases can improve NRC hearings, limit unproductive litigation, and at the same time ease the burdens in hearing preparation and participation for all participants.

In the final rule, well-supported, specific contentions will be required in all proceedings, just as they are now required under the Commission's formal hearing procedures. See § 2.309(f). Petitioners generally have been able to meet the current specific contention requirements and the Commission would not expect the application of those requirements to informal proceedings to adversely affect public participation. Indeed, by focusing litigation efforts on specific and well-defined issues, all parties will be relieved of the burden of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.

Under the final rule, early document disclosure and witness identification will be required of all parties (except the NRC staff) in every case. See §§ 2.336, 2.704. In proceedings using hearing procedures other than Subparts G and J, no other discovery would be permitted. This approach should reduce the burden on public participants because petitioners would be given access to pertinent information without the need to file formal discovery requests, and would not be burdened with responding to formal discovery requests. In Subparts G, L, and N, the NRC staff is required to prepare a hearing file. In Subpart J proceedings, the NRC staff is required to maintain an electronic docket, and all potential parties are required to participate in the Licensing Support Network (LSN), which will afford access to all relevant documents. In sum, the Commission believes that in all hearing tracks the parties will have sufficient information available to prepare their cases.

Under the final rule, cross-examination is retained for Subpart G hearings. By contrast, in informal hearings, only the presiding officer will question witnesses. Nevertheless, the informal procedures allow the parties to suggest questions for the presiding officer to ask, and they permit motions to allow the parties themselves to cross-examine witnesses. The presiding officer may grant the motion if he or she believes that such cross-examination is necessary to develop an adequate record for decision. This should ensure that there is questioning of witnesses sufficient to develop an adequate record. However, the Commission expects that the use of cross-examination in Subparts L, M or N proceedings will be rare.

Comment. Some participants raised concerns regarding case management practices by the Licensing Boards. One concern was the perceived lack of control by presiding officers in some informal and formal proceedings. According to these participants, in informal proceedings, presiding officers too often allow pleadings to be amended or allow an unlimited number of reply briefs. Nuclear industry participants stated that discovery in formal proceedings takes too long, that the NRC staff requires too much time to issue a Final Environmental Impact Statement (FES) and Safety Evaluation Report (SER), and that the presiding officer/board takes too long to issue an initial decision.

Response. Strong case management is an integral part of an efficient and effective hearing process. The Commission expects presiding officers/boards to manage all adjudications carefully and attentively. Tools to be used to this end are reflected in the final rule. The Commission has modified the intervention requirements in Subpart L to require the submission of specific, well-supported contentions as is currently required for hearings held under Subpart G. This should result in hearings that focus on well-defined issues and obviate the need to receive evidence of questionable relevance. The Commission also modified the less formal hearing procedures in Part 2 in a manner that should reduce the amount of motion practice over what hearing procedures to use. As noted earlier, the Commission is also taking a number of actions (described below in II.A.2.(f) in the discussion of § 2.337) to ensure timely preparation of NRC staff testimony and evidence, and to clarify the NRC documents which must be admitted into evidence in different proceedings conducted under Part 2.

Comment: One of the attributes of the current formal process is cross-examination of witnesses. Nuclear industry participants urged that cross-examination not be used as it is often not an effective or efficient way to determine the validity of any particular matter. However, citizen group participants argued that cross-examination is effective and oppose any elimination of this tool. Some nuclear industry participants argued that cross-examination should only be an optional tool that can be used if it is determined that it is necessary. These representatives also asserted that cross-examination must be used in enforcement hearings. Other licensee representatives suggested that certain proceedings such as those involving license applications for activities posing low risk from a public health and safety perspective, should not use cross-examination. Citizen group participants pointed out that there may not be agreement as to which proceedings involve "low risk" activities.

Response. The final rule provides for cross-examination by the parties in proceedings that warrant the use of Subpart G hearing procedures. Other NRC proceedings will utilize less formal procedures that do not include cross-examination by the parties unless ordered by the presiding officer or the Commission in a particular case. *See* §§ 2.1207, 2.1204(b), 2.1405, 2.1402(c). Nonetheless, these latter proceedings involve questioning of witnesses by the presiding officer in response to lines of questioning proposed by parties, and cross-examination by the parties themselves only where the presiding officer determines that it is necessary to develop an adequate record for decision. The Commission believes that this approach strikes an appropriate balance in the use of cross-examination, and is consistent with the requirements of the Administrative Procedure Act (APA), which does not require cross-examination for on-the-record proceedings unless necessary for a "fair and true disclosure of the facts." 5 U.S.C. 556(d).

Comment. Another attribute of the current formal proceedings is discovery. The representatives of citizen groups view discovery as essential because they do not have access to all of the

information that licensees and the NRC staff do and they perceive this as a disadvantage early in the proceedings. Citizen group representatives also noted ready access to information can be frustrated by the fact that the application may be incomplete and is supplemented through the NRC staff's requests for additional information (RAI). In response to the citizen group representatives' concerns, the nuclear industry representatives suggested that interested parties should attend staff-applicant meetings that take place before the submission of an application. Citizen group representatives suggested that interested individuals should be permitted to participate in these meetings instead of just observing. One option suggested by the administrative judge participant was that the NRC model its discovery rules on Rule 26 of the Federal Rules of Civil Procedure.

Response. The final rule provides that in all adjudicatory proceedings (whether formal or informal), the parties must exchange relevant documents and other information at the beginning of the proceeding. *See* §§ 2.336, 2.704. Parties other than NRC staff are also required to exchange the identity of expert witnesses,[4] as well as existing reports of their opinions. The "mandatory disclosure" concept is expanded in subpart J by requiring the NRC and potential parties to disclose pertinent documents by participating in the "Licensing Support Network" (LSN) before an application is filed. In addition, under subparts G, L, and N the NRC staff is required to prepare, make available, and update a "hearing file" consisting of the application and any amendments, NRC safety and environmental reports relating to the application, and any correspondence between the NRC and the applicant that is relevant to the application. A parallel concept is provided in subpart J by the requirement for the NRC staff to maintain an "electronic docket." Thus, the mandatory disclosure requirement in subpart C, the hearing file provision in subparts G, L, and N the requirement for an LSN and "electronic docket" in subpart J, go well beyond the "discovery" provisions for full, on-the-record adjudicatory hearings under the APA. *See* 5 U.S.C. 554 and 556(c). Moreover, formal discovery tools, *e.g.*, interrogatories and depositions, remain for proceedings conducted under subparts G and J. *See, e.g.*, §§ 2.702 through 2.709 (subpart G), § 2.1000 (subpart J).

The Commission also encourages members of the public (including States, local governmental bodies, and Federally-recognized Indian Tribes) to attend meetings between the NRC staff and the applicant, both before and after a license application is submitted, and to review NRC staff-prepared meeting summaries. These meetings are noticed in advance and are, with limited exceptions to protect proprietary, sensitive financial and safeguards information, open to all to observe. If practical, teleconferencing access to meetings where the meeting site is not easily accessible to interested persons is provided upon request. Depending upon the nature of the meeting, the public is provided an opportunity to either ask questions of the NRC staff, or participate in a discussion of regulatory issues at designated points in the meeting. Meeting summaries prepared by the NRC staff are placed in the docket file for the application and are available through the NRC Web site and in the Public Document Room.[5] Public attendance at these meetings and review of the meeting summaries should provide individuals or groups early access to information so that they may participate more effectively in the hearing process. This may also reduce the number of issues that must be adjudicated.

In sum, the Commission believes that its current policy on public meetings, broad public access to information, mandatory disclosures under Subpart C, the requirement for a hearing file under Subparts G, L and N, the requirement for an LSN and "electronic docket" under Subpart J, and the availability of the full panoply of formal, trial-like discovery under Subpart G, together constitute a system for discovery which is tailored to the regulatory and licensing matters which must be resolved in NRC adjudicatory proceedings.

Comment. The representatives of citizen groups and local governments argued that the rules for standing should be liberalized. These participants noted that NRC proceedings require much time and money and are not undertaken lightly.

Response. Members of the public who have an interest that will be affected by a proposed action should be readily able to establish their standing under the standards in the final rule. At the same time, the Commission recognizes that there may be instances where persons who do not have a direct interest and cannot demonstrate standing nevertheless are able to make a substantial contribution to the development of the record in the proceeding. Accordingly, the Commission is codifying the six criteria for discretionary intervention which were first articulated in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976): (1) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record; (2) the nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; (3) the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interests; (4) the availability of other means for protecting the interests of the requestor/petitioner; (5) the extent to which the requestor's/petitioner's interests will be represented by existing parties; and (6) the extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding. *See* § 2.309(e). Discretionary intervention, however, will not be allowed unless at least one other petitioner has established standing and at least one admissible contention.

Comment. Citizen group representatives stated that the NRC should return to its pre-1989 contention standards. Some of these participants asserted that an intervenor, under current practice, often has to prove its case in order to have a contention admitted. These participants also believe that the current contention standard has a chilling effect on citizen group participation. The citizen group representatives also stated that they had difficulty meeting the current contention standard because they lacked information about the application. In addition, the NRC staff practice of issuing requests for information (RAIs) for a purportedly incomplete application is said to place additional burdens on intervenors to continually support their contentions on a changing application.

Response. The NRC believes that the contention standard in § 2.309(f) is appropriate. The threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of

[4] Although in proceedings other than those under Subparts G and J, no further discovery will be permitted after the required disclosures, the identity of expert witnesses will allow the parties to conduct research on, and formulate challenges to the expertise and credibility of the identified witnesses.

[5] These meeting procedures are consistent with the Commission's direction in its January 8, 2002 Staff Requirements Memorandum (ADAMS Accession No. ML020080358), which approved the NRC staff's proposals for enhancing public participation in NRC meetings as described in SECY-01-0137 (July 25, 2001, ADAMS Accession No. ML012070084).

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concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues. The contention standard has been in effect for more than ten years and has been effective in focusing litigation on real issues. The contention standard does not contemplate a determination of the merits of a proffered contention. Ample information is provided in the application and related documents to allow the formulation and support of real, concrete issues.

Comment. All citizen group participants stated that there is a need for intervenor funding. These participants argued that if the intervenors had access to resources for participation, there could be fewer delays in the proceeding and they could better assist the NRC in reaching the correct result. One participant noted that legislation prohibits the NRC from providing intervenor funding.

Response. Congress, in Section 502 of the Energy and Water Development Appropriations Act for FY 1993, has barred the use of appropriated monies to pay the expenses of, or otherwise compensate, parties intervening in NRC adjudicatory proceedings. Public Law 102–377, Title V, section 502, 106 Stat. 1342 (1992) (codified as amended at 5 U.S.C. 504). Therefore, the final rule does not provide for assistance to intervenors.

II. Discussion of the Final Rule

A. Resolution of Public Comments on Proposed Rule; Bases for Final Rule

1. Overview of Public Comments on Proposed Rule

The public comment period for the proposed rule closed on September 14, 2001.[6] As of January 8, 2002, the NRC had received a total of 1,431[7] public comments on the proposed rule from individuals, citizen groups and the industry. In total, 1,422 comments generally opposed the proposed rulemaking, while nine (9) comments favored NRC's efforts. Of the 1,431 comments received, twenty-two (22) were substantive, with fifteen (15) opposing and seven (7) in support of the proposed rule. The vast majority of the 1,422 comments opposing the rule were postcards submitted by private citizens. Of the fifteen (15) substantive comments opposing the rule, eight (8) were from citizen groups, including the Nuclear Information and Resource Service (NIRS), Public Citizen—Critical Mass Energy and Environment Program, the Massachusetts Citizens for Safe Energy, Ohio Citizens for Responsible Energy (OCRE), and the Project on Government Oversight. The National Whistleblower Center and the Committee for Safety at Plant Zion filed a joint comment. A collection of seventy-six (76) citizen groups, from the Alliance For a Clean Environment to the Women's International League for Peace and Freedom/Tucson, filed a joint comment by their representative (Jonathan Block). The remaining substantive comments opposing the rule were from individuals, including several unaffiliated individuals (Phillip Greenberg, Carlo Popolizio, and Kurt Wilner), a self-described pro se petitioner (Sarah M. Fields), and a political science professor (Kenneth A. Dahlberg). The seven (7) substantive comments supporting the proposed rulemaking were provided by a group representing the nuclear industry (Nuclear Energy Institute (NEI)), three (3) law firms representing three (3) groups of utilities (Morgan, Lewis &Bockius; Shaw Pittman; and Winston & Strawn), three (3) utilities (Florida Power and Light; and Virginia Electric Power Co. jointly with Dominion Nuclear Connecticut), and the National Mining Association (NMA).

2. Significant Comments and Issues, and Their Resolution in Final Rule

After consideration of the public comments received on the proposed rule, as well as public comments received on the 1998 Policy Statement and in the hearing process workshop, the Commission has decided to retain the proposed rule's general approach of fashioning hearing procedures that are tailored to the different kinds of licensing and regulatory activities the Commission conducts. However, in response to public comments, the Commission has revised the scope of proceedings to be governed by a hearing track, and has created a new track to provide for "legislative hearings." The Commission expects that the revised hearing procedures, ranging from informal to formal, will improve the effectiveness and efficiency of the NRC's hearing process, and better focus and use the limited resources of all involved.

The following discussion describes and sets forth the bases for the final rule, including the Commission's resolution of all significant matters raised in public comments on both individual provisions of the proposed rule, and the Commission's requests for comment on specific issues, as well as additional corrections, clarifications, and additional matters addressed by the Commission in the final rule. The Commission's response to all remaining matters raised in the public comments are contained in "Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule." This document may be inspected at the NRC's Public Document Room, 11555 Rockville Pike, Rockville, Maryland, 20852, as well as in the NRC's Public Electronic Reading Room, *http://www.nrc.gov/NRC/ADAMS/index.html* (ADAMS Accession No. ML033510327). Conforming changes to other Commission regulations in Title 10 of the Code of Federal Regulations have not been discussed, except where additional clarification of the basis for the change was deemed necessary.

(a) Overall Organization of part 2.

To provide for a more effective and efficient hearing process, the Commission is revising 10 CFR part 2 by:

(1) Establishing a new Subpart C to consolidate the Commission's procedures for ruling on requests for hearing/petitions for leave to intervene and admission of contentions, and establishing criteria for determining the specific hearing procedures that are to be used in particular cases and to set out the hearing-related procedures of general applicability;

(2) Modifying the hearing procedures in the current subpart G and subpart L and expanding the applicability of more informal procedures;

(3) Establishing a new subpart N that will provide "fast track" hearing procedures;

(4) Establishing a new subpart O that the Commission will use to conduct "legislative hearings;"

(5) Making conforming amendments as necessary throughout part 2 and the remainder of the Commission's regulations in title 10 to refer to the correct provisions of revised part 2; and

(6) Making correcting amendments to use: (i) Consistent terminology (*e.g.*, "construction authorization for a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5)," and "proceedings on an

[6] The original comment period for the proposed rule expired on July 16, 2001 (66 FR 19610; Apr. 16, 2001). In response to several requests, the comment period was extended until September 14, 2001 (66 FR 27045; May 16, 2001).

[7] Over 1200 comments were received in the form of postcards printed with an identical message opposing the proposed rule. Where an individual submitted more than one of these postcards under the same signature, this was treated as a single comment, for purposes of determining the total number of comments received. Thus, the tally of 1,431 comments does not reflect the additional identical postcards filed by the same individual.

initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area"), (ii) proper grammar, and (iii) plain English.

New subpart C—Rules of General Applicability for NRC Adjudicatory Hearings—is the starting point for consideration of, and rulings on, all requests for hearing/petitions for leave to intervene and the admissibility of contentions, and for selecting the appropriate hearing procedures to be applied in the remainder of the case. The Commission or a designated presiding officer would rule on requests for hearing/petitions to intervene and the admissibility of proffered contentions using the standards and procedures of subpart C.

In a change from past NRC practice, the Commission may designate either an administrative law judge[8] or a three-member Atomic Safety and Licensing Board,[9] to preside over subpart G, J, K, L and N hearings. The Commission has taken this step to ensure that all of these proceedings meet the requirements with regard to a presiding officer for an on-the-record hearing under the APA, 5 U.S.C. 554, 55, 556, and 557.

When it is determined that a hearing should be held, the Commission, presiding officer, or Licensing Board would next examine the nature of the action that is the subject of the hearing and the contentions admitted for litigation, apply the criteria in subpart C to determine the specific procedures/subpart that should be used for the adjudication, and issue an order for hearing designating the procedures/subpart to be used for the remainder of the proceeding. The hearing activities would then proceed under the designated subpart, *i.e.*, Subpart G to be used for the most formal hearings, Subpart L for more informal hearings, Subpart M for license transfer cases, Subpart N for an expedited "fast track" hearing. The exception is Subpart O, which identifies the circumstances and procedures under which the Commission will conduct "legislative hearings." These hearings may be held in the Commission's sole discretion: (1) In connection with design certification rulemakings, and (2) to assist the Commission in resolving questions on whether the Commission rules and regulations should be considered in a particular adjudication certified to it under § 2.335(d), as well as the special procedures to be utilized in such hearings. Subpart C also contains rules applicable in general to hearings conducted under the respective subparts.

The hearing procedure selection provision in § 2.310 reflects the range of proceedings for which the Commission intends to use informal hearing procedures. This is in keeping with the Commission's intent to expand the use of more informal procedures to improve the effectiveness and efficiency of the NRC's hearing processes. Subject to four exceptions, hearings will be conducted using more informal procedures. These exceptions are: (1) Licensing of uranium enrichment facilities, (2) initial authorization of the construction of a HLW geologic repository, and initial issuance of a license to receive and possess HLW at a HLW geologic repository, (3) enforcement matters (unless the parties agree to use more informal hearing procedures), and (4) parts of nuclear power plant licensing proceedings where the presiding officer by order finds that resolution of an admitted contention necessitates resolution of: (a) Issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (b) issues of motive or intent of the party or eyewitness material to the resolution of a contested factual matter. Hearings for such contentions would be conducted using Subpart G procedures; hearings for any other contentions which do not meet this test would be conducted using Subpart L (or, upon agreement of all parties, Subpart N) procedures.

The Commission is retaining essentially all of the current procedures specific to the conduct of hearings under Subpart G. The Commission is substantially modifying the existing procedures in Subpart L to correct weaknesses identified under the current rule and to build on the experience under the current procedures for hearings in Subpart M for license transfer proceedings. The primary modifications to Subparts G and M involve the removal of provisions that are generally applicable to all proceedings and the relocation of the essence of those common provisions to Subpart C. The Commission is adopting a new Subpart N containing procedures for a "fast track" hearing, including an expedited oral hearing and oral motions, and limits on written submissions and the sometimes protracted series of written responses they often entail. Subpart N procedures could be used in any proceeding (except a proceeding on the licensing of construction and operation of a uranium enrichment facility) upon agreement of all parties.

Finally, the Commission is also adopting a new Subpart O that will govern the conduct of "legislative hearings" that the Commission may, in its discretion, decide to hold in either design certification rulemakings or to assist it in resolving a question certified to it under § 2.335. Conforming changes have been made to other subparts of 10 CFR part 2 and throughout Chapter 10 to reflect the reorganization of part 2.

(b) Commission Response to Eight General Questions in Proposed Rule.

In the proposed rule the Commission requested public responses to general questions in each of eight areas of discussion. The comments and the Commission's resolution of the comments are set forth below.

Question 1: Overall Approach for More Informal Hearings

In preparing the proposed rule, the Commission carefully considered the advantages and disadvantages of both formal hearings and informal hearings, attempting to balance the competing considerations of accurate decisionmaking, ensuring protection of public health and safety, timeliness of Commission decisions, and maintaining public confidence in the decisionmaking process. The Commission recognized that various NRC stakeholders may have differing perspectives on the relative importance of these considerations and differing views on the balance to be struck among these considerations. The Commission requested public comments on the relevant considerations that should inform the Commission's decision in adopting more informal hearing procedures, and whether the Commission's strategy in moving towards more informal hearing procedures should be continued. Commenters were asked to identify any aspect of the proposed rule's informal and formal hearing procedures which the commenter believes could be improved, together with specific proposals for improvement and an assessment of the proposal against relevant considerations, including fundamental fairness, the need for timely decisionmaking, and accurate fact-finding.

A broad range of comments was received, from those supporting the move to tailored, less-formal hearings, to those who oppose the move, asserting that the NRC's legislative and agency

[8] Administrative law judges are appointed by an agency in accordance with 5 U.S.C. 3105, and are accorded some independence from the agency appointing them, because control of their compensation, promotion and tenure is vested by statute in the Office of Personnel Management.

[9] Section 191 of the Atomic Energy Act of 1954, as amended, (AEA) authorizes the Commission to use Atomic Safety and Licensing Boards as an alternative to using an administrative law judge in agency hearings.

history supports formal public hearings conducted under Subpart G. In general, all of the private individual commenters and citizen groups opposed the move away from the full panoply of hearing procedures in Subpart G and the expanded use of more-informal hearing procedures reflected in the proposed Subparts L, M, and N. Two citizen group commenters argued that the Commission's proposal to expand the use of more-informal hearing procedures in Subpart L instead of the full panoply of Subpart G hearing procedures in nuclear power plant licensing proceedings was in violation of the AEA and the APA. In support of this view, they pointed to an OGC memorandum that was prepared in 1989 on license renewal that concluded that formal hearings were likely intended by Congress under the AEA. Several citizen group commenters asserted that the use of informal hearing procedures in reactor licensing proceedings constitutes a violation of due process under the Fifth Amendment of the U.S. Constitution. Several commenters argued that it is inconsistent for NRC to decide that formal hearings for licensing of a HLW geologic repository are necessary in order to build public confidence. In their view, "deformalizing" public participation in the decision-making process to generate more HLW through license extensions, new licenses, and amendments essentially eliminates the time needed for public awareness and involvement. By contrast, the nuclear industry commenters generally supported the shift away from the Subpart G procedures, with a commenter specifically asserting that informal hearings should become the presumptive hearing mechanism.

For the reasons set forth in Section I.B. above, the Commission continues to believe that formal, on-the record hearings are not required by the AEA, except for the initial licensing of the construction and operation of a uranium enrichment facility under Section 193 of the AEA. Furthermore, the Commission believes that, with the adoption of the requirement in § 2.313 that hearings under Subparts G, J, K, L and N be presided over by either an administrative law judge or an Atomic Safety and Licensing Board, the hearing procedures in each of these subparts meets the requirements for an on-the-record hearing under the APA in any event.

However, as a matter of discretion the Commission has decided to provide for formal, on-the-record hearings using the full panoply of Subpart G procedures and cross-examination in certain narrowly-prescribed areas. The fact that there may have been a long-standing Commission position that hearings must be conducted under Subpart G—at least with respect to reactor licensing—does not by itself prevent the Commission from taking a different view, and providing for less-formal hearing procedures, rather than the full panoply of discovery and cross-examination under Subpart G.

The Commission also disagrees with the assertion that use of hearing procedures other than those in Subpart G in reactor licensing proceedings violates the Due Process clause of the Fifth Amendment. The commenters presented no citations to any court decision holding that the use of other than Subpart G procedures in reactor licensing proceedings is a Due Process violation. Nor did the commenters present any legal analysis using the three criteria identified by the U.S. Supreme Court in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) for evaluating claims that agency procedures violate the Fifth Amendment. The Commission notes that intervenors in reactor licensing proceedings (as opposed to reactor license applicants, and those who are the subject of an NRC enforcement action) ordinarily cannot raise constitutional Due Process issues with respect to NRC hearing procedures, inasmuch as intervenors cannot claim governmental deprivation of "life, liberty or property" as a result of the NRC's licensing action. *See City of West Chicago* v. *NRC*, 701 F.2d 632, 645 (7th Cir. 1983). The Commission believes that the use of these procedures raises no constitutional Due Process issues, and that the Commission possesses the discretion to adopt the use of more informal hearing procedures.

The Commission also sought comments on whether the more informal hearing processes should be augmented or even supplanted by even more informal, legislative hearing procedures. One commenter supported supplanting both the existing hearing procedures, including Subpart G to the maximum extent allowed by law, and the proposed informal procedures with legislative hearings. Another commenter suggested that proposed Subparts L and N were sufficiently flexible and informal, but that moving to an even more informal legislative hearing may also be acceptable, so long as requirements are imposed to ensure that the hearings will be clearly focused on matters in dispute, and that parties will have sufficient opportunity to challenge factual claims or expert opinions advanced by their opponents. Finally, several commenters noted their opposition to legislative hearings. One commenter opined that legislative hearings were appropriate for resolving public policy issues, but not for issues implicated in nuclear licensing. Another simply stated that it was unrealistic to envision more legislative hearings as it presupposes that the Commission, presiding officer or Licensing Board possesses the requisite experience to promptly grasp and frame the issues. Additionally, a commenter stated that the rule should not be changed to resemble legislative hearings; adjudicatory hearings should provide for a fair process before an independent tribunal. Accordingly, the commenter asserted that it is the interested person and not the presiding officer or Licensing Board that must be responsible for proposing the issues and offering sufficient evidence to support their position.

The Commission believes that legislative hearings—where there are no parties, no discovery, witnesses are called to provide testimony on agency-identified matters, and questions are propounded to witnesses by the presiding official (which may be the Commission)—are not well suited to resolving disputes of fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, or where the motive or intent of the party or eyewitness is at issue. Nor does the legislative hearing model appear to offer any real advantages over other informal or formal hearing procedures in resolving matters of law. Moreover, the Commission has little experience in using legislative hearing procedures in contested proceedings, making it difficult to determine what practical problems would arise if contested proceedings were conducted under a legislative hearing model. Legislative hearings, however, do appear to be suited to the development of "legislative facts," viz., general facts which help a decisionmaker decide questions of policy and discretion. *See* Sidney A. Shapiro, Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry, 1986 Duke L.J. 288, 265–96 & nn.61–66, citing Kenneth Culp Davis, The Requirements of a Trial-type Hearing, 70 Harv. L. Rev. 193, 199 (1956).

In the Commission's view, the non-adversarial nature of a legislative-style hearing may be the best way of developing the factual and policy bases for a decision in at least two discrete, narrowly-defined circumstances. The first is in design certification rulemaking, where the Commission

identifies a significant policy issue (perhaps of potentially generic implications) either during the formulation of the proposed design certification rule, or as the result of public comments on the proposed design certification rule. In either circumstance, the Commission could, as a matter of discretion, decide to hold a legislative hearing to develop a record on the competing policy considerations that would inform a Commission decision on the underlying policy issue. The current rules, 10 CFR 52.51 and 52.63, provide for an opportunity for a commenting member of the public (or, in the event of a proposed amendment to a design certification rule, the party which applied for the certification) to request an informal hearing, but provide no guidance as to the nature of issues for which an informal hearing may be granted. Furthermore, the hearing is held only upon request; the rule is silent with regard to the Commission itself holding a hearing to gather pertinent facts and policy perspectives. The Commission believes that the design certification rulemaking process could be strengthened by incorporating an option for the Commission to hold, on its sole discretion, a legislative hearing to enable it to gather information on discrete policy matters relevant to the design certification.

The second area where a legislative hearing may prove useful is in the Commission's determination of a question certified to it by the presiding officer under § 2.335 (formerly § 2.758) regarding whether the Commission's rules and regulations should be considered in a particular adjudication. There may be circumstances where the Commission, after reviewing the question certified to it by the presiding officer, determines that there are significant policy issues regarding the certified question. As in design certification rulemaking, the Commission could, as a matter of discretion, hold a legislative hearing to develop a record on the competing policy considerations that would inform a Commission decision on the certified question.

Question 2: Hearing Tracks

A very significant part of this rulemaking involves the development of criteria for the selection of the hearing procedures to be used for the proceeding. These criteria set the course for the rest of the hearing by specifying the use of particular types or categories of procedures (*e.g.*, formal, informal, informal-fast track, hybrid) for the remainder of the proceeding. In developing the proposed rule's hearing procedure selection criteria, the Commission recognized that, with the exception for licensing of uranium enrichment facilities, the Commission has broad authority and substantial flexibility to choose among the procedures in Subpart G, more informal oral or written hearing procedures, or any combination of Subpart G and more informal hearing procedures. The proposed rule reflected the Commission's belief that there should be at least three hearing tracks—a formal hearing track, an informal hearing track, and as provided by statute for expansion of spent fuel storage at nuclear power plants, a hybrid procedure. However, the Commission requested public comment on: (1) The proposed rule's approach of multiple, specialized tracks tailored to certain types of issues, (2) whether additional specialized tracks should be considered, and (3) the desirability of adopting an alternative approach that would provide for a single formal and two informal hearing procedures, with the presiding officer given the discretion to tailor the procedures to suit the circumstances of each case.

While a number of commenters on this question generally supported the use of multiple hearing tracks tailored to certain types of issues, there was much disagreement over the kinds of proceedings which should be subject to differing hearing tracks. One commenter suggested that hearings on license applications, amendments, and transfer requests should be informal and normally conducted by means of written submittals. Additional specialized hearing tracks were not seen as necessary because the tracks in the proposed rule, with some modifications, were viewed as sufficient to address the various types of matters coming before the Commission for adjudication. One commenter specifically stated that it did not support the adoption of a single formal and two informal hearing tracks, with presiding officer discretion to tailor procedures for each case. The commenter stated that, although somewhat complex, the multiple-track approach currently proposed would provide clear directions and certainty for each type of proceeding. Two commenters asserted that providing hearing officers with wide discretion to determine the hearing process in each case would likely result in additional disputes and litigation over procedural matters, reduce the predictability of likely burdens on participants in proceedings, and risk application of inconsistent processes in similar cases. One commenter argued that, in licensing all nuclear fuel cycle activities, formal hearings should be available on request to interested persons.

The Commission has decided to adopt the proposed rule's approach of establishing three primary hearing tracks supplemented with additional hearing tracks tailored to the kind of proceedings and issues that may be addressed in such proceedings. The primary hearing tracks are: (1) Subpart G, containing the full panoply of formal, trial-type procedures; (2) Subpart L, establishing a set of more informal hearing processes; and (3) Subpart K, containing a legislatively-required hybrid hearing process.

The Commission sought public comment on whether there are better alternatives to the proposed rule's approach for defining what type of proceedings are appropriate for Subpart G hearing procedures, versus more informal hearing procedures. The Commission asked whether the proposed category of cases to which formal hearing procedures would apply was too narrow, or conversely, should the rule specify that all proceedings would be informal hearings unless one or more criteria are met for the use of formal, Subpart G hearing procedures. The Commission requested proposals for criteria for determining formal versus informal hearing procedures, indicating that commenters should identify the perceived advantages and disadvantages of suggested alternative approaches as compared with the proposed rule's approach for determining the applicability of formal and informal hearing procedures.

Industry commenters generally asserted that the proposed category of cases to which informal hearing processes would apply is too narrow. They also disagreed with the assumption that formal trial-like procedures in Subpart G will be helpful in resolving proceedings with "numerous and complex issues." Instead, they proposed that informal processes such as those in proposed Subparts L and N should be used for nearly all types of proceedings. By contrast, citizen group commenters generally opposed the move to informal hearing procedures, and contended that all hearings should be formal.

The Commission has decided to continue using the approach set out in the proposed rule, whereby most adjudications would be conducted under the hearing procedures in Subpart L, unless one of the more specialized hearing tracks in Subparts G, K, M, or N, apply. With the exception of Subpart O legislative hearings, the criteria for

selecting among the specialized hearing tracks are set forth in § 2.310. The circumstances under which the Commission may decide to hold Subpart O legislative hearings, are set forth in § 2.1502. The criteria for designating the hearing track for any given proceeding are discussed further in II.A.2(f) in connection with the resolution of comments on § 2.310.

Question 3: Presiding Officer

The Commission sought comments on whether there should be criteria for determining whether a proceeding should be held before an administrative judge/Licensing Board or the Commission and, if so, what those criteria should be. In general, commenters did not embrace the possibility of the Commission itself conducting a hearing. One commenter asserted that the Commission should always serve the role of an appellate body, while all proceedings should be before administrative judges of the Atomic Safety and Licensing Board Panel. Two commenters indicated that the NRC should make greater use of the Atomic Safety and Licensing Board or a single administrative judge rather than relying upon the Commission to preside. One of these commenters noted that they would not object if the Commission were to preside over a hearing in carefully selected special cases, if time and other Commission responsibilities permitted, but observed that allowing one or more Commission members to preside would create practical difficulties on review of the initial decision. The commenter argued that the final rule should specify whether a single presiding officer or Licensing Board is to preside over particular proceedings, rather than setting forth criteria governing the selection of hearing procedures. The commenter also suggested that § 2.313 be redrafted to allow specifically for parties to request appointment of a Licensing Board or single administrative judge within a reasonable time (10 days) after a hearing is granted.

The Commission has decided that, with the exception of license transfer proceedings, the final rule should not specify the circumstances under which the Commission may choose to act as the presiding officer, inasmuch as these circumstances are likely to occur infrequently and in unusual circumstances. There seems to be little benefit in developing criteria that would be used infrequently; the Commission can address the question of the Commission itself serving as the presiding officer on a case-by-case basis. However, as discussed earlier, the Commission has decided that hearings conducted under Subparts G, J, K, L and N should be presided over by either a single administrative law judge (rather than a single administrative judge) or an Atomic Safety and Licensing Board. Hearings under Subparts M and O may be presided over by the Commission, a single administrative law judge, a single administrative judge, or an Atomic Safety and Licensing Board.

Question 4: Discovery

Unlike former Subpart G, where parties are permitted discovery ranging from document production to multiple interrogatories and depositions of other parties' witnesses, the proposed Subpart C would set forth a general requirement in every proceeding that the parties disclose and make available pertinent documents and identify witnesses. Additional discovery would be available in proceedings that use the formal hearing procedures of Subpart G. However, in view of the general availability of licensing and regulatory documents under NRC regulatory practice, it is not clear that discovery is needed in most NRC adjudications beyond the mandatory disclosures required by Subpart C and the broad public accessibility to documents provided by § 2.390 (former § 2.790). The Commission requested comments on whether discovery should be eliminated or limited to requests from the presiding officer.

Several commenters supported the use of a hearing file of the sort currently required by Subpart L, as the file contains the entire basis for NRC staff action in a particular case and, therefore, the information pertinent to a general determination whether the application meets the Commission's requirements. One commenter suggested that such a hearing file should constitute the sole form of discovery, while another supported the use of the broader disclosure provisions in Subpart C as an adjunct to the hearing file. Some commenters supported the adoption of the mandatory disclosure provisions, but found proposed §§ 2.335 (§ 2.336 in the final rule) and 2.704 overly burdensome as drafted. Other commenters opposed any changes in discovery, preferring that the Commission either maintain the existing Subpart G discovery provisions, or that discovery be governed by the Federal Rules of Civil Procedure. In general these commenters argued that the proposed discovery provisions diminished the rights of citizens and therefore should be prompted only by the most compelling reasons which the NRC failed to provide. One commenter stated that discovery is most successful when controlled by the opposing party without oversight by a presiding officer, and considered full discovery of the NRC staff to be essential.

The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery. At the foundation of the Commission's approach are the provisions in Subparts C and G which provide for mandatory disclosure of a wide range of information, documents, and tangible things relevant to the contested matter in the proceeding, and the NRC's provisions for broad public access to documents in § 2.390. The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, have been tailored to reflect the nature and requirements of NRC proceedings. Mandatory disclosure of information relevant to the contested matter (together with the hearing file and/or electronic docket, discussed later) should reduce or avoid the need to draft often-complex discovery requests such as interrogatories, prepare for time-consuming and costly depositions, and engage in extended litigation over the responsiveness of a party to a discovery request. Reducing the burden of discovery may enhance the participation of ordinary citizens in the discovery process, since they often do not have the resources to engage in protracted litigation over discovery.

The second tier of discovery is provided by the hearing file in Subpart G, L and N proceedings, and the electronic docket and LSN in Subpart J. The hearing file consists of the application, correspondence between the applicant and NRC relevant to the application, and when available, any NRC environmental impact statement or assessment, and any NRC safety report related to the application/proposed action. *See* § 2.1203(b). The NRC staff has a continuing duty to keep the hearing file up to date. *See* § 2.1203(c). Thus, all parties in a Subpart G, L, or N proceeding need only periodically check the hearing file (which is required to be placed on the NRC Web site, and/or at the NRC's Public Document Room, *see* § 2.1203(a)(3)) in order to be informed of the status of the NRC staff's consideration of the application or proposed action. In a Subpart J proceeding, rather than using a hearing file, the Secretary of the Commission will maintain an electronic docket into

which an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area will be placed. In addition, the electronic docket will provide all official NRC records on the application, and all exhibits tendered during the hearing. In addition, prior to the filing of any application, potential parties, including the applicant and the NRC staff, must enter all pertinent documents into the LSN which will make such documents available to all potential parties. Thus, the hearing file, the electronic docket, and the LSN provide ready public access to all public documents (*i.e.*, those not otherwise required to be protected from public disclosure, see § 2.390) on the application or enforcement action which is the subject of the hearing.

A third tier of discovery is provided for proceedings governed by the hearing procedures in Subpart G, in which "traditional" discovery tools such as interrogatories, depositions, subpoenas and admissions may be used, as a supplement to the required mandatory disclosures. These discovery tools may be useful in gaining information necessary to adequately prepare for hearing, in seeking to gain specific information from eyewitnesses or persons who have direct knowledge about events or incidents directly bearing on motive or intent. In addition discovery against the NRC staff may be pursued in accordance with § 2.709 (formerly §§ 2.720 and 2.744).

The Commission believes that public access to NRC documents afforded by § 2.390, mandatory disclosure for parties other than the NRC staff, and maintenance of either a hearing file or an electronic docket, will be sufficient in most proceedings to provide a party with adequate information to prepare its position and presentations at hearing (whether in written or oral form), such that the discovery under Subpart G (*e.g.*, depositions, interrogatories, and subpoenas) is unnecessary. Subpart G discovery tools are analogues to discovery tools used for litigation in trial courts of general jurisdiction. These adjudications generally involve private parties where information is not publicly disclosed nor ordinarily available to all parties, and concern disputes over a broad range of subject matters. By contrast, the vast majority of NRC proceedings concern licensing applications or enforcement actions. All documentation between the NRC and the applicant/subject of the enforcement action with respect to the licensing application or enforcement action is public (unless protected from public disclosure, *see* § 2.390), and will be placed into the hearing file or electronic docket. In addition, as discussed later, the NRC staff often holds public meetings where an application is discussed. In these circumstances, there is little or no need for the broad range of additional discovery permitted under Subpart G. Accordingly, the Commission concludes that the public access to documents afforded by § 2.390, the mandatory disclosures required by § 2.336, and the requirements for the NRC staff to maintain either a hearing file under §§ 2.336(b) and 2.1203 or an electronic docket under § 2.1011 (and the requirement for all potential parties to participate in the LSN for any HLW repository proceeding), are sufficient discovery in most NRC adjudications.

Question 5: Witnesses, Cross-Examination, and Oral Statements by the Parties

The Commission sought public comment on the degree to which oral testimony and questioning of witnesses should be used in each of the proposed hearing tracks. With respect to cross-examination, the Commission requested public comment on: (1) The relative value and drawbacks of cross-examination; (2) whether the proposed approach that would limit cross-examination in favor of questioning by the presiding officer is appropriate; (3), whether the proposed revisions to Subpart L should include traditional cross-examination as a fundamental element of an oral hearing; and (4) assuming that cross-examination is retained for some subset of oral hearings, the appropriate criteria for identifying and distinguishing between proceedings or issues where cross-examination should be used, and those where cross-examination is not necessary.

Commenters responding to this question ranged from those who supported traditional cross-examination in all proceedings, to those who preferred questioning by the presiding officer. Of those commenters preferring cross-examination by the parties in all proceedings, one commenter noted that cross-examination has long been a hallmark of NRC proceedings and that it is crucially important to intervenors who lack the resources to submit their own expert testimony, but who have valid concerns about an applicant's case. Another commenter opposed the change in cross-examination practice without a compelling reason provided by the NRC to justify such a fundamental change. One commenter requested that all hearings be formal with the right to call witnesses for direct and cross-examination. Another commenter regarded cross-examination as most effective when it is "exploratory" or unplanned and thus, opposed its constraint in any way. Another commenter was concerned that a presiding officer and members of the Atomic Safety and Licensing Board Panel are normally not qualified as an expert to ask the necessary follow-up questions, and noted that any competent trial judge should be able to limit excessive cross-examination. Other commenters supported limiting cross-examination to issues and proceedings where it proves useful. One commenter argued that the Subpart L approach of questioning conducted by the presiding officer should be expanded into Subpart G proceedings, where possible. This commenter continued by arguing that the assertion of a need for cross-examination to get to the truth has been repudiated by legal scholars, and that limitations on cross-examination do not deprive any party of its right to a full or fair hearing. Another commenter asserted that, with the exception of hearings under Subpart G, the presumption should be that hearings would be conducted based upon written submittals unless specific criteria are met. This commenter asserted that in some circumstances, cross-examination can assist a presiding officer by requiring witnesses to answer questions which would otherwise not be asked. The commenter also suggested that cross-examination is particularly useful in cases where the credibility or motivations of a witness or his or her recollection of events is at issue, but that it has several drawbacks. Accordingly, the commenter suggested that cross-examination be reserved for those matters in which it is likely to add appreciable value. Another commenter stated that cross-examination should be reserved for genuine issues of pure fact, and that in other instances, the proper way to rebut an expert's testimony is by filing rebuttal expert testimony.

After considering the various arguments of the commenters, the Commission continues to believe that cross-examination conducted by the parties often is not the most effective means for ensuring that all relevant and material information with respect to a contested issue is efficiently developed for the record of the proceeding. The Commission's consideration of cross-examination in the hearing process begins with the observation that parties have no fundamental right to cross-

examination, even in the most formal hearing procedures provided in Subpart G. Curators of the Univ. of Mo., CLI–95–1, 41 NRC 71, 120 (1995). Under the APA, cross-examination is authorized only if necessary for a "full and true disclosure of the facts." 5 U.S.C. 556(d). Since neither due process principles nor the APA require cross-examination, the Commission's determination whether to permit cross-examination turns on whether cross-examination is necessary to elucidate relevant and material factual evidence, or whether the hearing process affords other mechanisms of assuring that the decisionmaker is privy to such evidence in a manner that conserves the decisionmaker's and the parties' time and resources. While cross-examination can be an effective mechanism for ensuring a complete and accurate hearing record, especially in circumstances involving disputes over the occurrence of an activity or the credibility of a material witness, it does not appear to be either necessary or useful in circumstances where, for example, the dispute falls on the interpretation of or inferences arising from otherwise undisputed facts. In such cases, questioning of witnesses by the presiding officer, after consideration of questions for witnesses propounded by the parties, has the potential to be the better approach for assuring the expeditious, controlled and deliberate development of an adequate record for decision. The presiding officer is ultimately responsible for the preparation of an initial decision on the contention/contested matter; it would follow that the presiding officer is best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer's (future) decision. If there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize cross-examination by the parties.

Furthermore, upon further consideration and assessment of the limited comments on the matter, the Commission believes that the complexity and number of issues in nuclear power plant licensing proceedings may not, per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters. Rather, it is the nature of the disputed matters themselves that most directly and significantly bears on whether the techniques of formal hearings such as cross-examination are appropriate. Accordingly, the Commission has decided to modify the proposed rule by providing for the use of Subpart G procedures (including formal discovery procedures and cross-examination at hearing) in nuclear power plant licensing only where the presiding officer by order finds that the resolution of particular contentions necessitates resolution of material issues of fact which are best determined through the use of the procedures in Subpart G. As discussed earlier, these are issues relating to the occurrence of a past event material to the issue in controversy, where the credibility of an eyewitness (not an expert witness without first-hand knowledge) may reasonably be expected to be at issue, as well as issues of motive or intent of the party or eyewitness. In these circumstances, formal trial-like procedures, with formal discovery before the hearing and cross-examination at the hearing, are useful and should result in development of an adequate record for decision on these particular types of issues. The Commission continues to believe that in proceedings using more informal hearing procedures, the presiding officer should have sole authority and responsibility to conduct the examination of witnesses, after considering suggested questions for witnesses posed by the parties. However, the presiding officer has the authority to allow cross-examination in informal proceedings upon request of a party, if the presiding officer determines that cross-examination is necessary to ensure the development of an adequate record for decision. *See, e.g.*, § 2.1204(b) (Subpart L); § 2.1322(d) (Subpart M); § 2.1402(c) (Subpart N). While the Commission acknowledges that this approach places greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record, the Commission concludes this approach will result in the fair but expeditious development of an adequate record for a final decision. In sum, the Commission expects that in hearings under Subpart L, M, and N procedures, the presiding officer will conduct the examination of witnesses, and that the presiding officer will permit cross-examination only in the rare circumstance where the presiding officer finds in the course of the hearing that his or her questioning of witnesses will not produce an adequate record for decision, and that cross-examination by the parties is the only reasonable action to ensure the development of an adequate record.

The Commission requested public comment regarding whether parties should be permitted to make oral statements of position (possibly under time limits), if the Commission decided not to afford the right of cross-examination in certain circumstances (as was proposed for Subparts L and N). The Commission received no comments specifically addressing this question, and no change to the proposed rule was made in this regard.

Question 6: Time Limitations

In the proposed rule, the Commission noted that although the existing part 2 and the proposals that follow set time limits for filings, petitions, responses, and the like,[10] there are no firm time schedules or limitations established within which major aspects of the hearing process (*e.g.*, discovery, issuance of an initial decision) must be completed. The Commission requested comment on whether firm schedules or milestones should be established in the NRC's Rules of Practice in part 2.

Several commenters supported the principle that the Commission set strong and effective schedule mileposts in the rules to ensure appropriate case management. One commenter stated that the rules (including Subparts G, L and N) should specify clear and appropriate schedules similar to existing Subpart M. The commenter continued by noting that, although the proposed rule contains some potentially effective tools to encourage Licensing Boards and presiding officers to conduct efficient and effective hearings, more is needed, and supported imposition of specific schedular milestones in all hearing tracks governing the time limits for each stage of the proceedings, similar to the milestones in Subpart N, §§ 2.1404–2.1407. Another commenter stated that the schedule should provide sufficient time for parties to prepare for and participate in the proceeding, but contended that limits should be set to prevent proceedings from becoming unduly delayed and unpredictable in duration. Another commenter suggested that the final rule should include firm hearing schedules and should provide that the Commission be notified by the presiding officer within five days if any of the milestones are missed. Another comment argued that departures from schedules should not be permitted except upon an affirmative showing that

[10] It should be noted that the proposed revisions to 10 CFR part 2 generally did not contain special extended deadlines for NRC staff responses to petitions, motions and pleadings. The elimination of the allowance of extra time for NRC staff responses is part of the Commission's effort to increase the efficiency of NRC adjudications.

specific criteria for departure from the schedule or order have been met. But at least one commenter expressed firm opposition to milestones or schedules stating that making schedules mandatory would lead to an inflexible regime which violates the APA's mandate and would further delay the time it would take for the Commission to become involved.

The Commission does not believe that a rule of general applicability such as part 2 should establish mandatory and inflexible schedules for the conduct of proceedings. The potential wide variation in the number of parties and participants (interested State, local government body, and affected, Federally-recognized Indian Tribes), number of contentions, complexity of contentions, and other case-specific circumstances and considerations may make it difficult to establish a generic schedule or set of milestones. Moreover, the Commission believes that strong case management and control by the ASLBP and its presiding officers—using the tools and reflecting the policies in the Commission's Policy Statement on the Conduct of Adjudicatory Proceedings and in the rules of practice—and the Commission's ongoing oversight of presiding officers and Licensing Boards are the key to the efficient and effective conduct of hearings. Accordingly, the final rule does not contain any generally-applicable hearing schedule or set of milestones for the conduct of proceedings. The rule does, however, require the presiding officer to establish a schedule for the proceeding, to manage the case against that schedule, and to notify the Commission when it appears that there will be slippage in the overall schedule of sixty (60) days or more. *See* §§ 2.332 and 2.334. The Commission will continue to exercise its oversight of proceedings and may revisit this issue in the future if circumstances warrant. In particular, the Commission will consider whether general sets of milestones for the principal adjudicatory tracks can be developed and added to the rules as an appendix or provided as guidance by other means.

Question 7: Request for Hearing and Contentions

The Commission requested public comment on the appropriate time frame for filing petitions/requests for hearing and contentions, *i.e.*, the simultaneous filing of requests/petitions, and contentions (specific comments on the appropriateness of forty-five (45) days, versus a different time period, are addressed below in II.A.2.(f) under "Timing of Requests for Hearing/Petitions to Intervene"). Several commenters supported the consolidation of petitions to intervene/requests for hearing with proposed contentions. One comment noted that this change should improve the efficiency of proceedings, and eliminate ambiguities currently surrounding the timing of submission of contentions. Most citizen group commenters, however, opposed consolidated filing, arguing that the time provided for intervenors to file their request/petition—which must demonstrate standing—and contentions is unreasonably short and unduly burdens potential requestors/intervenors. One of these commenters proposed using a process whereby a request for hearing/petition to intervene is filed, standing is resolved, and thereafter contentions are due.

The Commission has retained the consolidated filing of requests for hearing/petitions to intervene and contentions in the final rule. The Commission's experience in the area of license transfers under Subpart M shows that simultaneous filing of requests/petitions and contentions is not unreasonable and generally does not impose an undue burden on potential requestors/intervenors. Moreover, unlike Subpart M, which provides for twenty (20) days to submit requests/petitions and contentions, as discussed below with respect to Section § 2.309 the Commission has considered concerns over the adequacy of the 45-day period and has decided to provide sixty (60) days for submission of requests/petitions and proposed contentions. The Commission also notes that many significant licensing actions involve pre-application meetings, which afford the public advance notice of impending applications and an early opportunity to gain information on the substance of the planned application. For these reasons, the Commission concludes that a consolidated period for filing both requests/petitions to intervene and contentions is a reasonable regulatory approach.

Question 8: Alternative Dispute Resolution

The Commission requested comments on whether the Commission's rules should require parties to engage in alternative dispute resolution (ADR). All commenters responding to this question supported the availability and use of ADR in a wide variety of cases. Another comment supported the use of ADR if all parties agreed to its use. However, no commenter supported the mandatory use of ADR.

The Commission agrees with the commenters that in the absence of a statutory requirement for the use of ADR in NRC adjudications, it is not appropriate to mandate the use of ADR. The final rule's provisions addressing ADR provide an opportunity for parties to use ADR, but do not mandate it. Apart from this rulemaking, the Commission is currently undertaking an evaluation of the use of ADR in NRC enforcement proceedings (66 FR 64890; Dec. 14, 2001). This assessment may lead to further changes in 10 CFR part 2 with respect to ADR in enforcement proceedings.

(c) Introductory provisions.

The Commission is amending § 2.4 to add a new definition of "presiding officer," to make clear that when a provision in part 2 refers to a presiding officer, it may mean the Commission, a single administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or other designee, who has the authority to preside in a part 2 proceeding as determined under the provisions of part 2.

(d) Subpart A.

The Commission is amending § 2.100 to correct a typographic error ("a license, versus "alicense"). Section 2.101 is amended to provide correct references to Subpart C and to conform paragraph (g)(2) to current Federal Register formatting requirements. In response to a comment, the Commission is modifying § 2.101(a)(3)(ii) and (b) to require that the applicant's notification of the availability of an application and/or environmental report should be accompanied by, *inter alia*, the email address, if one is available, of the designated applicant representative. Section 2.102 is also amended to provide correct references to Subpart C. Section 2.103 is amended to make clear that these regulatory procedures for granting and denying a license also apply to facility licenses; currently the rule does not refer to facility licenses although there is no reason why the regulatory procedures outlined should not also apply to such licenses. In addition, §§ 2.103, 2.104, 2.105 and 2.106 are amended to add a reference to part 63 (66 FR 55732; Nov. 2, 2001), and to use consistent terminology. In response to a comment, § 2.107 is corrected to provide that if an application is withdrawn before issuance of a notice of hearing, the Commission (rather than a presiding officer) dismisses the proceeding. Sections 2.108 and 2.110 are amended to provide correct references to Subpart C.

(e) Subpart B.

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Section 2.206—Requests for Action Under This Subpart

The Commission is modifying paragraph (c) of § 2.206 to transfer from former § 2.772(g) (proposed rule § 2.345(g)) the authority of the Secretary to extend the time for Commission review on its own motion of a Director's denial. Director's denials under § 2.206 are not governed by the adjudicatory processes in part 2 and therefore do not belong in Subpart C, which applies only to certain specified NRC adjudicatory proceedings.

(f) Subpart C.

Section 2.302—Several corrections and clarifying changes were made to § 2.302 to: Correct the address for personal and expedited delivery upon the Secretary, and to reorder the listing of addresses so that this section and § 2.305 are consistent with each other.

Section 2.304—Formal Requirements for Documents; Acceptance for Filing

In response to a comment, § 2.304(f) is revised to correct a typographic error in the proposed rule whereby the number of paper copies of an electronically-filed document to be submitted to the NRC was not specified. Section 2.304(f) now refers to "2 copies."

Section 2.305—Service of Papers, Methods, Proof

Section 2.305(e)(3) of the proposed rule provided that service by electronic mail would be complete upon receipt of electronic confirmation that one or more of the addressees for a party has successfully received the transmission. A commenter argued that paper copies of documents served electronically should be provided, in part because service of hard copies is necessary to ensure consistency with pagination for citation purposes. In addition, the commenter suggested that this section be revised to provide for service by mail or fax where an electronic transmission is undeliverable.

A change in this provision is warranted since not all e-mail systems provide confirmation of delivery to the sender. Furthermore, the Commission is considering a rulemaking addressing electronic filing, which would be a better forum for the Commission to consider issues of confirmation of electronic service. Finally, the Commission agrees that paper copies should be provided to facilitate uniform citation of documents which are served electronically. Accordingly, the final rule deletes the provision for completion of service of e-mail documents through electronic confirmation, and adds a new provision in paragraph (c) requiring that a document served by e-mail must also be served by one of the other means of service provided in § 2.305.

Several corrections and clarifying changes were made to § 2.305 to: (1) Add delivery by courier as equivalent to personal delivery, (2) consistently refer to "express" mail, (3) add references to "expedited delivery services" (*e.g.*, Federal Express and other private delivery services) and to make clear that such services are equivalent to express mail, (4) provide that the presiding officer may require service of pre-filed testimony and demonstrative evidence to be made by means other than first-class mail, (5) clarify the address for delivery of documents by courier and expedited delivery services to the Secretary of the Commission; and (6) correct the email address for service of documents by e-mail to be consistent with § 2.302.

In addition, to ensure that NRC staff is kept abreast of developments in a proceeding, so that it may properly fulfill its obligations to advise the presiding officer of its decision to act on an application (*see* §§ 2.1202(a), 2.1316(a) 2.1403(a)), and to determine whether it should participate as a party in those proceedings where the NRC staff may decide whether to participate (*see* §§ 2.1202(b), 2.1316(b), 2.1403(b)), the Commission is revising § 2.305 by adding a new paragraph (f). Section 2.305(f) requires: (1) All parties to serve the NRC staff with copies of all documents required to be served upon all parties and the Secretary, in instances where the NRC chooses not to participate as a party, and (2) the NRC staff to designate the person and address for service of such documents. The NRC staff's designation must be made when it informs the presiding officer of its determination not to participate as a party.

Section 2.306—Computation of Time

In response to a comment, the Commission is modifying § 2.306 to provide that when computing time allowed for a response, no time is added if a notice or paper is served in person or by courier. In addition, the rule was modified to clarify that the period of time allowed for response commences upon receipt of the document, and to refer to "after 5 PM" instead of "not received * * * before 5 PM." Other clarifying and conforming changes were made to: (1) Consistently refer to "first class mail," (2) make clear that expedited delivery services are equivalent to express mail for purposes of determining the time for responses, and (3) make clear that delivery in person or by courier is equivalent to electronic transmission for purposes of determining the time for responses.

Section 2.309—Hearing Requests/ Petitions To Intervene; Standing; Contentions Timing of Requests for Hearings/Petitions To Intervene

Section 2.309(b) of the proposed rule contained different requirements for the timely filing of requests for hearings/ petitions, depending on whether notice of the proceedings and opportunity for hearing are published in the Federal Register. Where Federal Register notice is required, the proposed rule provided that the period for filing requests/ petitions would be the latest of the time specified in the notice, the time specified in § 2.102(d)(3), or if the notice does not specify a time, forty-five (45) days from the date of publication. Where Federal Register notice is not required by statute or regulation, the proposed rule provided that a notice of agency action (for which an opportunity to request a hearing may be required) published on the NRC Web site would initiate a forty-five (45) day period in which timely requests for hearing must be filed. The Commission requested public comment on this proposal, asking commenters to identify whether there are other notification methods that the NRC could use to provide timely notice of licensing actions which are not required to be noticed in the Federal Register.

A commenter supported publication of actions on the NRC Web site where notice in the Federal Register is not required, noting that the website is broadly and easily accessible to the public. On the other hand, another commenter asserted that the NRC should continue and expand its practice of publishing notices in the Federal Register, explaining that while it supports publishing notice on the NRC Web site, it is not as reliable as publication in the Federal Register, which is legally deemed to be adequate notice.

The Commission believes that it should expand its practice of noticing on the NRC Web site some of those actions which do not require publication of notice in the Federal Register. The NRC Web site already makes available a broad range of information, including notices of availability of NRC reports, and notices of availability of NRC safety evaluations. The Commission has recently approved NRC staff proposals to enhance the NRC's Public Meeting Web site. *See* SECY–01–0137, Enhancing Public Participation in NRC Meetings (July 25, 2001) (ADAMS Accession No.

ML012070084). Internet access is becoming increasingly available to the general public. According to the National Telecommunications and Information Administration, in 2001 over 50 percent of U.S. households have Internet access, with 43 percent of the households having access at home. National Telecommunications and Information Administration, U.S. Department of Commerce, A Nation Online: How Americans are Expanding Their Use of the Internet (Feb. 2002).[11] Persons who do not have Internet access at home can, in many cases, obtain Internet access through local public libraries (the Federal Communications Commission's Universal Service Fund System provides funding for public libraries to provide free Internet access, *see* 47 CFR 54.503). The Commission believes that, as a practical matter, publication of notice by means of the NRC Web site provides at least as much access to the notice for the public as publication in the Federal Register. However, notice on the NRC Web site costs substantially less than publication in the Federal Register and can sometimes be done without the few days delay inherent in sending notices for publication in the Federal Register. Where Federal Register notice is not required by statute or regulation, any notice of agency action (for which an opportunity to request a hearing may be required) published on the NRC Web site initiates the period in which timely requests for hearing must be filed.

On the other hand, while the Commission agrees with the comment that the NRC's Web site is broadly and easily accessible to the public, the Commission nonetheless acknowledges that publication of notices in the Federal Register are, by law, deemed to be constructive notice to the public. Furthermore, the Commission recognizes that under the AEA, some notices of NRC regulatory actions are required to be published in the Federal Register, and for such regulatory actions a Web site notice cannot replace (although they can supplement) a Federal Register notice. However, in situations where notice is not required by law to be published in the Federal Register, the cost of Federal Register publication does not appear to be justified where a more cost-effective, timely and broadly-accessible alternative, viz., publication on the NRC Web site, is available. Accordingly, as will be discussed later, the Commission will direct the NRC staff to enhance and expand its efforts to provide public notice in some cases through publication on the NRC Web site where Federal Register notice is not required.

The Commission also requested comments on three alternative approaches for the timing of filing requests for hearing/petitions to intervene, and proposed contentions: (1) Proposed contentions to be filed as part of the initial request for hearing/petition to intervene forty-five (45) days from the date of publication (either in the Federal Register or on the NRC Web site) of the notice of opportunity to request a hearing (embodied in proposed § 2.309); (2) retention of the current NRC practice, viz., filing of requests for hearing within thirty (30) days of notice, and filing of contentions sometime later, or (3) a longer time, *e.g.*, seventy-five (75) days from notice of opportunity for hearing, to file a request for hearing/petition to intervene and proposed contentions.

In general, citizen group commenters opposed the proposed rule, focusing on the limited time available to file requests/petitions that address standing, while simultaneously developing contentions and their supporting bases, as required by § 2.309(f) (see comments to Commission Question 7 above). One citizen group commenter noted that the Commission previously had considered requiring simultaneous filing of requests and contentions in Subpart G, and abandoned it as unworkable. By contrast, nuclear industry commenters supported the proposed rule requirement that requests/petitions and contentions be filed no later than forty-five (45) days after NRC notice of the proposed action, with the Commission having the discretion of extending the time upon showing of good cause. One commenter stated that an expansion of time for filing is warranted only in situations where the times allowed by the rule are unworkable. One nuclear industry commenter opposed providing seventy-five (75) days for submission of contentions.

To address the comments that a forty-five (45) day period for filing requests for hearing/petitions to intervene and contentions is insufficient, as well as to ensure timely public notification of impending NRC staff actions, the Commission has decided to provide a sixty (60) day period for filing requests for hearing/petitions to intervene and proposed contentions. The limited exceptions involve facility license transfer proceedings, where the Commission is retaining the current twenty (20) day period for filing requests for hearing/petitions to intervene and contentions, and the proceeding on a HLW geologic repository where the Commission will retain the thirty (30) day period for filing requests for hearing/petitions to intervene and contentions (in view of the ample pre-application document disclosures provided by the LSN).

In addition, the Commission will direct the NRC staff to: (1) Establish a single area on the NRC Web site for publishing: (a) Notices of receipt of major applications or pre-application notifications of intent to file an application; (b) notices of docketing of major applications; and (c) notices of opportunity to request a hearing/petition to intervene for major applications and regulatory actions; and (2) develop guidelines, criteria and procedures for timely determining the types of major applications, licensing and regulatory actions for which Web site notice is appropriate. The Commission's intention is that the most important applications, licensing and regulatory actions, *e.g.*, initial nuclear power plant and fuel facility construction permits, facility license renewals, design certifications under part 52, be noticed on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*. This Webpage will include either a link for download of the document, a link to a webpage with the document text, or an ADAMS accession number and a link to the NRC's Public Electronic Reading Room (PERR).

The Commission believes that these notice provisions, in conjunction with an expanded period of sixty (60) days in which to file a request for hearing/petition to intervene and contentions, will provide more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions. Most major licensing actions for nuclear facilities (where the scope of the application is most likely to require significant review time in order to prepare a request for hearing/petition to intervene) entail pre-application filings which are docketed and are available to the public, and pre-application meetings between the applicant and the NRC staff which are open for observation to the public. As discussed earlier, the NRC staff, with Commission direction, is undertaking actions to provide more consistency in the conduct of public meetings, and the opportunities for the public to ask questions of the NRC staff at such meetings. For major licensing actions for nuclear facilities, the Web notice of pre-application meetings which the public may observe and have

[11] This report is available for download at the National Telecommunications and Information Administration Web site, at *http://www.ntia.doc.gov*.

a limited opportunity to ask questions, the availability of application-related documents for reading on the NRC Web site and/or download, and Federal Register and/or Web notice of the filing of an application and acceptance of the application for docketing, effectively provides the public with more than sixty (60) days to become familiar with an application and prepare an adequate request for hearing/petition for intervention and contentions. License amendments and similar regulatory approvals for nuclear facilities, by contrast, are for the most part narrow in scope in terms of regulatory permission sought, and do not involve extensive amounts of documentary material. For these actions, a period substantially less than sixty (60) days should be sufficient to become familiar with an application and prepare an adequate request for hearing/petition for intervention and contentions. Nonetheless, the Commission will set the period for filing requests for hearing/petitions to intervene and contentions at sixty (60) days for these actions too.

With respect to licensing actions for radioactive materials, most of these actions do not usually involve extensive amounts of documentary material to review, and there is no statutory requirement for publication of notice of materials licensing actions in the Federal Register. Thus, the sixty (60) day period provided by § 2.309(b) should be more than ample time to review the application for a radioactive materials license and prepare a request for hearing/petition to intervene and proposed contentions. For those radioactive materials licensing actions that are sufficiently complex or broad in scope, it is the Commission's intention that NRC Web site notices would be provided for pre-application meetings and notifications of intent to file an application, and notice of docketing of the application. These notices would ordinarily be published only on the NRC Web site inasmuch as there is no statutory requirement for publication in the Federal Register, although the Commission could, as a matter of discretion, decide to publish notices of opportunity for hearing in the Federal Register in individual cases if circumstances tend to indicate that such publication is desirable. The Commission believes that sixty (60) days is more than ample time to review the application for a complex and/or broad scope radioactive materials license and prepare a request for hearing/petition to intervene and contentions, in view of Web site notice of pre-application meetings, availability of application-related documents for reading on the NRC Web site and/or download, and Web site notice of the filing of an application and acceptance of the application for docketing.

If a potential requestor/petitioner believes that the period provided for filing a request for hearing/petition to intervene is insufficient, it may file an appropriate motion with the Commission to extend the deadline for submission of requests/petitions and contentions. Although the Commission expects to exercise its discretion to extend such deadlines sparingly, the availability of such relief provides additional reason to set a sixty (60) day period for filing a request for hearing/petition to intervene for the usual cases. Therefore, the final rule provides for a sixty (60) day period from notice in the Federal Register (if no time is specified in the Federal Register notice) or on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html* for filing of requests for hearing/petitions to intervene, together with proposed contentions.

Section 2.309(b)(1) incorporates the existing twenty (20) day period for filing a request for hearing/petition to intervene and contentions on license transfers that was formerly contained in § 2.1306 (which is being removed in the final rule). Although the proposed rule indicated that § 2.1306 would be removed, a corresponding requirement for filing within twenty (20) days was not included in proposed Subpart C. Section 2.309(b)(1) of the final rule corrects this oversight. Similarly, Section 2.309(b)(2) incorporates the existing thirty (30) day period for filing a request for hearing/petition to intervene in connection with the licensing of a HLW geologic repository. Although the proposed rule indicated that § 2.1014 would be removed, a corresponding requirement for filing within thirty (30) days was not included in proposed Subpart C. Section 2.309(b)(2) corrects this oversight. To accomplish these changes, paragraphs (b)(1) and (b)(2) of proposed § 2.309 are renumbered as (b)(3) and (b)(4), and paragraph (b)(3) is modified to remove the phrase, "the latest of." Finally, § 2.309(b)(3)(iii) is modified to make clear that the sixty (60) day filing period applies where the Federal Register notice does not specify a time for filing requests/petitions.

Standing

A nuclear industry commenter indicated that § 2.309(d) should specify that a person must establish standing in order to participate in Commission proceedings. Two citizen group commenters stated that the NRC should not rely upon NRC case law for standing requirements, but should go to the broadest judicial standards.

The Commission does not believe that § 2.309 needs to specify that a showing of standing is the general rule for participation in NRC hearings, inasmuch as the basic structure of the rule requires a demonstration of standing in order to participate as a party (standing is presumed for a State, local government, and Federally-recognized Indian Tribe where a facility is located within its political boundaries). The only exception where intervention may be permitted, despite a lack of demonstration of standing, is discretionary intervention under § 2.309(e).

While Article III of the Constitution does not constrain the NRC hearing process, our hearings therefore, are not governed by judicially-created standing doctrine, see *Envirocare of Utah, Inc.* v. *NRC*, 194 F.3d 72 (D.C. Cir. 1999), the Commission nonetheless has generally looked to judicial concepts of standing where appropriate to determine those interests affected within the meaning of Section 189.a. of the AEA. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999), citing Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). The Commission contemplates no change in this practice. Accordingly, no change to the rule has been made in this regard.

A commenter, while supporting the proposed § 2.309(d) requirement that a single designated representative of an affected State, local governmental body and affected, Federally-recognized Indian Tribe (Indian Tribe) be granted party status, suggested that the designated representative must take a position on any contentions for which the affected State, local governmental body or Indian Tribe wishes to participate. The Commission believes that the language of the proposed § 2.309(d) may have led the commenter incorrectly to conclude that the Commission would permit an affected State, governmental body, or affected Indian Tribe admitted as a party under § 2.309 to "participate as a party without taking sides." On the contrary, the Commission intended to maintain the distinction between a State, local governmental body, or Indian Tribe participating as parties under § 2.309, versus their participation in a hearing as an "interested" State, local governmental body or Indian Tribe under § 2.315(c) (formerly § 2.715(c)). A

State, local governmental body or Indian Tribe admitted as a party is entitled to the rights and bears the responsibilities of a full party, including the ability to engage in discovery, initiate motions, and take positions on the merits. By contrast, an "interested" State, local governmental body or Indian Tribe may participate in a hearing by filing testimony, briefs, and interrogating witnesses if parties are permitted by the rules to cross-examine witnesses, as provided in § 2.315(c). However, such participation is dependent on the existence of a hearing independent of the interested State, local governmental body or Indian Tribe participation, and such participation ends when the hearing is terminated. The Commission believes that the first sentence of proposed § 2.309(d)(2)(ii), which was intended to apply only to participation under § 2.315(c) as an "interested" State, local government body or Indian Tribe, may have led to the confusion with respect to the participation of a State, local governmental body or Indian Tribe as a party. Accordingly, this sentence is removed from § 2.309(d)(ii) and has been incorporated into § 2.315(c). Other minor conforming changes were made to §§ 2.309(d) and 2.315(c), to uniformly refer to "local governmental body," and "affected Federally-recognized Indian Tribe."

Discretionary Intervention

The Commission requested public comment on whether the standard for discretionary intervention should be extended by providing an additional alternative for discretionary intervention in situations when another party has already established standing and the discretionary intervenor may "reasonably be expected to assist in developing a sound record." The Commission also requested public comments on whether, as an alternative to codification of the six-part Pebble Springs standard for discretionary intervention,[12] the Commission should adopt a simpler test for permitting discretionary intervention and the nature of such a standard.

Many commenters opposed codification of the discretionary intervention standard in proposed § 2.309(e), arguing, *inter alia* that: (1) The subjectivity of the standards will likely delay presiding officers in making determinations, (2) meaningful public participation will not be hampered by continuing to apply the Pebble Springs factors without codification, and (3) discretionary intervention is not consistent with the purpose of adjudicatory proceedings and would permit parties who cannot demonstrate a direct interest in the outcome of the proceeding to extend and broaden the scope of the proceeding. Two commenters argued that there should be a presumption against discretionary intervention such that it should be allowed only in extraordinary circumstances. On the other hand, a citizen group commenter indicated that the NRC should adopt a simpler test for permitting discretionary intervention: one standard should be if a petitioner lives within a community near a licensed facility or is affected by a licensed facility; another should be the ability to raise important health, safety, environmental, and legal issues that have previously not been considered or adjudicated by the NRC.

The Commission has decided to incorporate the Pebble Springs standard for discretionary intervention into the final rule to allow consideration of discretionary intervention when at least one other requestor/petitioner has established standing and at least one admissible contention so that a hearing will be held. Those criteria presume that discretionary intervention is an extraordinary procedure, and will not be allowed unless there are compelling factors in favor of such intervention. The Commission disagrees with the claim that the subjectivity of the standards will result in delays; in the past, the Pebble Springs standards have been applied by presiding officers and Licensing Boards without apparent delay. With respect to the claim that the lack of codification will not prevent meaningful public participation, the Commission notes that codification directly into the Commission's procedures for the conduct of adjudicatory proceedings provides clear notice to the public regarding the criteria that the Commission or presiding officer will apply in evaluating requests for discretionary intervention; members of the public who are unaware of the Pebble Springs decision would not be aware of the criteria that the Commission would apply in assessing a petition for discretionary intervention. The Commission disagrees with the assertion that discretionary intervention is inconsistent with the purposes of adjudicatory proceedings. The ultimate purpose of an adjudicatory proceeding is to resolve material issues with respect to an NRC regulatory action. The discretionary intervention standards, properly applied, should ensure that only persons and entities who can meaningfully contribute to the development of a sound record on contested matters will be admitted as parties. With respect to the citizen group commenters' suggestion that discretionary intervention should be permitted for any petitioner living within a community near a licensed facility, the Commission believes that such a criterion, if adopted, would most likely be met in every circumstance and would not account for the consideration of other relevant factors. With respect to the second criterion, the Commission agrees with the citizen group commenter that one factor (indeed, the most important factor, *see* Pebble Springs, 4 NRC at 617) to be considered in assessing requests/petitions for discretionary intervention is the capability of the requestor seeking discretionary intervention to contribute to the development of a sound record on important health, safety, environmental or legal issues. However, the Commission must also be mindful that there are other factors that must be considered, *e.g.*, whether other parties already admitted in the hearing possess the same capability to represent that requestor's interest. In the Commission's view, the Pebble Springs criteria for assessing petitions for discretionary intervention provide for an appropriate balancing of the relevant competing factors. Therefore, the Commission declines to adopt the suggestion that discretionary intervention be based solely on consideration of the requestor's capability to contribute to the hearing.

Nonetheless, the Commission must emphasize that past case law and Commission policy make it clear that foremost among the factors in favor of granting discretionary intervention is whether the petitioner will assist in developing a sound record. See Pebble Springs, 4 NRC at 617 (1976). The most important factor weighing against intervention is the potential to inappropriately broaden or delay the proceeding. *Id.* The Commission fully expects that this case law and Commission policy will be followed in applying the codified discretionary intervention criteria.

Contentions

In a significant change from the existing regulations, the requirement to proffer specific, adequately-supported contentions in order to be admitted as a party is extended to informal proceedings under Subpart L. Under the existing Subpart L, petitioners need only describe "areas of concern about the licensing activity that is the subject

[12] Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976).

matter of the proceeding" (10 CFR 2.1205(e)(3)). This sometimes leads to protracted "paper" litigation over ill-defined issues and the resulting development of an unnecessarily large, unfocused evidentiary record. The presiding officer is then burdened with the need to sift through the record to identify the basic issues and pertinent evidence necessary for a decision. The requirement to have specific contentions with a supporting statement of the facts alleged or expert opinion that provides the bases for them in all hearings should focus litigation on concrete issues and result in a clearer and more focused record for decision.

Several commenters supported the Commission's proposal to extend to Subpart L proceedings the requirement to proffer specific, adequately supported contentions rather than simply state issues. One commenter argued that the formulation of contentions is necessary to efficiently develop an accurate record in an informal hearing. The commenter also suggested that the Commission require that a contention show that the petitioner is entitled to relief. Other commenters opposed requiring contentions in informal proceedings, with one commenter asserting that the Commission could accomplish its goal by clarifying the "areas of concern" procedure, rather than forcing the public to bear the increased cost of formulating admissible contentions. Citizen group commenters also urged that the Commission adopt provisions permitting requestors/petitioners/parties to be able to freely amend or add new contentions based upon new information and documents such as the filing of the NRC staff's SER and EIS. Nuclear industry commenters, by contrast, argued that the Commission should instead take one or more actions to make clear that SERs and EISs are not necessary to resolution of contentions, and that the Commission take appropriate actions to ensure that the NRC staff is able to provide its safety position on any contention in a timely manner in a proceeding.

The Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation. The Commission continues to believe that a request for hearing/petition to intervene should include proposed contentions. The Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing. This principle applies regardless of whether a hearing is to be conducted under informal or formal procedures. The § 2.309(f) contention requirement is intended to support an early NRC determination whether there are issues that are appropriate for and susceptible to NRC resolution with respect to an NRC regulatory/licensing action. The suggestion for clarifying the "areas of concern" approach would not accomplish that goal, inasmuch as requestors/petitioners would not have to show at the outset whether there is a real, cognizable dispute amenable to resolution by the NRC. Nonetheless, the Commission does not agree with the commenter's suggestion that still another requirement—that a contention show that the petitioner is entitled to relief, should be added to the petitioner's contention pleading burden. Such a criterion overlaps the requirement in § 2.309(d)(1)(iv) with respect to standing, requiring the request/petition to address "the possible effect of any decision or order that may be issued in the proceedings on the requestor's/petitioner's interest." Because a new criterion in § 2.309(f) on this matter would place an unneeded additional requirement on the contention pleading provisions, the Commission declines to adopt the commenter's suggestion.

The Commission also declines to adopt the thrust of the suggestions to allow free amendment and addition of contentions based upon new information such as the SER. The NRC staff has the independent authority, indeed the responsibility, to review all safety matters. *See, e.g.*, S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB–680, 16 NRC 127, 143 (1982); Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB–678, 15 NRC 1400, 1420, n.36 (1982); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), ALAB–778, 20 NRC 42, 48 (1984). The adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding. Curators of the Univ. of Mo., CLI–95–1, 41 NRC 71, 121–22 (1995), affirmed on motion for consideration, CLI–95–8, 41 NRC 386, 396 (1995), La. Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB–812, 22 NRC 5, 55–56 (1985); Pac. Gas Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB–728, 17 NRC 777, 807 (1983), review denied, CLI–83–32, 18 NRC 1309 (1983). If information in the SER bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding. The commenters' proposal appears to be based upon the misapprehension that, absent consideration in a hearing, safety concerns will not be addressed by the NRC. On the contrary, the NRC may not issue a license until all appropriate safety findings have been made. *See, e.g.*, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB–678, 15 NRC 1400, 1420 n.36 (1982), citing S.C. Elec. & Gas Co. (Virgil C. Sumner Nuclear Station, Unit 1), ALAB–642, 13 NRC 881, 895–896 (1981). Furthermore, any member of the public who believes that he or she has significant safety information may, at any time, submit a request for NRC action under 10 CFR 2.206 to modify, suspend, or revoke a license, or for any other action (*e.g.*, refuse to issue a license) that may be appropriate. In sum, the hearing process is directed at resolving issues identified and conceptualized by an interested member of the public, not at supervising the NRC staff's independent safety review.

With respect to the EIS, the current regulations in 10 CFR Part 51 provide for hearing consideration of environmental matters. *See* 10 CFR 51.94. Accordingly, § 2.309(f)(2) will control the admission of amended and new contentions based upon issuance of the NRC staff's EIS, and § 2.337(g) will govern the introduction of the EIS or EA into evidence in a proceeding.

One commenter suggested that the Commission adopt a new § 2.309(f)(3) to specify, where a petitioner adopts an admitted contention of another party, that the presiding officer or Licensing Board must require one of the petitioners to act as lead. The Commission agrees that a new § 2.309(f)(3) should be adopted to include such a requirement, and concludes that the paragraph should also include an analogous requirement for a lead representative where two or more requestors/petitioners co-sponsor a contention.

Timing of Identification of Appropriate Hearing Procedures

In the proposed rule, § 2.309(g) would require that the request for hearing/petition to intervene address the question of the type of hearing procedures (*e.g.*, formal hearings under Subpart G, informal hearings under Subpart L, or "fast track" informal procedures under Subpart N) to be used for the proceeding. The Commission

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indicated that this would not be a requirement for admission as a party to the proceeding, but a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling. The Commission requested public comment on whether, if the Commission adopts the alternative proposal that requests for hearing be filed within thirty (30) days of appropriate notice, but that contentions be filed later (*e.g.*, within seventy-five (75) days of such notice), the Commission should require the petitioner to set forth its views on appropriate hearing procedures at the deadline for filing contentions, rather than in the petition/request for hearing. Commenters did not specifically address the Commission's question, and no changes were made in the final rule with respect to this matter.

Answers and Replies

In the proposed rule, § 2.309(h) would allow the applicant or licensee and the NRC staff twenty-five (25) days to file written answers to requests for hearing/petitions to intervene, and would permit the petitioner to file a written reply to the applicant/licensee and NRC staff answers within 5 days after service of any answer. No other written answers or replies would be entertained. The Commission sought public comment on whether the proposed time limits for replies and answers should be expanded.

A commenter representing a number of organizations indicated that the five (5) days allotted in § 2.309(h)(2) is too short a time to respond to NRC, applicant or licensee answers. Instead, the rule should provide for at least ten (10) days to respond. By contrast, NEI argued that the periods allowed in the proposed rule for answering requests for hearing/petitions to intervene and replies should be expanded only in situations where time limits are "unworkable."

The Commission has decided to provide seven (7) days for a requestor/petitioner to respond to an applicant/licensee and NRC staff answer on a request for hearing/petition to intervene. Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer; a seven-day period to prepare such a focused reply is not unreasonable. If there are special circumstances, the requestor/petitioner may request a short extension from the presiding officer.

A commenter suggested that Subpart C should provide that the presiding officer issue a decision on standing and admissibility of contentions within 45 days of the completion of the parties' filings on those issues. The Commission agrees with this suggestion, and a new paragraph (i) has been added to § 2.309 requiring the presiding officer to issue a decision on standing and admissibility of contentions within forty-five (45) days of the completion of the parties' filings. The Commission believes that this is an appropriate and reasonable time period for a presiding officer to issue a decision on standing and admissibility of contentions, considering the thoroughness of the petitions and responses. Additional time beyond the 45 days may be provided if circumstances warrant.

Section 2.310—Selection of Hearing Procedures

(1) Subpart G Hearing Procedures.

The Commission requested comment on the criteria for identification of cases where the use of Subpart G hearing procedures would be of benefit. Comments will be discussed under each criterion in the proposed rule.

Uranium Enrichment Facilities. The single exception to the Commission's broad authority to select hearing procedures involves proceedings on licensing the construction and operation of uranium enrichment facilities. Section 193 of the AEA requires that hearings on uranium enrichment facility construction and operation be "on-the-record," thus requiring formal trial-type hearing procedures to be used. Section 2.310(b) of the proposed rule reflected this requirement by specifying that a proceeding on licensing the construction and operation of a uranium enrichment facility must be conducted using the hearing procedures of Subpart G. No comments were received on this criterion and no change to the substance of the proposed rule was made in this regard. However, the Commission reorganized § 2.310 in the final rule. Accordingly, § 2.310(c) in the final rule specifies the use of Subpart G hearing procedures in proceedings on the licensing of the construction and operation of uranium enrichment facilities.

Enforcement Matters. In its July 22, 1999 Staff Requirements Memorandum on SECY–99–006, Reexamination of the NRC Hearing Process, the Commission noted that Subpart G hearing procedures would seem to be appropriate for hearings on enforcement actions. Several participants in the October 1999 hearing process workshop agreed, noting that Subpart G hearing procedures would give the entity subject to the proposed enforcement action the opportunity to fully confront the proponent of the proposed enforcement action. The Commission requested comments on the proposal to require the application of Subpart G hearing procedures in hearings involving enforcement matters and views on whether and when to allow the use of less formal hearing procedures for these matters.

All commenters agreed that Subpart G hearing procedures should be available in enforcement cases, with one commenter noting that Subpart G should be available in enforcement actions against both individuals and licensees. However, one commenter asserted that enforcement matters should be the only proceedings where Subpart G procedures should be applied. Two commenters stated that individuals and licensees should be able to request use of informal procedures in enforcement cases. One of those commenters indicated that the NRC staff should not have "veto power" over a licensee's choice to use Subpart N in enforcement and civil penalty cases, while the other implicitly suggested that the NRC staff should not be able to choose to use more informal procedures.

The Commission continues to believe that Subpart G hearing procedures should be applied in enforcement actions against both individuals and licensees. The Commission does not agree with the suggestion that the subject of an enforcement action alone should be able to choose informal procedures. As one commenter pointed out, enforcement actions usually involve making determinations of intent and credibility, for which the use of Subpart G hearing procedures—in particular, cross-examination—are especially suited. On the other hand, if all parties agree to the use of one of the more informal hearing procedures in an enforcement proceeding (*e.g.*, Subpart L or Subpart N), there does not appear to be any significant public policy mitigating against such a choice by all parties. Therefore, the substance of the final rule remains unchanged from the proposed rule in providing that all parties must agree and jointly request an enforcement proceeding to be conducted under the procedures of Subpart L or Subpart N.

High Level Waste (HLW) Repository Licensing. Until the adoption of Subpart L in 1989 (54 FR 8276; Feb. 28, 1989), all proceedings conducted by the AEC and NRC were formal adjudicatory hearings. Consistent with that established practice, in 1978 the NRC declared that it would hold Subpart G hearings on an application to construct and operate a repository for HLW. In

final rules published in 1981, the Commission provided for a mandatory Subpart G hearing at the construction authorization stage and for an opportunity for a Subpart G hearing before issuing a license to receive and possess HLW at a geologic repository. Subsequently, Congress enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* That law does not include any specific hearing requirements. Instead, it seems to contemplate, in Section 114, that the NRC will apply existing laws applicable to the construction and operation of nuclear facilities. In sum, there is no statutory requirement for a formal, on-the-record hearing using Subpart G procedures on a HLW repository, but without a rule change, the NRC's regulations *would* require a Subpart G hearing.

Although the Commission generally seeks to use more informal procedures for its hearings, the proposed rule reflected the Commission's tentative conclusion that the hearing procedures of Subpart G should be used in proceedings for the initial authorization to construct a HLW repository, and proceedings for issuance of an initial license to receive and possess HLW at a HLW repository. The initial authorization of construction of a HLW repository and the initial issuance of a license to receive and possess HLW are likely to be highly contested. The President's recommendation to proceed with repository development at the Yucca Mountain site has been upheld by Congress. The adjudication is likely to involve multiple parties, including the State of Nevada, as well as possible participation by other States, local governmental bodies, and Federally recognized Indian Tribes. The issues to be adjudicated will undoubtedly involve a large number of disputes over material facts. Moreover, the Commission has long taken the position that for this unique, first-of-its-kind proceeding, it would provide an on-the-record hearing under Subpart G for repository licensing, thereby creating certain public expectations on the hearing procedures to be used for this particular proceeding. A change in Commission position now to permit the use of more informal procedures for authorizing construction of a HLW geologic repository and issuance of a license to receive and possess HLW at a geologic repository operations area would not advance public confidence in the Commission's repository licensing process. Based on these considerations, § 2.310(e) of the proposed rule provided that the initial application for authorization to construct a HLW repository, and initial issuance of a license to receive and possess HLW at a geologic repository operations area use the hearing procedures of Subpart G. Section 2.310(e) of the proposed rule provided that amendments to the construction authorization for the HLW repository, and amendments to the application and/or license to receive and possess HLW at a geologic repository operations area should be subject to the same criteria as other proceedings in determining what hearing procedures will be used. The Commission requested public comment on these proposals.

In general, industry commenters opposed the use of Subpart G procedures for initial authorization to construct a geologic repository and issuance of the initial license to receive and possess HLW at a geologic repository. One industry commenter stated that the nature and subject matter of the HLW proceedings are similar to those involving reactor licensees and there is no reason to apply different hearing procedures; accordingly, the commenter argued that HLW proceedings should be conducted under proposed Subparts L or N. Another commenter indicated that the Commission should not prejudge the nature of the issues that will be raised regarding the HLW repository and instead should maintain flexibility to decide, based on the nature of contentions at the time they are raised, what kind of hearing procedure will best serve the interests of the stakeholders. Two citizen group commenters, while not directly addressing the type of procedure to be used in HLW repository authorizations, argued that it is inconsistent for the Commission to provide formal hearings for HLW authorizations, while moving to "deformalize" nuclear power plant and materials licensing proceedings.

The Commission continues to believe that, while not required by statute, any hearings in connection with the initial authorization to construct a HLW geologic repository, and the initial license to receive and possess HLW at a geologic repository operations area should be held using Subpart G hearing procedures. None of the comments received on this subject raised any new arguments or considerations that were not already considered by the Commission in making its tentative determination for the proposed rule. Accordingly, the hearing procedure selection provision in § 2.310(f) specifies the use of Subparts G and J hearing procedures for the initial authorization to construct a high-level radioactive waste geologic repository, and initial issuance of a license to receive and possess high-level waste at a geologic repository operations area. In response to a commenter, the Commission removed a typographic error that resulted in a partial sentence in this paragraph of the proposed rule. The Commission also modified the language to clarify that Subpart G proceedings apply only to the initial authorization to construct and to initial issuance of the license to receive and possess HLW.

Complex Issues in Reactor Licensing. Section 2.310(c) of the proposed rule included a criterion that would call for the use of the hearing procedures of Subpart G in those reactor licensing proceedings that involve a large number of complex issues which the presiding officer determines can best be resolved through the application of formal hearing procedures. The Commission requested public comments on the appropriateness of this proposed "numerous/complex issues" criterion, and representative examples of the type of "complex issues" that would benefit from the use of Subpart G hearing procedures. The Commission also requested comment on whether this criterion should be modified to instead provide for Subpart G hearings in initial power reactor construction permit proceedings, initial operating license proceedings, combined license issuance proceedings under 10 CFR Part 52, Subpart C, and hearings associated with authorizations to operate under a combined license under 10 CFR 52.103.

The nuclear industry commenters on this matter uniformly opposed the proposed numerous/complex issues criterion. Several commenters indicated that the proposed standard is too subjective and would be difficult to interpret and apply, consequently leading to overuse of this criterion. Another commenter argued that the criterion undermines the advantages to be derived from less formal procedures and creates additional opportunities for argument and litigation over procedural matters. A third commenter suggested that it is not always true that "very complex cases" will benefit from formal hearings, pointing out that it is the nature of the issues to be decided that determines whether formal procedures are appropriate. No citizen group specifically addressed the "numerous/complex issues" criterion, although their general support for Subpart G procedures for all nuclear power plant licensing proceedings implies their opposition to this criterion.

Upon reconsideration, the Commission agrees that the proposed

"numerous/complex issues" criterion may not be well-suited for determining whether the procedures of Subpart G should be used in a given proceeding. Rather, the Commission agrees with the thrust of the commenters opposing this criterion that, inasmuch as neither the AEA[13] nor the APA require the use of the procedures provided in Subpart G, they should be utilized only where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters. In the Commission's view, the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination which challenges their recollection or perception of factual occurrences. This also appears to be the position of several citizen group commenters, judging by the reasons given for their opposition to greater use of Subpart L procedures. Hence, the Commission focused on criteria to identify those contested matters for which an oral hearing with right of cross-examination would appear to be necessary for a fair and expeditious resolution of the contested matters. Common sense, as well as case law, lead the Commission to conclude that oral hearings with right of cross-examination are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event." *See Union Pac. Fuels* v. *FERC*, 129 F.3d 157, 164 (DC Cir. 1997), *citing La. Ass'n of Indep. Producers & Royalty Owners* v. *FERC*, 958 F.2d 1101, 1113 (DC Cir.1992). In Union Pacific Fuels, the Court of Appeals for the DC Circuit concluded that a FERC rate determination based upon a determination of the relative importance of facilitating wellhead competition and preserving a party's risk allocation was a policy issue (as opposed to a factual and credibility issue) whose resolution would not be facilitated by a trial-type hearing. Id. Courts reached similar conclusions in a number of other cases. See, *e.g.*, *SBC Communications, Inc.* v. *FCC*, 56 F.3d 1484, 1496–97 (DC Cir. 1995) (disputed issues on legal and economic conclusions concerning market structure, competitive effect, and the public interest do not require oral evidentiary hearing), citing *United States* v. *FCC*, 652 F.2d 72, 89–90 (DC Cir. 1980) (*en banc*); *Penobscot Air Servs.*, Ltd. v. *FAA*, 164 F.3d 713, 722–725 (1st Cir. 1999) (due process does not require formal evidentiary hearing where historical facts are undisputed, and agency decision involved interpretation and application of statutes, regulations and policies); *Chemical Waste Mgmt., Inc.* v. *EPA*, 873 F. 2d 1477, 1183–1185 (DC Cir. 1989) (due process does not require formal evidentiary hearing where issues do not involve determinations of witness credibility but instead turn on technical data and policy judgements). In *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), the U.S. Supreme Court held that where the relevant statute requires an agency assessment of "fault" and a determination whether recoupment of erroneous payments from a social security beneficiary would be "against equity and good conscience," an opportunity for an oral hearing is required. The Supreme Court stated:

> "[F]ault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence * * * and physical and mental condition" as well as his good faith. 20 CFR § 404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like detrimental reliance, usually requires an assessment of the recipient's reliance, usually an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale. *See Goldberg* v. *Kelly*, 397 U.S., at 269.

Califano, 442 U.S. at 696–97.[14]

In sum, the Commission has concluded that the procedures in Subpart G should be utilized in any nuclear power plant licensing proceeding for the resolution of a contention involving: (1) Issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter. Section 2.310(d) specifies the use of Subpart G hearing procedures in these circumstances.

(2) Informal Hearing Procedures.

Expansion of Spent Fuel Storage Capacity. Subpart K contains "hybrid" hearing procedures for use in proceedings on the expansion of spent fuel storage capacity at civilian nuclear power reactors.

A commenter suggested that proposed § 2.310(d) should be amended to specifically state that Subpart L applies to licenses or amendments to expand spent fuel storage capacity unless a party requests the use of Subpart K, or if all parties agree to apply Subpart N. The Commission agrees with the commenter, inasmuch as § 2.1101 specifically states that the procedures of Subpart K are to be used "upon request of any party[.]" Accordingly, appropriate changes have been made to § 2.310(e), which now provides that proceedings for the expansion of spent fuel storage capacity at civilian nuclear power reactors will be governed by Subpart L, unless a party requests the use of Subpart K.

License Transfers. The Commission is retaining existing Subpart M, which contains informal hearing procedures for use in proceedings involving reactor or materials license transfers. Subpart M requires the use of its hearing procedures for all license transfer proceedings for which a hearing request has been granted unless the Commission directs otherwise. The hearing procedure selection provision in § 2.310(g) of the final rule (§ 2.310(f) in the proposed rule) specifies the use of Subpart M hearing procedures in license transfer proceedings. No significant comments were received on this proposal.

Other Proceedings. Section 2.310(a) (§ 2.310(g) of the proposed rule) applies the hearing procedures of the new Subpart L to all other proceedings not specifically named, *i.e.*, proceedings involving hearings on the grant, renewal, licensee-initiated amendment or termination of licenses and permits subject to 10 CFR parts 30, 32 through 35, 36 (the final rule adds part 36, which was erroneously omitted in the proposed rule), 39, 40, 50, 52, 54, 55, 61, 70 and 72. In addition, Subpart L procedures would be used in nuclear power plant licensing proceedings for the resolution of contentions which do

[13] A commenter suggested that Section 181 of the AEA requires that NRC hearings be "on-the-record," and therefore subject to the full panoply of procedures required by the APA for "on-the-record" adjudications. The Commission regards the commenter's analysis to be incorrect. By its terms, Section 181 merely states that the APA applies; nowhere does Section 181 explicitly state that adjudications required by the AEA are to be considered "on-the-record" adjudications for purposes of applying the APA. The APA itself does not specify what adjudications must be "on-the-record."

[14] The Supreme Court also held that the 5th Amendment's Due Process Clause does not require an oral hearing even where credibility is in dispute. *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979) ("[W]e do not think that the rare instance in which a credibility dispute is relevant to a section 204 (a) claim is sufficient to require the Secretary to * * * grant a hearing to the few [claims] that involve credibility."). The Commission also notes that, for the most part, constitutional Due Process considerations are not at issue with respect to an intervenor-party's right to cross-examination in NRC proceedings, inasmuch as governmental deprivation of life, liberty or property of the intervenor-party are not at issue in an NRC proceeding. On the other hand, in enforcement proceedings where a licensee or individual may be subject of an enforcement action depriving them of liberty or property, the Commission believes that it is appropriate to provide the licensee or individual an opportunity to request a Subpart G adjudicatory hearing with cross-examination.

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not meet the criteria set forth in section 2.310(d) for use of Subpart G hearing procedures. Under this provision, Subpart L procedures would be used, as a general matter, for hearings on power reactor construction permit and operating license applications under parts 50 and 52, power reactor license renewal applications under part 54, power reactor license amendments under part 50, reactor operator licensing under part 55, and nearly all materials and spent fuel licensing matters. This is a significant change from current hearing practice for reactor licensing matters. Under existing practice, proceedings on applications for reactor construction permits, operating licenses and operating license amendments have used the hearing procedures of Subpart G. Similarly, in the Statement of Considerations for the 1991 rule on reactor license renewal, the Commission stated that it would provide an "opportunity for a formal public hearing" on reactor license renewal applications (56 FR 64943, 64946; Dec. 13, 1991). The hearing procedures of Subpart L could also be applied in hearings involving enforcement matters if all parties agree.

As discussed earlier with respect to the Commission's proposed move away from use of Subpart G trial-type hearing procedures, significant comments were received that both supported and opposed this direction. The Commission has decided, also for the reasons discussed earlier, that greater use of more informal hearing procedures is desirable and has decided to adopt in large part the proposed rule's provisions expanding the use of Subpart L hearing procedures.

Subpart N—Fast Track Procedures. Proposed § 2.310(h) would apply the informal "fast track" hearing procedures of new Subpart N in any proceeding (other than those designated in § 2.310(a)–(g) as requiring other procedures) in which the hearing is estimated to take no more than 2 days to complete or where all parties agree to the use of the "fast track" hearing procedures. The Commission requested comments and suggestions on the appropriate criteria for the use of Subpart N.

A citizen group commenter asserted that the Commission should not adopt a "fast track" hearing procedure, arguing that to presuppose that safety issues can be handled in a fast track proceeding "invites disaster." The Commission continues to believe there is a need for an expedited hearing track to provide for the expeditious resolution of issues in cases where the contentions are few and not particularly complex and might be efficiently addressed in a short hearing using simple procedures and oral presentations. The Commission views the "fast track" procedures of Subpart N as particularly useful for some reactor operator licensing cases or for small materials licensees cases where the parties want to be heard on the issues in a simple, inexpensive, informal proceeding that can be conducted quickly before an independent decisionmaker. The commenter provided no basis for the assertion that proper application of fast-track procedures would result in erroneous resolution of public health and safety issues. Therefore, the Commission declines to adopt the commenter's suggestion. The hearing procedure selection provision in § 2.310(h) specifies the circumstances for which Subpart N hearing procedures may be used.

Reorganization of § 2.310

The Commission has reorganized and changed the ordering of paragraphs within § 2.310 from that in the proposed rule. Paragraph (a) (paragraph (g) in the proposed rule) states the general rule that, unless otherwise determined through the application of paragraphs (b) through (h), the listed proceedings are to be conducted under Subpart L. Paragraphs (b) through (h) identify the type of proceeding (*e.g.*, enforcement proceeding) and the subpart whose procedures are to be used. Paragraph (i) indicates that in design certification rulemaking where the Commission in its discretion decides to hold a hearing under § 52.51, the hearing is to be conducted under Subpart O (legislative hearing). Paragraph (j) provides that in proceedings where the Commission grants a petition certified to it under § 2.335(b) seeking permission to consider Commission rules and regulations in a hearing, the Commission may, in its discretion, conduct a "legislative" hearing under Subpart O.

Section 2.311—Interlocutory Review

A commenter suggested that § 2.311(d) be revised to clarify that the only permissible grounds for challenging an order selecting a hearing process is that the selection was "erroneous," and that a 10-day time limit should be placed on the ability to appeal the order selecting a hearing procedure. While the Commission agrees that § 2.311(d) should be clarified, the term, "erroneous," does not accurately describe the basis for an appeal of an order selecting hearing procedures. Therefore, the Commission has instead decided to modify § 2.311(d) to refer to hearing procedure selections that were "selected in clear contravention of the criteria set forth in § 2.310." The Commission also agrees that a 10-day limit should be adopted for filing of an appeal of an order selecting a hearing procedure, and § 2.311(d) has been appropriately modified in the final rule.

Section 2.313—Designation of Presiding Officer, Disqualification, Unavailability, and Substitution

As discussed earlier, the Commission decided to provide that hearings conducted under Subparts G, J, K, L and N should be presided over by either a single administrative law judge (rather than a single administrative judge) or an Atomic Safety and Licensing Board, but that hearings under Subparts M and O may be presided over by the Commission, a single administrative law judge, a single administrative judge, an Atomic Safety and Licensing Board, or other designated person. To accomplish this, paragraph (a) is modified to include appropriate references to an administrative law judge, and a sentence is added which states that only the Commission may designate the presiding officer in Subpart O legislative hearings. A related change to § 2.4 adding a definition of "presiding officer" is discussed earlier. The Commission is also deleting the provision in former § 2.1207(a) requiring the Chairman of the Atomic Safety and Licensing Board Panel (Chief Administrative Judge) to appoint a single member of the Atomic Safety and Licensing Board Panel as a presiding officer. As a result, the Commission is changing the discretion of the Chief Administrative Judge, and provides him or her with the discretion to choose either an Atomic Safety and Licensing Board, or an administrative law judge for a hearing conducted under Subparts G, J, K, L or N, and either an Atomic Safety and Licensing Board, an administrative law judge, or administrative judge for a hearing conducted under Subpart M.

The Commission is making other changes to simplify and clarify the rule. Paragraphs (b) and (c) of the proposed rule, both of which address disqualification, are combined into a single paragraph (b), and redesignated as subparagraphs (b)(1) and (b)(2). In redesignated paragraph (b), the phrase, "board member," is changed to "presiding officer or member of the Licensing Board," in order to clarify the criteria for withdrawal of a single presiding officer who is not a member of a Licensing Board. Finally, paragraph

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headings are added to each paragraph of § 2.313.

Section 2.314—Appearance and Practice Before the Commission in Adjudicatory Proceedings

A commenter proposed that § 2.314(b) be amended to also refer to the "entity" on whose behalf a representative appears. The Commission agrees, and has modified § 2.314(b) accordingly.

Section 2.315—Participation by a Person Not a Party

A commenter proposed that § 2.315(d) be clarified that a person who is not a party who wishes to file an amicus brief should file the motion seeking leave to file together with the amicus brief. The Commission agrees and paragraph (d) has been modified to make that clear.

The Commission has also modified Section 2.315(a) to make clear that a person, even if affiliated or represented by a party (*e.g.*, a member of an organization who is a party in a proceeding), may make a limited appearance statement.

Section 2.319—Power of Presiding Officer

A commenter proposed that § 2.319(d) provide the presiding officer with the power to strike written records and oral testimony for cumulative, irrelevant or unreliable material. The Commission agrees with the apparently-underlying view of the commenter that the presiding officer should have authority to limit and/or preclude, as applicable, testimony or evidence that is cumulative, irrelevant or unreliable. However, the Commission believes that § 2.319(e), which permits the presiding officer to "restrict irrelevant, duplicative, or repetitive evidence and/or arguments" largely provides such authority to the presiding officer. However, the Commission has added the word, "unreliable" to § 2.319(e). Furthermore, because the type of arguments, evidence, and information that may be limited or stricken by the presiding officer are the same in § 2.319(d) and (e), both paragraphs have been conformed to use the same terminology, *i.e.*, "irrelevant, immaterial, unreliable, duplicative or cumulative."

The final rule includes two additional provisions in § 2.319 which explicitly provide the presiding officer with authority to rule on motions (analogous to the provision in former § 2.730(e)), and authority to issue orders necessary to carry out its responsibilities and duties under this part.

Section 2.323—Motions

Proposed § 2.323 incorporated the provisions in § 2.730 in Subpart G on the general form, content, timing, and requirements for motions and responses to motions. The Commission requested public comment on whether § 2.323(a) should specify a time limit of ten (10) days for filing of motions, beginning from the action or circumstance that engenders the motion. One nuclear industry commenter indicated that § 2.323 should set time limits on the filing of motions, preferably requiring them to be filed no later than ten (10) days after the occurrence or circumstance from which the motion arises. However, another nuclear industry commenter opposed setting a time limit because of the "broad nature" of motions. The Commission has decided that expeditious management of a hearing requires that motions be filed reasonably promptly after the underlying circumstances occur which engender a motion. Accordingly, a ten (10) day limit for filing motions is included in the final version of § 2.323(a).

Proposed § 2.323(e) included a standard for evaluating motions for reconsideration, viz., compelling circumstances, such as the "existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid" (this standard is also reflected in proposed § 2.344(b)). The Commission requested public comment on whether this "compelling circumstances" standard in the proposed rule should be adopted or eliminated from the final rule. A commenter supported inclusion of a "compelling circumstance" standard for reconsideration embodied in proposed § 2.323(e). Another commenter instead argued that the current standard for motions for reconsideration, as defined by NRC case law, should be retained. The existing standard allows for motions requesting the presiding officer to reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter. The Commission has decided that the "compelling circumstances" standard should be utilized for motions for reconsideration. This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Finally, the proposed rule addressed the referral of rulings and certified questions by the presiding officer to the Commission. With regard to referrals, proposed § 2.323(f) would provide for referrals of decisions or rulings where the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. The proposed section also differs from the existing requirements by allowing any party to file with the presiding officer a petition for certification of issues for early Commission review and guidance. This is consistent with the Commission's direction in the 1998 Statement of Policy on Adjudicatory Proceedings stating that issues or rulings involving novel questions which would benefit from early Commission guidance should be certified to the Commission. No comments were received on this provision, and the Commission adopts § 2.323(f) without change.

Section 2.327—Official Recording; Transcript

In response to a commenter, in paragraph (c) the word, "therefore," is changed to "therefor."

Section 2.332—General Case Scheduling and Management

Section 2.332 of the proposed rule would have required a presiding officer to consult with the parties early in the proceeding in order to set schedules, establish deadlines for discovery and motions, where appropriate, and set the ground rules for the control and management of the proceeding. The proposed rule also addressed integration of the NRC staff's preparation of its safety and environmental review documents into the hearing process schedules. The Commission requested comment on the case management provisions proposed in this section and welcomed suggestions for additional case management techniques.

Commenters proposed a variety of requirements: That the presiding officer provide copies of scheduling orders and modifications to scheduling orders to the Commission; that the relative resources of the parties be considered under § 2.332(b); that the presiding officer hold scheduling hearings within thirty (30) days of the commencement of every hearing; and a process for appeal directly to the Commission if a petitioner believes that a presiding officer is grossly mismanaging a hearing.

In the Commission's view, these suggestions are either unnecessary, or would have the Commission become too

closely involved in the detailed management of individual hearings. For example, the Commission does not believe that it should be monitoring on a day-by-day basis the scheduling orders of the presiding officer; the Commission has already provided for time limits and suggested schedules, as applicable, in Part 2. Any party that is aggrieved by the scheduling determinations of a presiding officer or by the failure of a presiding officer to adhere to the general scheduling guidance of the Commission may always submit an appropriate motion to the Commission. Accordingly, the Commission declines to adopt these case management suggestions.

Section 2.332(a)(1) was corrected in the final rule to indicate that the presiding officer's scheduling order may also modify the times for disclosure under § 2.336.

Section 2.333—Authority of the Presiding Officer To Regulate Procedure in a Hearing

In response to a comment that the Commission's Policy Statement on the conduct of adjudications should be codified, the Commission has determined that a requirement for filing of cross-examination plans in conjunction with requests/motions to conduct cross-examination should be added to the generally-applicable provisions of Subpart C. Accordingly, § 2.333(c) has been added to the final rule, requiring the presiding officer to require each party or participant who wishes to conduct cross-examination to file a cross-examination plan. The provisions in § 2.333(c) were drawn from § 2.711(c). In addition, the Commission added paragraph (d) in the final rule requiring the presiding officer to ensure that each party or participant who is permitted to conduct cross-examination conducts its cross-examination in conformance with its cross-examination plan. Finally, the Commission modified paragraph (a) to authorize the presiding officer to strike unreliable or immaterial evidence.

Section 2.334—Schedules for Proceedings

In response to a commenter, the word "residing" was changed to "presiding" officer.

Section 2.336—General Discovery

In response to comments, the Commission modified § 2.336(a)(1) to make clear that the names of only those experts whom the party may rely upon as a witness need be disclosed. Paragraph (a)(4) was deleted, inasmuch as the scope of documents to be provided under the proposed rule, viz., those that "provide direct support for, or opposition to, the application or other proposed action that is the subject of the proceeding," extended beyond the scope of the contested issues in the proceeding. On the other hand, paragraph (b)(5) was revised to clarify that the NRC staff must provide a list of "otherwise-discoverable" documents for which the NRC staff asserts a claim of privilege or protected status.

In reviewing § 2.336, the Commission determined that the requirement in paragraph (a)(2) for disclosures of persons whom a party believes "is likely to have discoverable information relevant to the admitted contentions" is unnecessary, inasmuch as further discovery under Subpart C is not available. Accordingly, the final rule does not include this disclosure provision (however, this disclosure requirement is retained in § 2.704(a)(1) of Subpart G, inasmuch as Subpart G provides opportunities for additional discovery).

The Commission modified § 2.336(b) to make clear that the NRC staff's obligations with respect to a hearing file ordinarily do not apply to proceedings conducted under Subpart J. In Subpart J, the hearing file would essentially duplicate the function of the electronic docket and the LSN; hence there is no reason for the NRC staff to also maintain a hearing file.

Section 2.337—Evidence at a Hearing

A commenter suggested that the provisions of § 2.711(e), (f), (g), (h) and (i) of the proposed rule should be relocated to Subpart C, inasmuch as these are general provisions governing evidence which apply to all hearing tracks. Proposed § 2.711(e) (f), (g), (h) and (i) were drawn from former § 2.743(c) through (f), (g) and (i), and address matters relating to evidence, including admissibility, objections, and offers of proof. The Commission generally agrees with the commenter, and has relocated the provisions in proposed § 2.711 from Subpart G to Subpart C in a new § 2.337 (with proposed §§ 2.337 through 2.347 being renumbered in the final rule).

However, in response to comments submitted on both the 1998 Policy Statement on adjudicatory procedures and the proposed rule expressing concerns about delays in hearings associated with the submission of SERs and EISs, the Commission has reconsidered its current regulatory provisions with respect to NRC staff documents, including the provision in proposed § 2.711(i). As discussed earlier, commenters on the 1998 Policy Statement were concerned that late completion of the SER and EIS could result in delays in discovery and the conduct of the hearing. In addition, a nuclear industry commenter on the proposed rule suggested that the regulations should specifically direct that final NRC staff documents not be required before adjudication of safety and environmental contentions; and that the Commission establish procedures for scheduling orderly and final resolution of contested health and safety and environmental issues in adjudicatory proceedings independent of the NRC staff's scheduled completion of issuance of an SER or EIS. The commenter argued that, if necessary, the NRC staff could be directed to prepare statements of position or "partial" SERs or EISs on contested issues.

The Commission recognizes that the language of proposed § 2.711(i) (former § 2.734(g)), may be read to require the submission of the SER and EIS in a proceeding even if there are no contentions bearing on one of those documents, or if the NRC staff was prepared to proceed on a safety matter in advance of completion of a final SER. The Commission also recognizes that, but for the language of that paragraph, the staff could prepare testimony and take a final position on contested safety matters if its safety review has been completed in areas relevant to those contested matters. In this fashion, contested safety issues may be resolved without a completed SER. On the other hand, the NRC staff's practice has been to prepare relatively complete SERs without preparation of separate documents that specifically address matters in controversy. Nor should SERs be required to address matters in controversy as such, inasmuch as such a function is extraneous to the NRC Staff's primary authority and responsibility, viz., to review and judge the public health and safety of the applicant's proposed action.

By contrast, a final EIS is ordinarily necessary before the NRC staff may take a position on matters in controversy related to the environment and/or the adequacy of the EIS under the current regulations in 10 CFR Part 51. Inasmuch as the adequacy of the EIS is a matter which may be a subject of contention in a licensing proceeding, the EIS must be a part of the hearing record whenever the adequacy of the EIS is a matter in controversy in a proceeding.

Nonetheless, the Commission recognizes the potential for hearing delays while the NRC staff prepares an SER or EIS to support its position as a party in a proceeding. Therefore, the Commission has decided to address concerns over potential hearing delays

due to the need for staff documents as follows.

First, to avoid delays where litigation of a contention is dependent upon some NRC staff action, the Commission will direct the NRC staff to develop internal management guidance and procedures to support timely NRC staff participation in hearings, including early preparation of testimony and evidence to support the NRC staff's position on a contention/controverted matter.

Second, the Commission is including in § 2.337(g) new language which supersedes the language of proposed § 2.711(i) (former 2.743(g)) addressing the admission into evidence of NRC staff documents. Section 2.337(g)(1) provides that in proceedings involving an application for a facility construction permit, the NRC staff shall offer into evidence the ACRS report, the NRC's safety evaluation, and any environmental impact statement (EIS) prepared under 10 CFR Part 51. The need for these documents in every production and utilization facility construction permit proceeding stems from the requirement in Section 189.a.(1)(A) for a mandatory hearing for construction permits. In proceedings involving applications for other than a construction permit for a production or utilization facility, where the NRC staff is a party, § 2.337(g)(2) requires the NRC staff to offer into evidence any ACRS report on the application, at the discretion of the NRC staff either the safety evaluation prepared by the staff and/or the NRC staff statement of position on the matter in controversy provided to the presiding officer (see the fourth item below), and the EIS or environmental assessment (EA) if there are contentions/controverted matters with respect to the adequacy of the EIS or EA. This requirement applies to, for example, licensing hearings conducted under Subpart L, and all hearings conducted under Subpart G. By contrast, if the NRC staff is not a party in such proceedings, the NRC staff shall offer into evidence, and provide (with the exception of any ACRS report) one or more sponsoring witnesses, for any ACRS report on the application, at the discretion of the NRC staff the safety evaluation prepared by the NRC staff and/or the NRC staff statement of position on the matter in controversy provided to the presiding officer, and the EIS or environmental assessment (EA) if there are contentions/controverted matters with respect to the adequacy of the EIS or EA.

Third, the Commission has made a number of changes to §§ 2.1202 and 2.1210 to clarify the distinction between the presiding officer's decisionmaking on matters in controversy in Subpart L proceedings and the NRC staff's separate review of the proposed action, and to facilitate the presiding officer's timely resolution of contested matters in those Subpart L proceedings in which the NRC staff has chosen not to participate as a party. Section 2.1202(a) has been modified to require the NRC staff to provide a "statement of position" on matters in controversy as part of its notice to the presiding officer and parties of the NRC staff's action on the application or the underlying regulatory matter which is the subject of the hearing. This ensures that where the NRC staff takes an action before the presiding officer issues its decision (as the NRC Staff is authorized to do under § 2.1202(a)), the presiding officer and parties have the benefit of the NRC staff's views and explanation as to why, notwithstanding the pendency of matters in controversy, the NRC staff believes it is safe to take the action. It also provides information that may be useful to the presiding officer for his or her determination on whether to direct the staff to participate as a party on one or more contentions. To ensure that the Commission is the final agency arbiter where a presiding officer's decision is inconsistent with the NRC staff's notice of position and action under § 2.1202(a) and the NRC has not participated as a party, Section 2.1210(a)(ii) has been added requiring the Commission to review a presiding officer's initial decision if it is inconsistent with the NRC staff's action taken under § 2.1202(a). Section 2.1403 was revised, parallel with § 2.1202, to ensure that the presiding officer is aware of the NRC staff's action on the application/contested matter. However, neither §§ 2.1406 nor 2.1407 were revised to be parallel with § 2.1210(a)(ii), inasmuch as under § 2.1406(b), the presiding officer's decision in a Subpart N proceeding must be transmitted to the Commission for its sua sponte review. Hence, in Subpart N the Commission has the opportunity to review any inconsistency between the NRC staff's action and the presiding officer's decision, and take any necessary action, without awaiting an appeal by a party.

Finally, § 2.1210 is modified to add a new paragraph (e), and § 2.1407 is modified to add a new paragraph (c), in order to clarify that once an initial decision becomes final, the Secretary shall transmit the decision to the NRC staff for action in accordance with the decision.

Section 2.338—Settlement of Issues; Alternative Dispute Resolution (§ 2.337 in Proposed Rule)

The Commission has long encouraged the resolution of contested issues in licensing and enforcement proceedings through settlement, consistent with the hearing requirements of the Atomic Energy Act. *See* Statement of Policy on Conduct of Licensing Proceedings, CLI–81–8, 13 NRC 452 (45 FR 28533; May 27, 1981); Policy Statement on Alternative Means of Dispute Resolution (57 FR 36678; Aug. 14, 1992). In this rulemaking, the Commission considered expanding the role of alternative dispute resolution (ADR) in NRC adjudications. ADR can be defined as any technique that results in the conciliatory resolution of a dispute, including facilitation, mediation, fact finding, mini-trials, early neutral evaluation, and arbitration. Although "unassisted" negotiation to resolve disputes has long been effectively used in resolving disputed matters before NRC tribunals, the focus of the ADR Act, and the efforts of the Interagency Working Group on Alternative Dispute Resolution chaired by the Attorney General (Interagency Working Group), has been on "formal" ADR techniques that require the use of a third party neutral. The Commission's consideration of ADR techniques for use in the hearing process also focuses on these formal ADR techniques. Although the Commission believes that a broad array of ADR options could be made available to the parties in an NRC proceeding, its view at the proposed rule stage was that "non-binding" techniques, such as mediation, would be the most appropriate. For example, mediation is a process by which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting a voluntary agreement by the parties to the dispute. The parties are free to develop a mutually acceptable resolution to their dispute. The role of the mediator is to help the parties reach this resolution. The mediator does not decide the case or dictate the terms of a settlement. In addition to the foregoing, in response to suggestions by several workshop participants, the Commission indicated that it was considering providing further guidance on the use of alternative dispute resolution (ADR) as part of its hearing procedures.

In considering expanding the role of ADR in NRC adjudications, the Commission's focus is consistent with the NRC's continuing participation in the activities of the Interagency Working Group, as well as with the Administrative Dispute Resolution Act

of 1996 (ADR Act). The Working Group was established to facilitate the implementation of a May 1, 1998, memorandum from President Clinton that directed all executive departments and Federal agencies to develop dispute resolution programs. Nonetheless, the Commission recognizes that because of the Commission's statutory responsibility under the AEA to make required public health and safety findings, the use of ADR may not be appropriate in all circumstances.

Section 2.337 of the proposed rule would not only have consolidated the former provisions in part 2 on settlement (10 CFR 2.203, 2.759, 2.1241), it would also have provided guidance on the use of settlement judges as mediators in NRC proceedings. The Commission previously endorsed the appropriate use of settlement judges in Rockwell International Corp., CLI–90–05, 31 NRC 337 (1990). The proposed rule was modeled on a provision in the Model Adjudication Rules prepared in 1993 for the Administrative Conference of the United States (ACUS). *See* Cox, The Model Adjudication Rules, 11 T.M. Cooley L. Rev. 75 (1994). The Commission sought public comment on the text of proposed § 2.337 as well as on the following questions:

- Should the Commission formally provide for the use of ADR in its hearing process?
- Should the use of ADR be codified in the Commission's regulations or provided for in some other manner, such as a policy statement?
- At what stage of the hearing process should an opportunity for ADR be provided?
- What types of issues would be amenable to resolution through ADR? What types of issues should not be considered for resolution through ADR?
- How should the use of ADR operate in the context of the hearing process? Who could propose its use? What should be the role of the presiding officer? Who should be parties to the ADR process? What should be the role of the NRC staff in the ADR process? What happens to the proceeding while the ADR process is being implemented? How would the resolution of a dispute be incorporated into the hearing process? What should the role of the Commission be in the ADR process?
- Should there be a source of third-party neutrals other than settlement judges appointed from the members of the Atomic Safety and Licensing Board Panel to assist in the ADR process, such as the roster of neutrals established by the U.S. Institute for Conflict Resolution or the National Energy Panel of the American Arbitration Association? How should such individual neutrals be selected? What arrangements should be made to compensate neutrals for their services?

A wide range of comments were received on ADR. Most commenters supported Commission efforts to encourage the use of ADR, but all indicated that ADR should not be required. While a commenter indicated that a proceeding should be suspended during ADR, other commenters argued that the use of ADR should not upset the hearing schedule. The Commission continues to believe that the use of ADR has the potential to eliminate unnecessary litigation of licensing issues, shorten the time that it takes to resolve disputes over issues, and achieve better resolution of issues with the expenditure of fewer resources. However, the Commission agrees that parties should not be forced to use ADR, and the final rule continues to make the use of ADR subject to voluntary agreement of all parties to any given contention. The Commission also believes that hearings should continue while ADR is ongoing, unless all parties agree to suspend the hearing and present an appropriate motion to the presiding officer. Thus, § 2.338 remains largely unchanged from the text of proposed § 2.337.

Section 2.337(i) of the proposed rule provided that a settlement or compromise must be embodied in a decision or order "settling and terminating the proceeding." However, some settlements or compromises may resolve only some of the contentions/controverted matters, and may not result in termination of the proceedings. Accordingly, the Commission removed that phrase in § 2.338(i) of the final rule.

Section 2.340—Initial Decision in Contested Proceeding (§ 2.339 in Proposed Rule)

A commenter proposed that the Commission incorporate into this section the requirement that a presiding officer refer to the Commission for its approval the presiding officer's determination under § 2.340 (formerly § 2.760a) that a matter not placed into controversy by the parties constitutes a serious safety, environmental, or common defense and security matter which should be examined and decided by the presiding officer. The Commission agrees that the Commission's practice should be codified into part 2, since this is consistent with the direction of the Commission as announced in the Policy Statement of Conduct of Adjudicatory Proceedings (63 FR 41872; August 5, 1998)[15] which is reflected in § 2.340(a).

A public citizen commenter argued that proposed § 2.342 (final § 2.343), which provides for oral argument on a petition for review in the Commission's discretion, is redundant to proposed § 2.340(c)(1), and therefore should be deleted. The Commission agrees that these two provisions are redundant, but has instead decided to delete § 2.340(c)(1) to maintain consistency with the organization of § 2.331.

Section 2.341—Review of Decisions and Actions by Presiding Officer (§ 2.340 in Proposed Rule)

A commenter pointed out that proposed § 2.340(b)(1), which provided that the filing of a petition for review is mandatory before a party will be deemed to have exhausted its administrative remedies for purposes of seeking judicial review, is inconsistent with current case law. The Commission does not agree with the commenter's view of the current law. However, the complex jurisdictional issues raised need not be resolved here. The Commission has simply modified § 2.341(b)(1) to provide that unless otherwise authorized by law, a party must file a petition for Commission review before seeking review of an agency action. Analogous changes were also made to §§ 2.1212 and 2.1407.

In response to a separate comment that proposed § 2.340(c)(1) and § 2.342 were redundant with respect to addressing the subject of oral arguments, the Commission removed the reference to oral arguments in § 2.341(c)(1) of the final rule. The last sentence in § 2.341(d) has been corrected to refer to the standard for reconsideration in § 2.323(e).

Section 2.348—Separation of Functions (§ 2.347 in Proposed Rule)

The proposed rule contained a slight modification to paragraph (b)(3) intended to reflect the use of "plain English." The Commission has decided that the language in former § 2.781(b)(3), from which this provision was drawn, is sufficiently clear and has decided to use that language in the final rule.

Section 2.390—Public Inspections, Exemptions, Requests for Withholding

The Commission corrected § 2.390 (former § 2.790) to include a footnote in paragraph (a) that was inadvertently

[15] As indicated in the Policy Statement, the Commission's policy directive is based upon the Commission's action in Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI–81–24, 14 NRC 614 (1981). 63 FR 41872, 41874 (third column).

removed from former § 2.790(a) by the Office of the Federal Register. The footnote provides that "final NRC records and documents" do not include handwritten notes, or draft records and documents.

(g) Subpart G.

The Commission proposed revising Subpart G by consolidating the provisions of general applicability in new Subpart C. As a result, Subpart G would contain only the provisions for the conduct of formal adjudications. Former § 2.705, which provides for the filing of an answer to a notice of hearing, is removed in the final rule; experience has shown this provision to be largely superfluous. For the same reason, former § 2.751a, which provides for a special prehearing conference in connection with construction permit and operating license proceedings, and former § 2.761a, which provides for separate hearings and decisions, are removed. The provisions of former § 2.752 are redesignated as § 2.318 in order to provide for the conduct of a prehearing conference to accomplish the same purposes as those in former § 2.751a. The provisions of former § 2.765, immediate effectiveness of an initial decision directing issuance or amendment of a license under part 61 of this chapter, are relocated to the revised Subpart L, which sets forth the provisions applicable to informal proceedings such as those under part 61.

The Commission requested public comment on whether Subpart G should be used in all initial power reactor construction permit and operating license proceedings, rather than in such proceedings involving a "large number" of "complex issues." The public comments received and the Commission's resolution of this matter are addressed earlier in "Complex Issues in Reactor Licensing" under the discussion of § 2.310.

Section 2.703—Examination by Experts

In response to comments suggesting that cross-examination must be controlled, the Commission has decided to add an additional requirement that a party seeking permission to use an expert to conduct cross-examination should file a proposed cross-examination plan in accordance with § 2.711(c). Filing of a proposed cross-examination plan would assist the presiding officer in determining whether the expert proposed to conduct cross-examination is capable of doing so in a manner that will facilitate the development of a concise and adequate record on contested matters.

Section 2.704—Discovery: Required Disclosures

A commenter noted that paragraph (b)(3) failed to include the words, "30 days after," from Rule 26 of the Federal Rules of Civil Procedure, and that these words should be added to the final rule. The Commission agrees that these words should be included, and the phrase, "the disclosures must be made within thirty (30) days after" has been added to the final version of § 2.704.

Section 2.705—Discovery—Additional Methods

A commenter noted that a footnote in proposed § 2.706(b)(1) did not appear to be relevant to that section. The footnote has been designated as a footnote to § 2.705(g)(4), and a typographic error corrected in the footnote.

Section 2.709—Discovery Against NRC Staff

The Commission has clarified § 2.709 to make clear that the Executive Director for Operations (EDO) may delegate his responsibilities to respond and object to discovery requests, and to respond to discovery orders issued under § 2.709(e) and (f) by a presiding officer, and that a presiding officer's discovery order to the EDO should reflect the authority and discretion of the EDO to so delegate his responsibilities. The final rule also corrects a reference to § 2.704(c) and (e) in the proposed rule; the correct reference should be to § 2.705(c) and (e), which contains the provisions requiring protective orders and the duty to update earlier discovery responses.

Section 2.710—Summary Disposition Motions

Section 2.710 of the proposed rule would have expanded the presiding officer's discretion not to consider a summary disposition motion unless he or she determines that resolution of the motion will serve to expedite the proceeding. The Commission requested comment on whether the proposed revision, or some other standard, should be adopted. Two comments were received on proposed § 2.710 in this regard. One commenter stated that although the presiding officer should be provided some discretion to rule on motions for summary disposition, as a general matter the presiding officer should rule on the motion unless delay would result. Another commenter opposed the proposed rule, arguing that rather than allowing such discretion the Commission should expand the use of summary disposition to resolve issues even where there is a genuine issue of material fact.

The Commission continues to believe that in many instances summary disposition involves an additional delaying step in a proceeding, and that a presiding officer's consideration of such motions at a point in time close to the scheduling of a hearing can divert all parties' and the presiding officer's attention from a hearing. These considerations in part underlies the Commission's admonition in its 1998 Policy Statement on Conduct of Adjudicatory Proceedings that Licensing Boards should forego the use of motions for summary disposition except upon a finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding. While the final rule remains generally unchanged from the proposed rule in terms of codifying that admonition (although moved to paragraph (d) of the final rule), the Commission also believes that if summary disposition motions are to be used, they must be filed soon after the end of discovery so that the presiding officer may have an opportunity to review the motions and advise the parties whether the motions will be granted in whole or part. Therefore, the Commission is adopting a number of additional provisions that will govern the filing and determination of summary disposition motions, in order to ensure that such motions serve to expedite the proceeding and do not distract the parties' and the presiding officer's attention from preparation for the oral hearing.

Section 2.710(a) of the final rule requires that all summary disposition motions must be filed no later than twenty (20) days after the close of discovery under §§ 2.702 through 2.708. By requiring a party to file its summary disposition motion soon after discovery is completed, the presiding officer will be able to determine whether the hearing may be scheduled in the near future (if no motions are submitted), or whether allowances must be made for the submission and resolution of such motions (c.f., § 2.329, with respect to a prehearing conference, and § 2.332, requiring the presiding officer to issue a scheduling order). The Commission believes that twenty (20) days is sufficient time to assess information obtained as the result of discovery and prepare summary disposition motions.

The Commission is also adopting a provision in § 2.710(e) requiring the presiding officer to issue an order no later than forty (40) days after any responses to the summary disposition motion are filed, indicating whether the motion is granted or denied, together with the bases for the presiding officer's

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determination. The Commission is retaining the provisions set forth in the final two sentences of proposed § 2.710(a) allowing the presiding officer not to consider a summary disposition motion which the presiding officer believes would not expedite the proceeding if the motion were granted, and to either summarily dismiss or hold in abeyance a summary disposition motion filed shortly before or during the oral hearing, if the presiding officer believes that substantial resources must be diverted to adequately respond to the motion. The provisions, however, have been moved into new paragraph (d)(1) of § 2.710.

(h) Subpart I.

The Commission is adopting a conforming change to § 2.901to specify that the procedures for handling Restricted Data and National Security Information in Subpart I apply to proceedings under subparts G, J, K, L, M, and N. Section 2.901, which specified that Subpart I procedures apply only to proceedings conducted under subpart G, was adopted in 1962, and underwent minor changes in 1976 but was not modified to reflect the Commission's adoption of subparts J, K, L, and M. The procedures in Subpart I for handling Restricted Data and National Security Information are generic and appropriate for use in NRC adjudicatory proceedings. However, it is highly unlikely that the Commission will choose to hold Subpart O legislative-style hearings requiring the handling and consideration of Restricted Data and National Security Information. Accordingly, the final rule specifies that Subpart I procedures will apply to proceedings under subparts G, J, K, L, M, and N. However, should the Commission determine that access to Restricted Data and National Security Information should be provided in Subpart O legislative-style hearings, the Commission may specify the use of Subpart I procedures under § 2.1502(c)(6).

In a conforming change, the definition of a "party" in § 2.902(e) is amended to refer to §§ 2.309 (former § 2.714) and 2.315 (former § 2.715).

(i) Subpart J.

The Commission proposed a number of changes to §§ 2.1000, 2.1001, 2.1010, 2.1012, 2.1013, 2.1014, 2.1015, 2.1016, 2.1018, 2.1019, 2.1021, and 2.1023. The changes are intended to: (1) Correct references to rules of general applicability in existing Subpart G that are being transferred to Subpart C, and (2) eliminate redundant or duplicate provisions in Subpart J that would be covered by the generally applicable provisions in Subpart C.

One commenter suggested that § 2.1013(b) be clarified to provide that exhibits used in connection with cross-examination need not be tendered in advance to opposing parties. The Commission declines to adopt the commenter's suggestion. The Commission has adopted in Part 2 the principle of broad disclosure of relevant documents and information to all parties. That principle is manifested in Subpart J by the requirement for the Licensing Support Network (LSN), in which the parties are to file certain documents as described in Subpart J, including §§ 2.1003 and 2.1004. Thus, all documents that may be used in cross-examination must be disclosed to other parties. However, nothing in Subpart J requires that such documents must be identified as to their intended use by a party in the proceeding. Therefore, an exhibit to be used in cross-examination need not be identified as such, nor must that exhibit be marked to show the portions of the exhibit to be used in cross-examination. Accordingly, all parties will have access to all relevant documents, including those to be used in cross-examination, without knowing which document (if any), or portion thereof, may be used in cross-examination.

The Commission has adopted the proposed revision to Subpart J with some additional conforming and correcting changes. Section 2.1000 is revised to provide for consistent organization and terminology among all scope statements in part 2. In addition, § 2.1000 is revised to add references to provisions of Subparts C and G, where existing § 2.1000 erroneously omitted reference to the parallel provisions in former Subpart G. Section 2.1000 now references §§ 2.301 and 2.701, which authorize the Commission to use alternative procedures to the extent that the conduct of military or foreign affairs functions are involved; § 2.317(a), which permits separate hearings in a proceeding; § 2.324, which authorizes the presiding officer to determine the order of procedure; and § 2.710, which addresses the use of summary disposition motions.

Conforming changes are made in § 2.1001 to provide correct references to §§ 2.309, 2.315, and 2.1021, and to use consistent terminology. Section 2.1006 is conformed to refer to § 2.390. Section 2.1018 is conformed to refer to § 2.708. A conforming change is made to § 2.1022 to correct a reference to the general provisions governing late-filed contentions in § 2.309(c). Finally, the newly-adopted provisions in Subpart J are changed to be consistent with Subpart C of this final rule and newly-adopted 10 CFR Part 63 (66 FR 55732; Nov. 2, 2001), by referring to a "construction authorization" for a HLW geologic repository, and a "license to receive and possess" HLW at a HLW geologic repository.

(j) Subpart K.

The Commission proposed several simple changes to §§ 2.1109 and 2.1117. In addition, § 2.1111 on discovery would be removed because discovery for Subpart K hybrid hearings will be addressed by the general discovery provisions of Subpart C. The proposed changes were intended: (1) To conform Subpart K to the rules of general applicability of Subpart C, particularly with regard to the need to request hybrid hearing procedures in the petition to intervene, and (2) to make it clear that a hearing on any contentions that remain after the oral argument under Subpart K will be conducted using the informal hearing procedures of proposed Subpart L.

A commenter argued that, because the first spent fuel pool capacity expansion license amendment case to use Subpart K, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP–00–12, 51 NRC 247 (2000) (Shearon Harris), took over two (2) years to reach resolution, many changes should be made to Subpart K which are not being made at this time. Specifically, the commenter suggested that § 2.1113(a) should allow issues of whatever nature that are identified for oral argument to be heard together; § 2.1113(b) should allow experts who prepare affidavits in support of written submissions to respond directly to questions posed by the hearing examiner at the oral argument; § 2.1115(a) should establish firm deadlines after oral argument for the presiding officer to rule on whether any issues remain to be heard in an adjudicatory hearing, and all issues admitted should be heard together; and § 2.1115(b) should specify that the party raising an issue of fact or law for consideration has the burden of proof as to whether the issue meets the standards for holding such a hearing.

The Commission does not agree with the commenter's suggestion that all issues be heard together at oral argument, and resolved in an adjudicatory hearing if one is held. The commenter did not explain how the lack of provisions in Subpart K addressing these matters resulted in unnecessarily prolonging the time needed for resolution in Shearon Harris.

On the other hand, the Commission agrees with the commenter's observation that "restrictions on oral argument"—presumably the fact that it is inappropriate for attorneys

representing their clients to make technical presentations—can make it difficult for parties to respond to interrelated technical issues. However, the Commission disagrees with the commenter's apparent proposed solution, viz., allowing experts to respond directly to questions posed by the presiding officer at the oral hearing. Rather than adapting a process to allow oral testimony by experts which would substantially depart from the statutory mandate behind Subpart K, the Commission has adopted an approach which provides an opportunity for each party to provide written responses to the written summaries and supporting facts and data submitted by the other parties. Accordingly, § 2.1113 has been modified in the final rule to provide that each party must submit its summary of all facts, data and arguments, together with the underlying facts and data, twenty-five (25) days before the oral hearing, rather than fifteen (15) days as provided in the proposed rule. Ten (10) days before the oral argument, each party may, but is not required to, submit a reply limited to addressing the written summaries, facts, data and arguments submitted by any of the other parties.

The Commission also agrees with the commenter that Subpart K should be clarified to state that while the applicant for the spent fuel pool capacity expansion license amendment bears the ultimate burden of proof (risk of non-persuasion) on admitted contentions, the proponent of an adjudicatory hearing bears the burden of demonstrating that the criteria in § 2.1115(b) have been met, and, accordingly, that an adjudicatory hearing should be held. This clarification, which is consistent with the Licensing Board's decision in Shearon Harris, 51 NRC at 254–55, is reflected in new § 2.1117. The text of proposed § 2.1117, "Applicability of other sections," is now included in new § 2.1119.

The Commission made conforming and correcting changes in § 2.1103 to provide for consistent organization and terminology among all scope statements in Part 2.

(k) Subpart L.

The NRC's experience with the informal hearing procedures of the existing Subpart L has shown that some aspects are cumbersome and inefficient in the development of a record. To address these problems, the Commission proposed replacing the existing Subpart L in its entirety with new provisions that would: (1) Shift the focus of Subpart L to informal oral hearings, (2) require submission of contentions, and (3) provide the opportunity to pose questions indirectly to witnesses by proffering proposed questions to the presiding officer. The Commission requested comment on this shift in emphasis to more informal hearings conducted under the proposed revised procedures of Subpart L.

A large number of comments were received on Subpart L. Nearly all the comments expressed displeasure with Subpart L, either in its current form or as proposed to be reconstructed. However, the reasons for the discontent fell into two general categories. Citizen groups and private individuals argued that Subpart L, by moving further away from the procedures embodied in Subpart G, will effectively eliminate public participation by substituting a more burdensome and expensive procedure. The proposed elimination of cross-examination was also identified as objectionable by this group of commenters. By contrast, industry commenters generally not only supported the elimination of cross-examination, but two commenters argued that the Commission should go further by eliminating the requirement for an oral hearing. Under their proposal, an oral hearing would be held only if the presiding officer determined, after reviewing the written presentations, that an oral hearing is necessary.

The Commission believes that its Subpart L strikes the appropriate balance between public confidence in the Commission's hearing process, and the need to expeditiously resolve contested matters. As discussed earlier with respect to the use of informal procedures, the Commission does not believe that a large number of NRC hearings involve factual disputes for which the expanded panoply of discovery procedures in Subpart G are necessary. Nor does the Commission believe that there are a large number of hearings where the credibility of eyewitnesses is an issue with respect to either the occurrence of a material past event, or the motive or intent of a party, such that cross-examination is an appropriate tool for issue resolution. On the other hand, the Commission believes that if the presiding officer has the opportunity to examine the witnesses, the presiding officer will be able to gain a better understanding of the testimony, and efficiently oversee the development of evidence relevant to the resolution of the contested matter in the hearing. Written follow-up questions propounded by a presiding officer are, at best, an inefficient substitute for the "back-and-forth" ability of a presiding officer to question witnesses orally, and experience indicates consumes more time and resources of the presiding officer and parties. For these reasons, the Commission concludes that an oral hearing should be provided for in a Subpart L proceeding, but that cross-examination should ordinarily not be permitted.

Although cross-examination by the parties generally will not be permitted in Subpart L proceedings and all of the more informal hearing tracks, the Commission emphasizes that the ultimate burden of proof (risk of non-persuasion) remains with the applicant and/or the proponents of particular actions in these proceedings. Moreover, a party sponsoring a contention bears the burden of going forward with evidence sufficient to show that there is a material issue of fact or law, such that the applicant/proponent must meet its burden of proof. Where cross-examination is not permitted, each party must bear its burden by going forward with affirmative evidentiary presentations and testimony, its rebuttal evidence and rebuttal testimony, and well-developed questions that the party suggests the presiding officer pose to the witnesses. Thus, the responsibility for developing an adequate record for decision is on the parties, not the presiding officer. The presiding officer is responsible for overseeing the compilation of the record and for ensuring that the record is sufficiently clear and understandable to the presiding officer such that he or she can reach an initial decision. However, the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens. The presiding officer will take the compiled record, clarified by action of the presiding officer as necessary so that it is understandable for the presiding officer's deliberations, and based upon that record determine whether the parties have met their respective burdens.

Nonetheless, to provide for the possibility in a Subpart L proceeding that, in some instances in a particular proceeding, cross-examination by parties may prove to be the best way of creating an adequate record for decision in certain situations, § 2.1204(b) allows the presiding officer to permit cross-examination upon motion of a party if the presiding officer finds that cross-examination is necessary for development of an adequate record. To ensure that cross-examination will be focused on disputed material issues of fact, § 2.1204(b) has been modified from the proposed rule to add a requirement that a motion/request for cross-examination must include a proposed cross-examination plan. The cross-

examination plan provisions in § 2.1204(b) were derived from the requirements in § 2.711(c). Furthermore, under the generally-applicable requirement in § 2.333, parties granted permission to conduct cross-examination must conduct their cross-examination in conformance with the cross-examination plan filed with the presiding officer.

The Commission also requested public comment on whether the final rule should provide explicitly for the option of the Commission or the Chief Administrative Judge to establish three-judge panels on a case-by-case basis, *e.g.*, in cases where there are likely to be both significant technical and legal issues to be resolved in the hearing.

Two comments were received on this matter. One commenter indicated that there was no need to expressly provide for appointment of a three-judge panel, since §§ 2.313 and 2.321 would already allow the Commission or Chief Administrative Judge to appoint a three-judge panel. Another commenter stated that it may be appropriate to appoint three-judge panels for initial reactor construction permit and operating license cases, as well as cases in which there is likely to be a large number of complex issues.

After reviewing the language of proposed §§ 2.313 and 2.321, the Commission agrees with the commenter that these sections provide sufficient flexibility for the Commission and Chief Administrative Judge to appoint three-judge panels in appropriate circumstances. The Commission also does not wish to limit in advance the circumstances for which the Commission or Chief Administrative Judge could appoint a single presiding officer. For these reasons, the Commission declines to adopt a further change to Part 2 addressing this subject, but notes that under revised § 2.313 the Commission and the Chief Administrative Judge are free to appoint a single presiding officer or a three-judge Atomic Safety and Licensing Board.

Several commenters asserted that § 2.1207 should be amended to address whether parties must submit in advance the questions they wish the presiding officer to pose to the witnesses, whether the questions must be exchanged with other parties, and whether parties may submit questions to the presiding officer at the oral hearing as the result of witnesses' testimony. The Commission has revised § 2.1207 to make clear that: (1) Questions must be submitted so that they are received by the presiding officer no later than five (5) days before the commencement of the hearing; (2) questions need not be exchanged with other parties; and (3) a party may not submit proposed questions to the presiding officer at the hearing, unless the presiding officer requests a party to submit such questions to assist the presiding officer in the parties' development of a sufficient record to permit a decision on the matters in controversy.

The Commission made conforming and correcting changes in § 2.1200 to provide for consistent organization and terminology among all scope statements in Part 2. In addition, the Commission revised § 2.1207 to ensure that a presiding officer treats proposed questions to be propounded to witnesses as confidential information until either the question is asked of the witness, or the presiding officer's initial decision is issued. Upon issuance of the decision, the presiding officer must transmit the questions to the Secretary so that they may be entered into the official record for the proceeding.

(l) Subpart M.

Sections 2.1306, 2.1307, 2.1308 (with the exception of paragraph (d)(2)), 2.1312, 2.1313, 2.1314, 2.1317, 2.1318, 2.1326, 2.1328, 2.1329, and 2.1330 are deleted because the substance of these sections is covered by rules of general applicability in new Subpart C. The final rule reinstates the language formerly contained in § 2.1308(d)(2), stating that Subpart M hearings are oral hearings, unless all the parties agree and file a motion that the hearing consist of written filings. The motion must be filed within fifteen (15) days of the service of the notice or order granting the hearing. This language was inadvertently designated as "removed" in the proposed rule, and the final rule correctly retains this language in § 2.1308.

No significant comments were received on the proposed changes, and the Commission has adopted proposed Subpart M without substantive changes. However, the Commission made conforming and correcting changes in § 2.1300 to provide for consistent organization and terminology among all scope statements in Part 2.

The Commission has corrected § 2.1315(a), so that the phrase, "no generic issue," is revised to correctly read, "no genuine issue." The Commission has also revised § 2.1323(d) in a manner similar to § 2.709, to clarify that a delegee of the Executive Director for Operations may designate the NRC personnel who will provide testimony in a Subpart M hearing.

(m) Subpart N.

New Subpart N is a "fast track" process for the expeditious resolution of issues in cases where the contentions are few and not particularly complex, and therefore may be efficiently addressed in a short hearing using simple procedures and oral presentations. This subpart may be used for more complex issues if all parties agree. Subpart N may be applied to all NRC adjudications except proceedings on uranium enrichment facility licensing, proceedings on the initial authorization to construct a high-level radioactive waste geologic repository, and proceedings for the initial issuance of a license to possess and receive HLW at a geologic repository operations area. In view of the simplified procedures and the expedited nature of the litigation involved, Subpart N allows an appeal as-of-right to the Commission so that the parties have a direct path to the Commission for review of the decision. The "fast track" procedures of Subpart N may be particularly useful for cases involving small materials licensees, where the parties want to be heard on the issues in a simple, inexpensive, and informal proceeding that can be conducted quickly before an independent decisionmaker. The Commission requested comments on the appropriate criteria for the use of Subpart N.

Several commenters stated that proposed § 2.310(h) would result in Subpart N being used too infrequently, because in a contested case the parties will probably not agree and it will be argued that the 2 day criterion will not be met. One commenter argued that the Commission should have only one informal track (other than Subparts K & M) and should simply state that the hearing should not take more than a specified number of days. Another commenter indicated that no specific set of criteria need to be defined in the rule for establishing whether a proceeding should be conducted under Subpart N other than a determination by the Commission, the Licensing Board or the presiding officer. The commenter instead proposed that § 2.310(h) be changed to allow the use of Subpart N if: (1) All parties agree to Subpart N; or (2) the Commission, the presiding officer, or the Licensing Board determines that the proceeding would demonstrably benefit from application of Subpart N. Another commenter indicated that a new § 2.310(i) should be added, specifying that Subpart N can be used for a portion of a hearing held under a different subpart if the Commission, the presiding officer or the Licensing Board determines that portion suitable for application of Subpart N.

The Commission believes that the procedures of Subpart N should be

limited to a relatively narrow set of proceedings where all parties agree, or where the hearing is expected to be concluded in two (2) days or less. The procedures were developed to permit a quick, relatively informal proceeding where the presiding officer could easily make an oral decision from the bench, or in a short time after conclusion of the oral phase of the hearing. The Commission is reluctant—absent all parties agreeing—to allow use in other circumstances where the issues are more complex or the hearing is drawn out over months. If experience shows that Subpart N is being underutilized, or that hearings are being conducted under other provisions such as Subpart L which, but for the 2-day limitation, would have been better conducted under Subpart N, the Commission will reconsider modifying or eliminating the 2-day limitation.

The Commission made conforming and correcting changes in § 2.1400 to provide for consistent organization and terminology among all scope statements in Part 2. The Commission also revised § 2.1407(a)(1) with respect to the need for filing an appeal with the Commission before seeking judicial review, consistent with the change to § 2.341(b)(1) discussed earlier.

(n) Subpart O.

As discussed earlier under II.A.2.(b), Commission Question 1, the Commission has decided to add a new Subpart O that will govern non-adversarial "legislative hearings." The procedures in Subpart O are intended to provide a hearing forum where the Commission (or a designated presiding officer) may obtain information and differing stakeholders' perspectives on a policy issue.

The Commission could hold legislative hearings in its sole discretion in two situations delineated in Subpart O. First, the Commission may hold a legislative hearing in connection with a design certification rulemaking, either indicating as part of the notice of proposed rulemaking that it intends to hold a legislative hearing, or issuing a notice of its intent to hold a legislative hearing after reviewing the comments received on the proposed design certification rule.

Although this represents a change from former 10 CFR 52.51(b), which provided an opportunity for an informal hearing in connection with a Federal Register notice of proposed rulemaking for a design certification, the Commission expects that there will be little impact on the public with this change. No hearing request was submitted in any of the three design certification rulemakings to date. In addition, many of the significant generic issues associated with the first three design certification rulemakings were the subject of discussion in workshops and open meetings, so that public stakeholders could observe and provide comments on the issues before the proposed rule was published. This may have diminished the need for informal hearings as part of the design certification rulemaking. The Commission believes that providing for a discretionary "legislative hearing" using the procedures in Subpart O is consistent with the requirements of the AEA, inasmuch as the "hearing" contemplated by Section 189 for rulemakings is satisfied by opportunity for comment on the proposed design certification rule. Hence, any additional hearing, such as a legislative-style hearing under Subpart O, is an enhancement over what is legally required for rulemaking under either the AEA or the APA.[16]

The other circumstance where the Commission could decide to use a legislative hearing is where the presiding officer under § 2.335(d) has certified to the Commission a question regarding a waiver of the prohibition on consideration of a Commission rule or regulation in an agency hearing. Under the last sentence of § 2.335(d) (formerly § 2.758(d)), the Commission may "direct further proceedings as it considers appropriate to aid its determination." The Commission believes that matters addressing the appropriateness of challenging or waiving existing Commission rules and regulations in a particular adjudicatory proceeding may raise the kinds of policy and regulatory issues which are suited for "legislative hearings" under Subpart O.

The procedures developed for this hearing are modeled to some extent upon the hearings held by Congress and other legislative bodies. Thus, under Subpart O, the Commission would determine the matters to be addressed in the legislative hearing; there would be no "parties"—the Commission would normally determine the witnesses at the hearing (in a legislative hearing considering a petition under § 2.335, all parties to the proceeding will be invited to participate, as will interested States, governmental bodies, and affected Federally-recognized Indian Tribes participating under § 2.315(c)); the NRC staff need not participate; written testimony and exhibits would be filed; the Commission could have witnesses testify as a panel; and there would be no "decision" other than the Commission's final design certification rulemaking or the Commission's determination under § 2.335(d). The Commission's determination in these legislative hearings need not be based upon information developed solely in the Subpart O proceeding (inasmuch as AEA does not require NRC rulemakings to be "on-the-record." Thus, only the most general procedures of Subpart C apply in the context of a Subpart O hearing.

(o) 10 CFR part 60.

In a conforming change, § 60.63(a) was revised to refer to Subpart J of part 2 instead of Subpart G, consistent with § 63.63(a) of the recently-adopted part 63 (66 FR 55732; Nov. 2, 2001). When § 60.63 was adopted in 1981 (46 FR 13971; Feb. 25, 1981), it referred to Subpart G inasmuch as Subpart J of Part 2 had yet to be adopted (54 FR 14925; May 14, 1989). The reference to Subpart G in § 60.63(a) should have been corrected to refer to Subpart J when Subpart J was adopted; thus, this final rule makes the necessary conforming change.

B. Section-by-Section Analysis

1. Implementation of Rule

The final rule will apply only to proceedings which are noticed on or after the effective date of the final rule. Current proceedings noticed before the effective date of the final rule will be governed by the former provisions of Part 2. If a decision is currently on appeal within the Commission, or to a Court of Appeals, and the decision is remanded to the NRC for further action, the remanded proceeding will continue to be governed by the former provisions of Part 2.

2. Introductory Provisions—Sections 2.1–2.8.

Conforming changes are made to §§ 2.2, 2.3, and 2.4 to reference the new section numbers in Part 2.

A new definition of "presiding officer" is added to § 2.4. Under this definition, a presiding officer may be the Commission, an administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or other person designated in accordance with the provisions of this part, presiding over the conduct of a hearing conducted under the provisions of this part. Section 2.313 sets forth the provisions governing which of these

[16] The Commission believes that the specific requirement for "notice and opportunity for comment" in the APA, 5 U.S.C. 553, is co-extensive with the AEA Sec. 189a(1)(A) requirement for a "hearing" in connection with a rulemaking. Therefore, satisfying the Sec. 189.a(1)(A) hearing requirement per se satisfies the APA notice and comment requirement. *Siegel* v. *AEC*, 400 F.2d 778, 785–86 (DC Cir. 1968).

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entities may act as a presiding officer in any particular hearing.

3. Subpart A—Sections 2.100–2.111

Section 2.100—Scope of Subpart

Section 2.100 is corrected to remove the typographic error, "alicense."

Section 2.101—Filing of Application

Conforming changes are made to this section to reflect the new section numbers in Part 2, and paragraphs (a)(3)(ii) and (b) were modified to require that the applicant's notification of the availability of an application and/or environmental report should be accompanied by, inter alia, the email address, if one is available, of the designated applicant representative.

Section 2.102—Administrative Review of Application

Conforming changes are made to this section to reflect the new section numbers in Part 2.

Section 2.103—Action on Applications for Byproduct, Source, Special Nuclear Material, Facility and Operator Licenses

Section 2.103 is amended to include a reference to "facility" licenses in the title and the text.

Section 2.104—Notice of Hearing

Section 2.104 addresses how the Commission will provide notice to parties, the public and State, local governmental, and federally-recognized Tribal officials. Paragraph (e) is corrected to make clear that the NRC will provide notice to all parties and all other persons entitled to notice of hearing with respect to applications for construction authorization for a HLW repository under 10 CFR parts 60 and 63, and applications to receive and possess high-level waste at a HLW repository.

Section 2.105—Notice of Proposed Action

Section 2.105 addresses how the Commission will provide notices of proposed action if a hearing is not required. Paragraph (a)(5) is revised to clarify that the Commission will publish notice of proposed issuance of licenses and license amendments to receive and possess high-level waste at a geologic repository operations area under 10 CFR parts 60 and 63 if the license or amendment would authorize actions which may significantly affect the health and safety of the public, where a hearing is not otherwise required by law. Paragraph (a)(6) is revised to clarify that the Commission will publish notice of proposed issuance of an amendment to a construction authorization for a high-level radioactive waste repository under 10 CFR parts 60 and 63 if the amendment would authorize actions which may significantly affect the health and safety of the public, where a hearing is not otherwise required by law.

Section 2.106—Notice of Issuance

Section 2.106 addresses how the Commission will provide notice to the parties, the public, and State, local governmental, and federally-recognized Tribal officials of issuance of a license or amendment. Paragraph (d) was corrected to make clear that the NRC will provide notice with respect to any action on an application for construction authorization for a high level waste repository under 10 CFR parts 60 and 63, issuance of a license to receive and possess high-level waste at a HLW repository, or issuance of an amendment to such a license.

Section 2.107—Withdrawal of Application

This section describes how the Commission will process a withdrawal of an application by an applicant. The second sentence was changed to correctly state that if an application is withdrawn before the NRC issues a notice of hearing, the Commission dismisses the proceeding. The last sentence of this section was rewritten to make clear that the presiding officer determines the terms and conditions for withdrawal of an application after the NRC issues a notice of hearing.

Section 2.108—Denial of Application for Failure To Supply Information

Conforming changes were made to this section to reflect the new section numbers in part 2.

Section 2.110—Filing and Administrative Action on Submittals for Design Review or Early Review of Site Suitability Issues

Conforming changes were made to this section to reflect the new section numbers in part 2.

4. Subpart B—Sections 2.200—2.206

Section 2.206 is amended to provide the Secretary with the authority (formerly set forth in § 2.772(g)) to extend upon the Commission's motion the time for Commission review under § 2.206(c)(1) of a Director's denial of a petition submitted under § 2.206.

5. Subpart C—Sections 2.300–2.348, 2.390

Subpart C contains the rules of general applicability for considering hearing requests, petitions to intervene and proffered contentions, for determining the appropriate hearing procedures to use for a particular proceeding, and for establishing the general powers and duties of presiding officers for the NRC hearing process. The provisions of Subpart C generally apply to all NRC adjudications conducted under the authority of the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, and 10 CFR part 2.

A large part of Subpart C essentially restates and updates the substance of many of the rules of general applicability that were formerly contained in Subpart G. The Commission has prepared Table 1, which cross-references the new provisions in Subpart C and the renumbered Subpart G to the superseded provisions of Subpart G, and Table 2 which cross-references the superseded provisions of Subpart G to new Subparts C and G.

TABLE 1.—CROSS-REFERENCES BETWEEN NEW SUBPARTS C AND G AND OLD PROVISIONS OF SUBPART G

[NA = no comparable provision in former Subpart G. None = no substantive or editorial change; references to Part 2 sections are corrected]

New section	Old section	Description/modification
Cross-References to New Subpart C		
2.301	2.700a	Paragraph (b) on applicability is removed.
2.302	2.701	Addresses facsimile transmissions and electronic mail.
2.303	2.702	Clarified; no substantive change.
2.304	2.708, 2.709	Addresses electronic mail; modifies format requirements of documents.

TABLE 1.—CROSS-REFERENCES BETWEEN NEW SUBPARTS C AND G AND OLD PROVISIONS OF SUBPART G—Continued

[NA = no comparable provision in former Subpart G. None = no substantive or editorial change; references to Part 2 sections are corrected]

New section	Old section	Description/modification
2.305	2.712	Addresses facsimile and electronic mail. Adds provision requiring service by most expeditious means, and provision on service on NRC staff when not a party. Deletes provisions on proof of service and free copying.
2.306	2.710	Addresses computation of time for electronic mail and facsimile transmissions.
2.307	2.711	Clarified.
2.308	NA	New section on Secretary's duty to forward petitions/requests for hearing to Commission or Chief Judge.
2.309	2.714	Changes requirement for standing; requires filing of contentions with petition/request for hearing. Adds provision with standards for discretionary intervention, and adds provision on time limit for issuance of presiding officer's decision on petitions/requests for hearing.
2.310	NA	New section setting forth criteria for different hearing tracks.
2.311	2.714a	Clarified; adds provision on appeals with respect to selection of hearing procedure.
2.312	2.703	Clarified; adds provision on statement of hearing procedures or subpart for order or notice of hearing.
2.313	2.704	Clarified and reorganized.
2.314	2.713	Simplified and expanded.
2.315	2.715	Clarified; adds requirement for designation of single representative for interested States, local governmental bodies, and affected Federally-recognized Indian Tribes not admitted as parties.
2.316	2.715a	Clarified and simplified; expanded to cover all proceedings.
2.317	2.716, 2.761a	Simplifies provision for establishment of separate hearings; no change to provision on consolidation of proceedings.
2.318	2.717	Conforming changes made to refer to administrative law judge.
2.319	2.718, 2.1233(e)	Clarified; consolidates several provisions relating to authority of presiding officer.
2.320	2.707	None.
2.321	2.721	Conforming changes made to refer to Chief Administrative Judge.
2.322	2.722	None.
2.323	2.730	Clarified and expanded to address motions for referral, reconsideration and certification, and accuracy in filing.
2.324	2.731	None.
2.325	2.732	None.
2.326	2.734	None.
2.327	2.750	Replaces subsection on provision of free transcripts, and adds new provisions on video recordings.
2.328	2.751	None.
2.329	2.752, 2.751a	Consolidates and adds provisions on purpose and objectives of prehearing conferences.
2.330	2.753	None.
2.331	2.755	None.
2.332	NA	New section on case scheduling and management.
2.333	2.757	Clarifies authority of presiding officer, and adds provisions on cross-examination plans as conforming changes.
2.334	NA	New section setting forth schedules for proceedings.
2.335	2.758	Clarifies that paragraph (a) applies to all adjudicatory proceedings.
2.336	NA	New requirement for disclosure of materials.
2.337	2.743(c)–(f), (h), (i)	Consolidates provisions on evidence at hearing; no substantive changes.
2.338	NA	New section on Alternative Dispute Resolution (ADR).
2.339	2.761	None.
2.340	2.760a, 2.764	Consolidates provisions on effectiveness of initial decisions.
2.341	2.786	Clarified; codifies Commission practice of discretionary review of requests for interlocutory appeals; modifies provision on exhaustion of administrative remedies.
2.342	2.788	Modified to include service affected by electronic means.
2.343	2.763	None.
2.344	2.770	None.
2.345	2.771	NRC staff not provided additional time to respond to petitions for reconsideration.
2.346	2.772	Clarified; removes provision on Secretary's authority to extend time for Commission review of a Director's denial under 10 CFR 2.206(c) (now addressed in 2.206(c)).
2.347	2.780	None.
2.348	2.781	Clarified; no substantive change.
2.390	2.790	None.

TABLE 1.—CROSS-REFERENCES BETWEEN NEW SUBPARTS C AND G AND OLD PROVISIONS OF SUBPART G—Continued

[NA = no comparable provision in former Subpart G. None = no substantive or editorial change; references to Part 2 sections are corrected]

New section	Old section	Description/modification
	Cross-References to New Subpart G	
2.700	2.700	Updated to reflect new scope of Subpart G.
2.701	2.700a	Applicability provision in former 2.700a(b) is removed.
2.702	2.720(a)–(h)(1)	Provisions in former 2.720(h)(2) addressing subpoenas of NRC staff transferred to 2.709.
2.703	2.733	No substantive change; new subdividing paragraphs added.
2.704	NA	New mandatory discovery provision analogous to 2.336.
2.705	NA	New mandatory discovery provision analogous to 2.336.
2.706	2.740a, 2.740b	Consolidates without substantive change provisions formerly contained in §§ 2.740a and 2.740b.
2.707	2.741	None.
2.708	2.742	None.
2.709	2.720(h)(2), 2.744	Consolidates provisions formerly contained in §§ 2.720(h)(2) and 2.744.
2.710	2.749	New requirements on timing of summary disposition motions, responses, and presiding officer consideration of the motions.
2.711	2.743	None.
2.712	2.754	None.
2.713	2.760	None.

TABLE 2.—CROSS-REFERENCES BETWEEN OLD PROVISIONS OF SUBPART G AND NEW SUBPART C

[NA = no comparable provision in former Subpart G. None = no substantive or editorial change; references to Part 2 sections are corrected]

Old section	New section	Description/modification
	Cross-References to New Subpart C	
2.700a	2.301	Paragraph (b) on applicability is removed.
2.701	2.302	Addresses facsimile transmissions and electronic mail.
2.702	2.303	Clarified; no substantive change.
2.703	2.312	Clarified; adds provision on statement of hearing procedures or subpart for order or notice of hearing.
2.704	2.313	Clarified and reorganized.
2.707	2.320	None.
2.708, 2.709	2.304	Addresses electronic mail; modifies format requirements of documents.
2.710	2.306	Addresses computation of time for electronic mail and facsimile transmissions.
2.711	2.307	Clarified.
2.712	2.305	Addresses facsimile and electronic mail. Adds provision requiring service by most expeditious means, and provision on service on NRC staff when not a party. Deletes provisions on proof of service and free copying.
NA	2.308	New section on Secretary's duty to forward petitions/requests for hearing to Commission or Chief Judge.
2.713	2.314	Simplified and expanded.
2.714	2.309	Changes requirement for standing; requires filing of contentions with petition/request for hearing. Adds provision with standards for discretionary intervention, and adds provision on time limit for issuance of presiding officer's decision on petitions/requests for hearing.
NA	2.310	New section setting forth criteria for different hearing tracks.
2.714a	2.311	Clarified; added provision on appeals with respect to selection of hearing procedure.
2.715	2.315	Clarified; adds requirement for designation of single representative for interested States, local governmental bodies, and affected Federally-recognized Indian Tribes not admitted as parties.
2.715a	2.316	Clarified and simplified; expanded to cover all proceedings.
2.716, 2.761a	2.317	Simplifies provision for establishment of separate hearings; no change to provision on consolidation of proceedings.
2.717	2.318	Conforming changes made to refer to administrative law judge.
2.718, 2.1233(e)	2.319	Clarified; consolidates several provisions relating to authority of presiding officer.
2.721	2.321	Conforming changes made to refer to Chief Administrative Judge.
2.722	2.322	None.
2.730	2.323	Clarified and expanded to address motions for referral, reconsideration and certification, and accuracy in filing.
2.731	2.324	None.

TABLE 2.—CROSS-REFERENCES BETWEEN OLD PROVISIONS OF SUBPART G AND NEW SUBPART C—Continued

[NA = no comparable provision in former Subpart G. None = no substantive or editorial change; references to Part 2 sections are corrected]

Old section	New section	Description/modification
2.732	2.325	None.
2.734	2.326	None.
2.743(c)–(f), (h), (i)	2.337	Consolidates provisions on evidence at hearing; no substantive changes.
2.750	2.327	Replaces subsection on provision of free transcripts, and adds new provisions on video recordings.
2.751	2.328	None.
2.752, 2.751a	2.329	Consolidates and adds provisions on purpose and objectives of prehearing conferences.
2.753	2.330	None.
2.755	2.331	None.
NA	2.332	New section on case scheduling and management.
2.757	2.333	Clarifies authority of presiding officer, and adds provisions on cross-examination plans as conforming changes.
NA	2.334	New section setting forth schedules for proceedings.
2.758	2.335	Clarifies that paragraph (a) applies to all adjudicatory proceedings.
NA	2.336	New requirement for disclosure of materials.
NA	2.338	New section on Alternative Dispute Resolution (ADR).
2.761	2.339	None.
2.760a, 2.764	2.340	Consolidates provisions on effectiveness of initial decisions.
2.763	2.343	None.
2.770	2.344	None.
2.771	2.345	NRC staff not provided additional time to respond to petitions for reconsideration.
2.772	2.346	Clarified; removes provision on Secretary's authority to extend time for Commission review of a Director's denial under 10 CFR 2.206(c) (now addressed in 2.206(c)).
2.780	2.347	None.
2.781	2.348	Clarified; no substantive change.
2.786	2.341	Clarified; codifies Commission practice of discretionary review of requests for interlocutory appeals; modifies provision on exhaustion of administrative remedies.
2.788	2.342	Modified to include service affected by electronic means.
2.790	2.390	None.
Cross-References to New Subpart G		
2.700	2.700	Updated to reflect new scope of Subpart G.
2.700a	2.701	Applicability provision in former 2.700a(b) is removed.
2.720(a)–(h)(1)	2.702	Provisions in former 2.720(h)(2) addressing subpoenas of NRC staff transferred to 2.709.
2.733	2.703	No substantive change; new subdividing paragraphs added.
NA	2.704	New mandatory discovery provision analogous to 2.336.
NA	2.705	New mandatory discovery provision analogous to 2.336.
2.740a, 2.740b	2.706	Consolidates without substantive change provisions formerly contained in §§ 2.740a and 2.740b.
2.741	2.707	None.
2.742	2.708	None.
2.720(h)(2), 2.744	2.709	Consolidates provisions formerly contained in §§ 2.720(h)(2) and 2.744.
2.749	2.710	New requirements on timing of summary disposition motions, responses, and presiding officer consideration of the motions.
2.743	2.711	None.
2.754	2.712	None.
2.760	2.713	None.

Section 2.300—Scope

This section indicates that the provisions of this subpart apply to all adjudications conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR part 2, unless otherwise specified. Subpart C by its terms does not apply to adjudications conducted under the authority of other statutes or to adjudications provided by the NRC under other parts of title 10 of the Code of Federal Regulations, *e.g.*, procedures governing access to restricted data or national security information or employment clearance under 10 CFR part 10.

Section 2.301—Exceptions

This section indicates that the Commission may use alternative adjudicative procedures where the conduct of military or foreign affairs functions is involved.

Section 2.302—Filing of Documents

This section establishes the alternatives for filing documents with the Commission in Part 2 adjudications, and provides that filing by mail, electronic mail or facsimile is considered complete as of time of

deposit in the mail, or upon electronic mail or facsimile transmission.

Section 2.303—Docket

This section requires the Secretary of the Commission to maintain docket files for each proceeding conducted under Part 2.

Section 2.304—Formal Requirements for Documents; Acceptance for Filing

This section establishes the requirements governing the formatting of documents to be filed in Part 2 adjudications, personal signature of filed documents, the number of copies to be filed with the original, and provides that the NRC may refuse to accept any documents not meeting these requirements.

Section 2.305—Service of Papers, Methods, Proof

This section describes the manner in which documents must be served on the Commission and all parties, and delineates the circumstances under which the Commission will consider service to be complete. Documents which are electronically served by e-mail or facsimile must also be simultaneously served on the Secretary by one of the other methods of service permitted by § 2.305(c). However, such electronic service will be deemed to be by e-mail for purposes of computation of time under § 2.306, unless a party claims that it did not receive the e-mail.

Section 2.305 also states that except for subpoenas, all Commission-issued orders, decisions, notices and other papers will be served upon all parties in a proceeding. Paragraph (f) requires all parties to file all documents that are required to be filed with other parties and the presiding officer, to also be filed upon the NRC staff in proceedings where the NRC staff decides not to participate as a party (as it is permitted to do in certain circumstances under Subparts L, M and N). When the NRC staff informs the presiding officer and parties of its determination not to participate, the NRC staff must designate a person and address for such fillings to be served upon the NRC staff.

Section 2.306—Computation of Time

This section describes how time periods under Part 2 must be computed.

Section 2.307—Extension and Reduction of Time Limits

This section addresses the authority of the Commission and presiding officer to both extend and reduce time limits.

Section 2.308—Treatment of Requests for Hearing/Petitions To Intervene by the Secretary

Section 2.308 is a "housekeeping provision" that describes the action the Secretary of the Commission would take when requests for hearing/petitions to intervene, contentions, answers and replies are received by the Secretary. Under this section, the Secretary would not take action on the merits or substance of the pleadings, but would forward the papers to the Commission or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, as appropriate, for further action.

Section 2.309—Hearing Requests, Petitions To Intervene, Requirements for Standing and Contentions

Section 2.309 establishes the basic requirements for all requests for hearing or petitions to intervene in any NRC adjudicatory proceeding. The section incorporates the basic standing and "one good contention" requirements of existing § 2.714 and applies those requirements to all NRC adjudicatory proceedings, whether formal (Subpart G and J), informal (Subparts L and M), hybrid (Subpart K) or "fast track" (Subpart N).[17]

Standing. The requirements to establish standing for intervention, as set forth in existing § 2.714, continues under § 2.309. For intervention in the proceeding on the licensing of the HLW geologic repository, § 2.309 continues the existing Subpart J requirement that an additional factor—relating to the petitioner's compliance with prehearing disclosure requirements under Subpart J—must be considered in any ruling on intervention. Otherwise, the Commission expects its boards and presiding officers to look to the ample NRC caselaw on standing to interpret and apply this standard. The Commission intends the term, "among other things," in paragraph (d)(3) to mean that it will consider the totality of information made known to it—not just information submitted in the request for hearing/petition to intervene—in determining whether standing exists.

Discretionary Intervention. Under this section, the presiding officer would consider admitting the petitioner as a matter of discretion where the petitioner has failed to establish his or her standing to intervene as-of-right, if the petitioner requests such consideration. In § 2.309(e), the Commission codifies the discretionary intervention factors that were established in its Pebble Springs decision (Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI–76–27, 4 NRC 610 (1976)) and requires a presiding officer or Licensing Board to apply those factors in all cases where a petitioner is found to lack standing to intervene under § 2.309(d) and the petitioner, in the initial petition, has asked for such consideration and addressed the pertinent factors. In this way, the Commission hopes to "underscore the fundamental importance of meaningful public participation in [its] adjudicatory process." *See* N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI–75–1, 1 NRC 1, 2 (1975). Of these criteria, the most important weighing in favor of discretionary intervention is whether the person seeking discretionary intervention has demonstrated the capability and willingness to contribute to the development of the evidentiary record, even though they cannot show the traditional interest in the proceeding. The most important factor weighing against discretionary intervention is the potential to appropriately broaden or delay the proceeding.

Timing of Requests for Hearing/Petitions to Intervene and Contentions. Section 2.309 establishes the requirements for the filing of a petition/hearing request, the content of the request, and the standards that must be met for a late-filed request. For those proceedings for which a Federal Register notice has been published, the requirements are much the same as those in former § 2.714(a)(1), except that § 2.309(b)(1) incorporates the twenty (20) day period for filing of a request for hearing/petition to intervene in license transfer cases governed under Subpart M (the twenty (20) day requirement in former § 2.1306 is deleted by the final rule), § 2.309(b)(2) incorporates the thirty (30) day period for filing of a request for hearing/petition to intervene in proceedings for the licensing of a HLW geologic repository (the thirty (30) day requirement in former § 2.1014 is deleted in the final rule), and section § (b)(3) generally establishes a sixty (60) day period for submission of most requests for hearing/petitions to intervene.

Section 2.309(b)(3)(iii) provides that where a time for submission is not specified in the Federal Register notice, the time period is sixty (60) days from the date of publication in the Federal Register.

For proceedings in which a Federal Register notice is not published, the requirements in § 2.309(b)(4) are derived

[17] Legislative hearings under Subpart O may not be requested by any party, and are held only in the discretion of the Commission. Therefore, Subpart O legislative hearings are not addressed in § 2.309.

from former § 2.1205 but have been supplemented to allow for publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, as providing official notice for purposes of § 2.309(b)(4). Where Federal Register notice is not required by statute or regulation, any notice of agency action (for which an opportunity to request a hearing may be required) published on the portion of the NRC Web site designated as providing official notice for purposes of § 2.309(b)(4) initiates the sixty (60) day period in which timely requests for hearing must be filed.

Regardless of whether notice of the proceeding and opportunity for hearing is required to be published in the Federal Register, all proposed contentions must be filed as part of the initial request for hearing/petition to intervene. The final rule provides a minimum of sixty (60) days from the date of publication (either in the Federal Register or on the NRC Web site) of the notice of opportunity to request a hearing for the filing of requests/petitions to intervene and contentions, except for license transfer cases, for which a period of twenty (20) days is provided, initial authorization to construct a HLW geologic repository and the initial license to receive and posses HLW at a geological repository operations area, for which a period of thirty (30) days is provided. Late-filed requests for hearing/petitions are governed by the criteria set forth in § 2.309(c) (formerly § 2.714(a)(1)(i) through (v)).

Contentions. Section 2.309(f) requires that the petition to intervene include the contentions that the petitioner proposes for litigation along with documentation and argument supporting the admission of the proffered contentions. Paragraphs (f)(1) and (2) of § 2.309 incorporate the longstanding contention support requirements of former § 2.714—no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met. Paragraph (f)(2) addresses the standards for amending existing contentions, or submitting new contentions based upon documents or other information not available at the time that the original request for hearing/petition to intervene was required to be filed. Paragraph (f)(2) incorporates the substance of existing § 2.714 (b)(2)(iii) with regard to new or amended environmental contentions—new or amended environmental contentions may be admitted if the petitioner shows that the new or amended contention is based on data or conclusions in the NRC's environmental documents that differ significantly from the data or conclusions in the applicant's documents. Of course, new or amended environmental documents must be submitted promptly after the NRC's environmental documents are issued. For all other new or amended contentions the rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Include in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the timing of availability of the subsequent information. See § 2.309(f)(2)(iii). This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention become available. Included in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the availability of the subsequent information. See § 2.302(f)(iii). This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available. A significant change, relative to existing requirements, is that the requirement to proffer specific, adequately supported contentions in order to be admitted as a party to the proceeding is extended to informal proceedings under Subpart L, as well as Subparts K, M, and N.

Another significant area of change is where two or more requestors/petitioners seek to co-sponsor a contention, and where a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/intervenor. Under § 2.309(f)(3), requestors/petitioners cosponsoring a contention must jointly designate a representative who shall have the authority to act for all requestors/petitioners. Similarly, if a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/intervenor, the requestor/petitioner must agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention. If the sponsoring party is subsequently dismissed from the proceeding for reasons other than resolution of its contentions, the party who adopted the contention may continue to pursue the contention, or seek dismissal.

Appropriate Hearing Procedures. Section 2.309(g) requires that the request for hearing/petition to intervene address the question of the type of hearing procedures (*e.g.*, formal hearings under Subpart G, informal hearings under Subpart L, "fast track" informal procedures under Subpart N) that should be used for the proceeding. This is not a requirement for admission as a party to the proceeding, but a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling. In addition, the final rule requires that if the requestor/petitioner asks for a formal hearing on the basis of § 2.310(d), the request for hearing/petition to intervene must demonstrate, by reference to the contention and the bases provided and the specific procedures in Subpart G, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

State and Local Governments and Affected Indian Tribes. Section 2.309(d)(2) addresses the participation of States, local governmental bodies, and affected, Federally-recognized Indian Tribes as parties in NRC adjudicatory proceedings. The final rule continues the existing requirement in § 2.1014(c) that a State, local governmental body, or affected Federally-recognized Indian Tribe who wishes to be a party in a HLW geologic repository proceeding must file at least one good contention. A significant change, relative to the former requirement in § 2.714, is that a State, local governmental body, or affected Federally-recognized Indian Tribe who wishes to be a party in a proceeding for a facility which is located within its boundary are explicitly relieved of the obligation to demonstrate standing in order to be admitted as a party. A State, local governmental body, or Federally-recognized Indian Tribes who wishes to be a party in a proceeding for a facility which is not located within its boundary must address standing. However, a State, local governmental body, or Federally-recognized Indian Tribe which is adjacent to a facility or, for example, has responsibilities as an offsite government for purposes of emergency preparedness, and presents such information in its request/petition, would ordinarily be accorded standing.

Another significant change from the requirements of former § 2.714 is that under § 2.309(d)(2) each State, local governmental body, and Federally-recognized Indian Tribe who wishes to be a party in a proceeding must each designate a single representative in the proceeding (an analogous requirement requiring "interested" States, local governmental bodies, and Federally-recognized Indian Tribes to each

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designate a representative is included in § 2.315(c) of the final rule). Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate potential parties. Each must separately satisfy the relevant contention requirement, and each must designate its own representative (that is, the Governor must designate a single representative, and the State official must separately designate a representative).

The Commission has deleted the language in the second sentence of the proposed § 2.309(d)(ii) regarding identifying contentions on which a State, local governmental body or Federally-recognized Indian Tribe "wishes to participate," inasmuch as that provision applies only to "interested" States, local governmental bodies, and Federally-recognized Indian Tribes under § 2.315(c).

Answers and Replies. Section 2.309(h) allows the applicant or licensee and the NRC staff twenty-five (25) days to file written answers to requests for hearing/petitions to intervene and contentions, and allows the petitioner to file a written reply to the applicant/licensee and staff answers within seven (7) days after service of any answer. No other written answers or replies will be entertained.

Decision on Request/Petition. Section 2.309(i) is a new provision that requires the presiding officer to render a decision on each request for hearing/petition to intervene within forty-five (45) days after the filing of all answers and replies under paragraph (h) of this section. If additional time is needed, § 2.309(i) permits the presiding officer to seek an extension from the Commission.

Section 2.310—Selection of Hearing Procedures

Section 2.310 of the final rule sets forth the criteria to be applied by the Commission, a presiding officer, or an Atomic Safety and Licensing Board in determining the hearing procedures to be utilized in the proceeding. Unless otherwise provided in § 2.310, proceedings involving hearings on the grant, renewal, licensee-initiated amendment or termination of licenses and permits subject to 10 CFR Parts 30, 32 through 35, 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 must ordinarily use Subpart L procedures. Thus, Subpart L procedures will be used, as a general matter, for hearings on nuclear power reactor construction permit and operating license applications under Parts 50 and 52, nuclear power reactor license renewal applications under Part 54, nuclear power reactor license amendments under Part 50, reactor operator licensing under Part 55, and nearly all materials and spent fuel storage licensing matters.

Subpart G procedures will ordinarily be used in four types of proceedings: Proceedings on the construction and operation of uranium enrichment facilities (required by Section 193 of the AEA to be a formal, "on-the-record" adjudication), proceedings on enforcement matters (unless all parties agree to use other procedures such as Subpart L), proceedings for the initial authorization to construct a HLW geologic repository, and proceedings for the initial issuance of a license to receive and possess HLW at a HLW geologic repository.

In addition, the final rule provides that Subpart G procedures will be used in licensing proceedings for nuclear power reactors if the Commission or presiding officer finds, based upon the materials submitted in the request for hearing/petition to intervene under § 2.309, that resolution of a proposed contention requires resolution of: (1) Issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of a party or eyewitness material to the resolution of the contested matter. The first criterion contains two elements: The first is that there is a dispute of material fact concerning the occurrence of (including the nature or details of) a past activity. This includes situations where all parties agree that an activity occurred (*e.g.*, a conversation between a worker and a supervisor), but there is disagreement over the details of the activity (*e.g.*, the worker alleges that the supervisor directed him/her to do an illegal act and the supervisor denies the allegation). However, this element does not include the testimony of any expert witness who has no first hand knowledge of the activity, inasmuch as the expert is simply providing an opinion based upon the testimony of others, and cross-examination in particular of the expert witness is not necessary to evaluate the weight to be given to his or her opinion. The second element is that the credibility of the eyewitness may reasonably be expected to be at issue. Examples of such credibility disputes include whether the eyewitness possessed the physical capability to experience the activity, or whether the eyewitness accurately describes the activity. This does not include disputes between parties over the qualifications and professional "credibility" of expert witnesses who have no first-hand knowledge of the disputed event/facts. Subpart G procedures such as cross-examination are not necessary for parties to effectively challenge the qualifications and professional "credibility" of an expert.

The second alternative criterion for determining whether Subpart G procedures should be used in a proceeding is whether the contention/contested matter necessarily requires a consideration and resolution of the motive or intent of a party or eyewitness. For example, a contention alleging deliberate and knowing actions to violate NRC requirements by an applicant's representative necessarily requires resolution of the motive or intent of the applicant and its representative. Application of Subpart G procedures should be considered in such circumstances. By contrast, disputes over the motive or intent of an expert witness who was not an eyewitness are not relevant in determining whether to apply Subpart G procedures, inasmuch as such issues are not relevant to the decision criteria of the presiding officer (*e.g.*, whether the contested application meets NRC requirements), and may easily be addressed in written filings and oral argument.

If a presiding officer determines that a contention meets the criteria in § 2.310(d), resolution of that contention will proceed using Subpart G procedures. To facilitate orderly conduct of the Subpart G hearing where there are several contentions meeting § 2.310(d), the presiding officer should schedule the resolution of the contentions in parallel. If the presiding officer has determined that one or more admitted contentions do not meet the criteria in § 2.310(d), those contentions will be resolved by the presiding officer in a separate Subpart L hearing. Parties admitted only with respect to contentions to be resolved under Subpart L hearing procedures do not have any right to participate in the Subpart G hearing, and parties admitted only with respect to contentions to be resolved using Subpart G hearing procedures do not have any right to participate in the Subpart L hearing.

The special hybrid hearing procedures in Subpart K continue to apply to hearings in proceedings on the expansion of spent fuel storage capacity at civilian nuclear power reactors. Similarly, the special informal hearing procedures in Subpart M continue to apply to hearings in proceedings on reactor or material license transfers.

New, informal "fast-track" procedures in Subpart N may be used by direction of the Commission if the proceeding is expected to take no more than two (2) days to complete, or if all parties agree to the use of the "fast-track" procedures.

The Commission has added a new Subpart O that provides for procedures to be used if the Commission decides to hold "legislative hearings." The legislative hearing procedures would be used in any design certification rulemaking hearings which the Commission in its discretion determined to hold under § 52.51(b). Conforming changes to § 52.51(b) are made to remove the hearing procedures currently contained in paragraph (b) of § 52.51. The legislative hearing procedures in Subpart O could be used at the Commission's discretion in developing a record to assist the Commission in resolving, under § 2.335(d), a petition filed under § 2.335(b).

Section 2.311—Interlocutory Review of Rulings on Requests for Hearing/ Petitions To Intervene and Selection of Hearing Procedures

Section 2.311 continues unchanged the provision in former § 2.714a that limits interlocutory appeal of rulings on requests for hearing and petitions to intervene to those that grant or deny a petition to intervene. However, paragraph (d) represents a new provision dealing with appeals of orders selecting hearing procedures. Appeals must be filed within ten (10) days of the order selecting hearing procedures, and the sole grounds for appeal is that the selection of hearing procedure was in contravention of the applicable criteria in § 2.310.

Section 2.313—Designation of Presiding Officer, Disqualification, Unavailability, and Substitution

Section 2.313 addresses who may be designated as a presiding officer in hearing tracks. In general, unless the Commission designates otherwise, the Chief Administrative Judge may designate either an Atomic Safety and Licensing Board or an administrative law judge as the presiding officer for a hearing conducted under Subparts G, J, K, L, or N, and may designate either an Atomic Safety and Licensing Board, an administrative law judge, or an administrative judge as the presiding officer for a hearing conducted under Subpart M. The Commission alone has authority to decide who shall be a presiding officer in a Subpart O hearing.

Section 2.313 also addresses the disqualification, unavailability and substitution of a presiding officer, and continues without substantive change the comparable provisions on disqualification, unavailability, and substitution of a presiding officer (including a member of a Licensing Board) in former § 2.704.

Section 2.314—Appearance and Practice Before the Commission in Adjudicatory Proceedings

Section 2.314 simplifies and expands the existing provisions in §§ 2.713 and 2.1215 on appearance and representation in NRC adjudications. For example, the new rule requires all persons appearing in a representative capacity to file a notice of appearance providing a facsimile number, and an e-mail address, if the person possesses either or both.

Section 2.315—Participation by a Person Not a Party

This section continues largely unchanged the provisions in former § 2.715(a) and (b). However, several clarifying changes have been made in the language of this section. For example, in paragraph (a), a sentence has been added to clarify that statements of position submitted by a person who is not a party shall not be considered evidence in the proceeding. In paragraph (d), the language has been clarified to make clear that the motion for leave to file an amicus brief may be submitted with the amicus brief itself. Regardless of the nature of participation by a person who is a non-party, that person does not possess any of the rights and privileges of a person who has attained the status of a party, including taking an appeal to the Commission, or to judicial review of an agency final decision.

Substantial changes have been made to § 2.315(c), in part to use language which is consistent with the final version of § 2.309(d), and to reflect the Commission's determination that interested States, governmental bodies (counties, municipalities or other subdivisions) and affected Federally-recognized Indian Tribes must identify prior to the commencement of the hearing the contentions on which they wish to participate. Also, the final rule, unlike existing § 2.715(c), requires each interested State, governmental body and Indian Tribe to designate a single representative for the proceeding; the Commission will no longer permit multiple agencies or offices within a political entity to separately participate under § 2.315(c).

Section 2.316—Consolidation of Parties

This section clarifies the language in former § 2.715a regarding consolidation of parties, and expands the applicability of the section from construction permit and operating license proceedings for production and utilization facilities under the former rule, to all proceedings.

Section 2.317—Separate Hearings; Consolidation of Proceedings

This section expands upon the general concept in existing § 2.761a that separate hearings may be appropriate in certain instances. In addition, this section incorporates without change the provisions for consolidation of proceedings currently in § 2.716.

Section 2.318—Commencement and Termination of Jurisdiction of Presiding Officer

This section continues without change the existing provisions in § 2.717 with respect to the commencement and termination of the jurisdiction of a presiding officer. A conforming change is made to § 2.107, "Withdrawal of application," to clarify that the Commission shall dismiss a proceeding when an application has been withdrawn before a notice of hearing has been issued.

Section 2.319—Power of the Presiding Officer

This section consolidates provisions in former § 2.718 and § 2.1233(e), and identifies the authority and powers of the presiding officer. Although the substance of the regulation remains unchanged, in some cases the regulation was clarified. For example, the language in § 2.319(d) derived from former § 2.718(c) was expanded to make clear the presiding officer's power to strike any portion of a written presentation that is cumulative, irrelevant, immaterial or unreliable. In other instances, the regulation includes a provision that identifies a power that presiding officers have always possessed, but was not specifically identified in the former regulation. For example, § 2.319(c) was added to make clear the presiding officer's power to consolidate parties and proceedings, which were formerly addressed in §§ 2.715a and 2.716.

Section 2.320—Default

Section 2.320 establishes the circumstances under which a presiding officer may declare a default, and describes the actions that may be taken upon a default. This section continues without change the provisions that were formerly in § 2.707.

Section 2.321—Atomic Safety and Licensing Boards

This section addresses the Commission's establishment of Atomic Safety and Licensing Boards, and states the general authority of these boards to exercise the powers granted to presiding officers under § 2.319, as well as any other powers as enumerated in Part 2. The quorum requirements of a Licensing Board, as well as the authority of the Chief Administrative Judge to exercise powers with respect to a proceeding when a board is not in session are also set forth. This section continues without change the provisions that were formerly in § 2.721.

Section 2.322—Special Assistants to the Presiding Officer

Section 2.322 authorizes a presiding officer (including an Atomic Safety and Licensing Board), after consultation with the Chief Administrative Judge, to appoint special assistants to assist the presiding officer in taking evidence and preparing a suitable record for review. This section restates the provisions of former § 2.722 without change.

Section 2.323—Motions

This section incorporates the substance of existing § 2.730 in Subpart G on the general form, content, timing, and requirements for motions and responses to motions. The final rule departs from former § 2.730 by establishing a "compelling circumstances" standard for evaluating motions for reconsideration. Such circumstances include the "existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid" (this standard is also reflected in § 2.345(b)). Section 2.323 also addresses referral of rulings and certified questions by the presiding officer to the Commission. With regard to referrals, § 2.323(f) provides for referrals of decisions or rulings where the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. Section 2.323 also differs from the existing requirements by including a specific provision in paragraph (f)(2) which allows any party to file with the presiding officer a petition for certification of issues for early Commission review and guidance.

Section 2.324—Order of Procedure

This section addresses the authority of the presiding officer and Commission to designate the order of procedures in a hearing, and provides that the proponent of an order will ordinarily open and close. This section restates the provisions of § 2.731 without change.

Section 2.325—Burden of Proof

This section provides that unless the presiding officer orders otherwise, the applicant or the proponent of an order bears the burden of proof (risk of non-persuasion). This section restates the provisions of § 2.732 without change.

Section 2.326—Motions To Reopen

This section governs the procedure, timing and criteria governing motions to reopen a closed record. This section restates the provisions of § 2.734 without change.

Section 2.327—Official Reporter; Transcript

This section governs the creation, correction and availability of official transcripts of NRC hearings. This section restates the provisions of § 2.750, but removes the provision on free transcripts.

Section 2.328—Hearings To Be Public

This section requires that all hearings be public, unless otherwise requested under Section 181 of the AEA. This section restates the provisions of § 2.751 without change.

Section 2.329—Prehearing Conference

This section addresses the scheduling and matters to be addressed in a prehearing conference. The prehearing conference is the primary tool by which the Commission or presiding officer, as applicable, will provide effective management of the proceeding. This section incorporates provisions in § 2.752 and § 2.751a, and eliminates reference to a "special prehearing conference" in production and utilization facility construction permit and operating license proceedings. Some of the provisions in those sections have been combined and clarified.

Section 2.330—Stipulations

This section addresses the use of stipulations, which the Commission encourages to focus the hearing on the contested matters between the parties. This section restates the provisions in § 2.753 without change.

Section 2.331—Oral Argument Before the Presiding Officer

This section addresses the authority of the presiding officer to determine whether oral argument will be held on any matter, and to set time limits on the oral argument. This section restates the provisions in § 2.755 without change.

Section 2.332—General Case Scheduling and Management

This section addresses general case scheduling and management. It requires a presiding officer to consult with the parties early in the proceeding in order to set schedules, establish deadlines for discovery and motions, where appropriate, and set the ground rules for the control and management of the proceeding. The section also addresses integration of the NRC staff's preparation of its safety and environmental review documents into the hearing process schedules.

Section 2.333—Authority of the Presiding Officer To Regulate Procedure in a Hearing

This section sets forth the general authority of the presiding officer to regulate the procedure in a hearing, to ensure that argumentative, repetitious, cumulative, irrelevant, unreliable, and immaterial evidence is not introduced into the record, and to provide for an orderly and expeditious conduct of the hearing.

Section 2.334—Schedules for Proceedings

Section 2.334 codifies the guidance in the Commission's 1998 Statement of Policy on the Conduct of Adjudicatory Proceedings that suggested that presiding officers should establish and maintain "milestone" schedules for the completion of hearings and the issuance of initial decisions. The section requires a presiding officer to establish a hearing schedule, and to notify the Commission if there are slippages that would delay the issuance of the initial decision more than sixty (60) days from the date established in the schedule. The notification must include an explanation of the reasons for the delay and a description of the actions, if any, that can be taken to avoid or mitigate the delay.

Section 2.335—Consideration of Commission Rules and Regulations in Adjudicatory Proceedings

This section, which was formerly designated § 2.758, governs situations where a party contends that an NRC rule or regulation should not be applied, or otherwise attempts to challenge the validity of the rule or regulation. No changes have been made to the regulatory language. However, the Commission notes that it has adopted a new Subpart O, "Legislative Hearings," which provides the Commission with the option to conduct a "legislative hearing" to, *inter alia*, assist it in resolving a question certified to it by the presiding officer under § 2.335(d).

Section 2.336—General Discovery

Section 2.336 generally imposes a disclosure requirement on all parties except the NRC staff, whose disclosure obligations are addressed in 2.336(b)) in all proceedings under Part 2, except for proceedings using the procedures of Subparts G and J. This generally applicable discovery provision requires each party to disclose and/or provide the identity of witnesses and copies of the analysis or other authority upon which that person bases his or her opinion. The duty of disclosure continues during the pendency of the proceeding. If a document, data compilation, or tangible thing required to be disclosed is publicly available from another source such as at the NRC Web site, *http://www@nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing. Section 2.336(b) sets forth the disclosure obligations of the NRC staff, regardless of whether it is a party. The discovery required by § 2.336 constitutes the totality of the discovery that may be obtained in informal proceedings. The final rule makes clear that the mandatory disclosure obligations of the NRC staff in § 2.336 do not apply in Subpart J proceeding, unless the Commission, presiding officer, or Atomic Safety and Licensing Board specifically orders. Section 2.336 authorizes the presiding officer to impose sanctions against parties who fail to comply with this general discovery provision, including prohibiting the admission into evidence of documents or testimony that a party failed to disclose as required by this section unless there was good cause for the failure (this sanction is similar to that provided in the rules of practice of the Environmental Protection Agency, 40 CFR 22.19(a), 22.22(a)).

Section 2.337—Evidence at a Hearing

This section contains the provisions relating to evidence that were formerly in § 2.743(c)–(f), (h)–(i), relating to admissibility of evidence, offering of objections, offers of proof, receipt of exhibits into evidence, keeping of the official record, and criteria for obtaining official notice.

Section 2.377(g) governs the need for admission of NRC staff documents into the hearing record, and replaces the provisions in former § 2.743(g). Section 2.337(g)(1) provides that in proceedings involving an application for a facility construction permit, the NRC staff shall offer into evidence the ACRS report,[18] the NRC's safety evaluation, and the environmental impact statement (EIS) prepared under 10 CFR Part 51. In proceedings involving applications other than a construction permit for a production or utilization facility where the NRC staff is a party, § 2.337(g)(2) requires the NRC staff to offer into evidence any ACRS report on the application, at the discretion of the NRC staff the safety evaluation prepared by the staff and/or testimony and evidence on the contention/controverted matter, any NRC staff position on the contention/controverted matter provided to the presiding officer under § 2.1202(a)(*see* the fourth item below), and the EIS or environmental assessment (EA) if there are matters in controversy with respect to the adequacy of the EIS or EA. If the NRC staff is not a party in such proceedings (as it may choose under, *e.g.*, Subpart L), the NRC staff shall offer into evidence, together with a sponsoring witness (except in the case of the ACRS report[19]), any ACRS report on the application, at the discretion of the NRC staff the NRC staff's safety evaluation and/or testimony and evidence on the contention/controverted matter, any statement of position on the contention/controverted matter in controversy provided to the presiding officer (*see* the fourth item below), and the EIS or environmental assessment (EA) if there are matters in controversy with respect to the adequacy of the EIS or EA. However, the NRC staff is not to be treated as a party solely due to its sponsoring these documents for admission into the record of the proceeding, analogous to its role in a Subpart M proceeding where the NRC staff is not required to be a party but must nonetheless offer into evidence with a sponsoring witness the SER associated with the proposed license transfer.

Section 2.338—Settlement of Issues; Alternate Dispute Resolution

Section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement (10 CFR 2.203, 2.759, 2.1241). Section 2.338 describes the required form and content of settlement agreements and provides guidance on the use of settlement judges as mediators in NRC proceedings. The Commission intends no change in the bases for accepting a settlement under the new rule.

Section 2.339—Expedited Decisionmaking Procedure

This section, formerly designated § 2.763, has not been substantively changed.

Section 2.340—Initial Decision in Contested Proceedings on Applications for Facility Operating Licenses

This section consolidates provisions on the effectiveness of initial decisions which were formerly in §§ 2.760a and 2.764. No substantive changes were made to the provisions, but conforming changes were made to reference the applicable provisions of new Subpart C that were formerly in Subpart G.

Section 2.341—Review of Decisions and Actions of a Presiding Officer

This section essentially restates former § 2.786. However, paragraph (f) clarifies that the Commission will entertain in its discretion petitions by a party for review of an interlocutory matter in the circumstances described in paragraph (f). This is consistent with the current Commission practice under former § 2.786. Minor changes are also being made to give guidance on the form and content of briefs. For example, the final rule increases the number of pages permitted for a petition for review of a decision of a presiding officer and any replies to the petition, from the current limit of ten (10) pages to twenty-five (25) pages.

Section 2.342—Stays of Decisions

This section describes the procedures and the standards for granting stays of decisions by a presiding officer (including decisions where the Commission is acting as the presiding officer). No substantive changes have been made to this provision, which was formerly designated § 2.788.

Section 2.343—Oral Argument

No substantive changes have been made to this provision, which was formerly designated § 2.763.

Section 2.344—Final Decision

No substantive changes have been made to this provision, which was formerly designated § 2.770.

Section 2.345—Petition for Reconsideration

This section continues largely unchanged the provisions in former § 2.771, but no longer provides the NRC staff with two additional days to file a reply brief. The NRC staff would be treated as any other party and have ten

[18] Although the NRC staff must offer the ACRS report into evidence, the NRC staff neigher sponsors the report nor is repsonsible for defending the content of the report, inasmuch as the ACRS is an independent advisory committee to the Commission.

[19] *See* prior footnote.

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(10) days to file a reply brief to a petition for reconsideration.

Section 2.346—Authority of the Secretary

This section sets forth the authority of the Secretary to act for the Commission on matters designated in this section. It differs from its predecessor (§ 2.772) by clarifying some of the matters on which the Secretary may act, and no longer addresses the Secretary's authority to extend the time for Commission review of Director's Decisions under § 2.206 (this is now addressed in revised § 2.206(c)).

Section 2.347—Ex Parte Communications

This section sets forth the limitations on ex parte communications between interested persons and NRC adjudicatory employees. No substantive changes have been made to this provision, which was formerly designated § 2.780.

Section 2.348—Separation of Functions

This section sets forth the requirements applicable to the NRC in order to maintain separation of functions within the NRC. No change has been made to this provision, which was formerly designated § 2.781.

Section 2.390—Public Inspections, Exemptions, Requests for Withholding

This section, which was formerly designated § 2.790, sets forth provisions of generic applicability concerning the public's access to information which apply irrespectively of whether there is an NRC proceeding. Following the publication of the proposed amendments to Part 2, the Commission adopted a final rule amending § 2.790 to revise the procedures regarding the submission and agency handling and disclosure of proprietary, confidential, and copyrighted information (68 FR 18836; Apr. 17, 2003). Section 2.390 now incorporates these amendments. The final rule also reflects the addition of a footnote to paragraph (a), which provides that "final NRC records and documents" do not include handwritten notes, nor do they include any drafts. Drafts which are protected from disclosure include documents prepared by NRC personnel, as well as documents prepared by contractors retained by the NRC.

6. Subpart G—Sections 2.700–2.713

Subpart G is a specialized hearing track containing the Commission's procedures for the conduct of on-the-record adjudicatory proceedings. Provisions of general applicability have been removed from Subpart G and transferred to new Subpart C. Most of the remaining provisions have been restated without change except for renumbering and internal cross-reference changes. Some provisions have been amended to better reflect current Commission policy regarding the conduct of adjudicatory proceedings and current Federal practice, for example, with respect to discovery. Subpart G (as with all other specialized hearing tracks) is to be used in conjunction with the rules of general applicability contained in Subpart C. Following is a section-by-section analysis of Subpart G.

Section 2.700—Scope of Subpart G

This section reflects the revised applicability of this Subpart to a limited set of proceedings for which formal adjudicatory procedures may be used.

Section 2.701—Exceptions

This section indicates that the Commission may use alternative adjudicative procedures where the conduct of military or foreign affairs functions is involved.

Section 2.702—Subpoenas

Section 2.702 is fundamentally a restatement of former § 2.720(a)–(h)(1).

Section 2.703—Examination by Experts

This section restates, with one exception, the requirements in former § 2.733 regarding the use of experts to examine and cross-examine witnesses of other parties. However, consistent with § 2.711(c), which authorizes the presiding officer to require filing of cross-examination plans, the Commission believes that a party seeking permission to use an expert to conduct cross-examination should file a proposed cross-examination plan in accordance with § 2.711(c).

Section 2.704—Discovery—Required Disclosures

New §§ 2.704 and 2.705 revise the general provisions for discovery in Subpart G proceedings, except for discovery against the NRC staff. These new discovery provisions, which are analogous to the disclosure provisions in § 2.336, provide for the prompt and open disclosure of relevant information by the parties, without resort to formal processes, unless intercession by the presiding officer becomes necessary. Section 2.704 sets forth the disclosures that all parties must make to other parties; a party need not file a request for the information required to be disclosed under § 2.704.

Section 2.705—Discovery—Additional Methods

Section 2.705 sets forth the additional methods of discovery that are permitted. It is expected that the new regulations would eliminate or substantially limit the need for formal discovery in adjudicatory proceedings, and at the same time, make explicit the presiding officer's authority to limit the scope and quantity of discovery in a particular proceeding, should the need arise.

Sections 2.706—Depositions Upon Oral Examination and Upon Written Interrogatories; Interrogatories to Parties

This section consolidates, without substantive change, the provisions regarding depositions and interrogatories that were formerly addressed in § 2.740a and § 2.740b.

Section 2.707—Production of Documents and Things; Entry Upon Land for Inspections and Other Purposes

This section restates the provisions in former § 2.741 with minor clarifying and grammatical corrections, and revised references to sections in Subparts C and G.

Section 2.708—Admissions

This section restates the provisions in former § 2.742 without substantive change.

Section 2.709—Discovery Against the NRC Staff

This section consolidates former §§ 2.720(h)(2) and 2.744, both of which addressed discovery against the NRC. The need for formal discovery against the NRC staff should be minimal, in view of the Commission's general policy of making all available documents public (*see, e.g.*, 10 CFR 9.15), subject only to limited restrictions (*e.g.*, those needed to protect enforcement, proprietary information, under 10 CFR 9.17). Except for the foregoing, the substantive aspects of the former regulations are unchanged.

Section 2.709 provides that when the NRC is a party, the Executive Director for Operations (EDO) will designate the NRC staff personnel to perform a number of functions relevant to the conduct of the proceeding, including answering written interrogatories and being witnesses for oral hearing or deposition (as applicable). As is the current practice, the EDO may delegate this function to a person or persons designated by the EDO.

Section 2.710—Motions for Summary Disposition

Section 2.710 generally retains the former provisions of § 2.749 regarding summary disposition. However, § 2.710 requires that summary disposition motions be filed within twenty (20) days of the close of discovery; responses to motions must be filed twenty (20) days thereafter. The final rule requires the presiding officer to address the summary disposition motion within 40 days after the last response to the motion is filed, and delineates the presiding officer's options for addressing the motion. Apart from deciding the motion, the presiding officer is given discretion not to consider a motion for summary disposition unless he or she determines that resolution of the motion will serve to expedite the proceeding. The presiding officer may also summarily dismiss or hold in abeyance any untimely summary disposition motions filed shortly before or during the oral hearing, if the presiding officer determines that substantial resources must be diverted from the hearing to adequately address the motion.

Section 2.711—Evidence

This section restates the requirements in former § 2.743 without change.

Section 2.712—Proposed Findings and Conclusions

This section continues, without change, the provisions of former § 2.754 regarding the requirement for the submission of proposed findings of fact and conclusions of law following completion of a formal hearing.

Section 2.713—Initial Decision and Its Effect

This section restates the requirements in former § 2.760 without change.

7. Subpart I—Sections 2.900–2.913

Section 2.901 has been revised to specify that the procedures for handling Restricted Data and National Security Information in Subpart I apply to proceedings under subparts G, J, K, L, M, and N.

The definition of "party" for this subpart has been amended to refer to §§ 2.309 and 2.315. No substantive change is intended by the corrected references.

8. Subpart J—Sections 2.1000–2.1027

The Commission is making a number of changes to §§ 2.1000, 2.1001, 2.1010, 2.1012, 2.1013, 2.1014, 2.1015, 2.1016, 2.1018, 2.1019, 2.1021, and 2.1023. The changes are intended to: (1) Correct references to rules of general applicability in former provisions of Subpart G that are being transferred to Subpart C, and (2) eliminate redundant or duplicate provisions in Subpart J that would be covered by the generally applicable provisions in Subpart C. Because these are conforming changes, a section-by-section analysis of the revisions to Subpart J is not provided.

9. Subpart K—Sections 2.1101–2.1119

Subpart K continues to be the Commission's specialized hearing track for contested proceedings on licenses or license amendments to expand spent fuel storage capacity at a civilian nuclear power plant site. Subpart K is to be used in conjunction with the rules of general applicability in Subpart C. Following is a section-by-section analysis of the revisions to Subpart K.

Section 2.1109—Requests for Oral Argument

This section is modified to clarify that a hearing on any contentions that remain after the oral argument under Subpart K will be conducted using the hearing procedures of Subpart L.

Section 2.1111

This section is removed and reserved for future use.

Section 2.1113—Oral Argument

Paragraph (a) of this section requires each party to submit a summary of the facts, data, and arguments which the party proposes to rely upon in the oral argument addressing whether the criteria in § 2.1115(b) have been met for holding an adjudicatory hearing, as well as all supporting facts and data in the form of sworn written testimony or written statements. These submissions must be made to the presiding officer and simultaneously on all other parties no later than twenty-five (25) days before the oral argument is scheduled. Paragraph (b) permits, but does not require, a party to submit a reply to the written summaries, facts, data and arguments; this reply must be filed on the presiding officer and simultaneously on all other parties no later than ten (10) days before the oral argument is scheduled. Paragraph (c) retains the requirements in former § 2.1113(b) without change.

Section 2.1117—Burden of Proof

This section states that while the applicant for the spent fuel pool expansion license amendment bears the ultimate burden of proof (risk of non-persuasion) on admitted contentions, the proponent of an adjudicatory hearing bears the burden of demonstrating that the criteria in § 2.1115(b) have been met and thus, an adjudicatory hearing should be held.

Section 2.1119—Applicability of Other Sections (§ 2.1117 in Proposed Rule)

This section is modified to add a reference to new Subpart C. By cross-referencing Subpart C, the Commission intends to make clear that the generally-applicable provisions of that Subpart, which are not addressed by more specific provisions in Subpart K, apply throughout a Subpart K proceeding. For example, the provisions in § 2.335 for directed certification of a Licensing Board determination of a petition on application of a Commission rule or regulation applies throughout the Subpart K proceeding, including the oral hearing and the presiding officer's determination under § 2.1115.

10. Subpart L—Sections 2.1200–2.1213

Subpart L constitutes the Commission's generally-applicable hearing procedure to be used in most proceedings unless one of the more specialized hearing tracks, *e.g.*, Subparts G, J, K, M, or N, applies. Subpart L is to be used in conjunction with the rules of general applicability contained in Subpart C.

The hearing procedures in this subpart are patterned after the Subpart M provisions on license transfers, but have been modified and supplemented to provide for a more generic hearing procedure as compared to Subpart M. The Subpart L procedures shift the focus to more informal oral hearings (*e.g.*, record developed through oral presentation of witnesses who are subject to questioning by the presiding officer), although all parties could agree to conduct the hearing based solely upon written submissions. Following is a section-by-section analysis of the revisions to Subpart L.

Section 2.1200—Scope of Subpart

Section 2.1200 indicates that Subpart L may be applied to all NRC adjudicatory proceedings except proceedings on the licensing of the construction and operation of a uranium enrichment facility, proceedings on an initial application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, proceedings on enforcement matters unless all parties otherwise agree and request the application of Subpart L procedures, and proceedings for the

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direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.

Section 2.1201—Definitions

Section 2.1201 provides that Subpart L has no unique definitions but relies on the definitions in existing § 2.4.

Section 2.1202—Authority and Role of NRC Staff

Section 2.1202 describes the authority and role of the NRC staff in the informal hearings under Subpart L. Similar to the situation in license transfer cases under Subpart M, the NRC staff would be expected to conduct its own reviews and take action on the application or matter that is the subject of the hearing, despite the pendency of the hearing. Section 2.1202(a) requires the NRC staff to provide notice to the presiding officer of the NRC staff's action on the application or the underlying regulatory matter for which a hearing was provided, as applicable. The notice must include the staff's explanation why it may take action on the application or the underlying regulatory matter despite the pendency of the contested matter before the presiding officer. In licensing proceedings, that explanation should ordinarily address why the public health and safety is protected and common defense and security is promoted despite the pendency of the contested matter. In no event, however, should the staff's explanation set forth a position on, or otherwise assume an advocacy position with respect to the contested matter in the adjudication before the presiding officer. The NRC staff's action on the application or matter would be effective upon issuance except in matters involving an application to construct or operate a production or utilization facility, an application for amendment to a construction authorization for a HLW repository, an application for the construction and operation of an independent spent fuel storage installation or monitored retrievable storage facility located away from a reactor site, and production or utilization facility licensing actions that involve significant hazards considerations. Under § 2.1213, the NRC staff's action would be subject to motions for stay.

Section 2.1202(b) also provides, consistent with § 2.310, that the NRC staff may decide whether to participate as a party to most proceedings conducted under Subpart L but would be required to be a party in enforcement proceedings, in a proceeding where the NRC staff has denied (or proposes to deny) an application, and in a proceeding where the presiding officer determines that the resolution of any issue would be aided materially by the NRC staff's participation as a party. At the commencement of a proceeding, if the NRC staff decides to participate as a party, § 2.1202(b)(2) requires the NRC staff to notify the presiding officer and parties of its intent to participate as a party and the contentions on which it wishes to participate as a party within 15 days of the order granting requests for hearing/petitions to intervene and admitting contentions. If the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice. Although the NRC staff should have continuing flexibility to enter a hearing as a party, it should not be permitted to make a delayed decision in order to avoid its disclosure obligations under § 2.336(b). In addition, the NRC staff must take the proceeding in whatever posture the hearing may be at the time that it chooses to participate as a party.

Section 2.1203—Hearing File and Prohibition on Other Discovery

Section 2.1203 requires the NRC staff to prepare and provide a hearing file and to keep the hearing file up-to-date by placing relevant documents such as the SER into the file as they become available. However, the Staff's obligation to place documents into the hearing file, by itself, has no significance with respect to the hearing schedule, and the unavailability of a staff-prepared document which is unnecessary for resolution of a contested matter must not affect the schedule for resolution.

Although the NRC has the capability to receive electronic files and make them available at the NRC's Web site, there is currently no requirement to submit documents in electronic form. Furthermore, the bulk of some electronic files, *e.g.*, files of nuclear power plant license applications, may be impractical to be available for electronic access and download, given current technologies, and may be distributed using media such as CD–ROM and DVD. Hence, the Commission expects that hearing files in the foreseeable future will consist of paper copies, electronic files, or a combination of both.

Discovery against the NRC staff is prohibited in Subpart L proceedings by § 2.1203(d), except as permitted by Subpart C.

Section 2.1204—Motions and Requests

Section 2.1204(a) makes clear that the provisions in Subpart C on motions, requests, and responses are to be applied in informal proceedings under Subpart L. Section 2.1204(b) allows the parties to request that the presiding officer permit cross-examination by the parties on particular contentions or issues. The presiding officer may allow the parties to cross-examine if he/she finds that cross-examination is necessary for the development of an adequate record for decision. However, the Commission expects that the use of cross-examination will be rare.

Section 2.1205—Summary Disposition

Section 2.1205 provides a simplified procedure for summary disposition in informal proceedings. The standards to be applied in ruling on such motions are those set out in Subpart G.

Section 2.1206—Informal Hearings

Section 2.1206 specifies that informal hearings under the new Subpart L will be oral hearings unless all the parties agree to a hearing consisting of written submissions (this is a significant change from the existing Subpart L which generally involves hearings consisting of written submissions). No motion to hold a hearing consisting of written submissions may be entertained absent unanimous consent of the parties.

Section 2.1207—Process and Schedule for Submissions and Presentations in an Oral Hearing

Section 2.1207 specifies the process and schedule for submissions and presentations in oral hearings under the revised Subpart L. This section addresses the sequence and timing for the submission of direct testimony, rebuttal testimony, statements of position, suggested questions for the presiding officer to ask witnesses, and post-hearing proposed findings of fact and conclusions of law. The section also contains provisions on the actual conduct of the hearing, including the stipulation that only the presiding officer may question witnesses.

Section 2.1208—Process and Schedule for a Hearing Consisting of Written Presentations

Section 2.1208 specifies the process for submissions in hearings consisting of written presentations. This section

addresses the sequence and timing for the submission of written statements of position, written direct testimony, written rebuttal testimony, proposed questions on the written testimony and written concluding statements of position on the contentions. Paragraph (a)(3) was revised to clarify that proposed questions may be submitted on written responses and rebuttal testimony filed under paragraph (a)(2), and that the presiding officer has the discretion whether these questions are to be posed to the sponsors of the responses and rebuttal testimony.

Section 2.1209—Findings of Fact and Conclusions of Law

Section 2.1209 requires parties to file proposed findings of fact and conclusions of law within thirty (30) days of the close of the hearing, unless the presiding officer specifies a different time.

Section 2.1210, 2.1211—Initial Decision and Its Effect, Immediate Effectiveness of Initial Decision Directing Issuance or Amendment of Licenses Under Part 61 of This Chapter

Under new § 2.1210, an initial decision resolving all issues before the presiding officer is effective upon issuance unless stayed or otherwise provided by the regulations in part 2. Under § 2.1210(a), the Commission, at its discretion, will determine whether initial decisions which are inconsistent with any staff action taken under § 2.1202(a) warrant Commission review. Once an initial decision becomes final, § 2.1210(e) provides that the Secretary transmits the decision to the NRC staff for action in accordance with the decision. Section 2.1211 restates former § 2.765, which specifies that initial decisions directing the issuance of a license or license amendment under Part 61 relating to land disposal of radioactive waste will become effective only upon the order of the Commission.

Section 2.1212—Petitions for Commission Review of Initial Decision

Section 2.1212 requires that petitions for review of an initial decision must be filed in accordance with the generally applicable review provisions of § 2.341. The second sentence of this section, which requires a party to file a petition for Commission review before seeking judicial review of an agency action, was modified to conform with the parallel provision in the second sentence of § 2.341(b).

Section 2.1213—Applications for a Stay

Section 2.1213 specifies the procedures for applications to stay the effectiveness of the NRC staff's actions on a licensing matter involved in a hearing under Subpart L. Applications for a stay of an initial decision issued under Subpart L must be filed under the stay provisions of § 2.342 in Subpart C.

11. Subpart M—Sections 2.1300–2.1331

Subpart M continues to be the Commission's specialized hearing track applicable to proceedings for the direct or indirect transfer of licenses for which prior NRC approval is required under governing statutes, the Commission's regulations, or an existing license condition. Subpart M is to be used in conjunction with the provisions of Subpart C listed in § 2.1304.

Section 2.1308 has been amended to remove provisions which are now covered under the generally-applicable provisions in Subpart C, but retains the language indicating that Subpart M hearings will ordinally be oral hearings unless the parties unanimously agree to a hearing consisting of written submissions and file a joint motion requesting a written hearing within 15 days of the notice or order granting a hearing.

Section 2.1315 states that a license amendment for an ISFSI that is intended to conform the license to reflect a license transfer, involves "no genuine issue as to whether the health and safety of the public will be significantly affected."

Sections 2.1321, 2.1322 and 2.1331 have been amended to remove references to deleted sections and to reflect the fact that requests for hearing/petitions to intervene for proceedings under Subpart M will be considered under the generally applicable requirements of § 2.309 in Subpart C.

Section 2.1323(d) provides that either the EDO or the EDO's delegee shall designate the NRC staff witnesses who will testify in a Subpart M hearing.

12. Subpart N—Sections 2.1400–2.1407

Subpart N is a new, specialized hearing track that contains the Commission's "fast track" hearing procedures. This subpart provides for the expeditious resolution of issues in cases where the contentions are few and not particularly complex and might be efficiently addressed in a short hearing using simple procedures and oral presentations. However, this subpart may be used for more complex issues if all parties agree. The Commission expects that the rendering of an initial decision should be accomplished within about two to three months of the issuance of the order granting a hearing if the issues are straightforward and deadlines are met. Subpart N is to be used in conjunction with the rules of general applicability contained in Subpart C. The following is a section-by-section analysis of Subpart N.

Section 2.1400—Purpose and Scope

This section indicates that the purpose of Subpart N is to provide for simplified procedures for conducting hearings, and identifies the proceedings where Subpart N procedures may be used.

Section 2.1401—Definitions

This section indicates that Subpart N has no unique definitions, and relies on the definitions in existing § 2.4.

Section 2.1402—General Procedures and Limitations; Requests for Other Procedures

Section 2.1402 specifies the general procedures and procedural limitations for the "fast track" hearing process of Subpart N. It limits the use of written motions and pleadings, prohibits discovery beyond that provided by the general disclosure provisions of Subpart C, and prohibits summary disposition. Section 2.1402 allows the presiding officer or the Commission to order that the hearing be conducted using other hearing procedures if it becomes apparent before the hearing is held that the use of the "fast track" procedures of this subpart are not appropriate in the particular case. It also permits any party to orally request that the presiding officer allow parties to cross-examine on particular contentions or issues. The presiding officer may grant the oral motion only if the presiding officer finds that cross-examination is necessary for the development of an adequate record for decision. The Commission expects, however, that cross-examination will rarely be used in Subpart N proceedings.

Section 2.1403—Authority and Role of the NRC Staff

Section 2.1403 describes the authority and role of the NRC staff in the "fast track" hearings under Subpart N. Regardless of its status as a party and similar to the situation under Subparts L and M, the NRC staff is expected to conduct its own reviews and take action on the application or matter that is the subject of the hearing, despite the pendency of the hearing. Section 2.1403(a) requires the NRC staff to provide notice to the presiding officer of the NRC's action on the application or the underlying regulatory matter for which a hearing was provided, as applicable. The notice must include the staff's explanation why it may take action on the application or the

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underlying regulatory matter despite the pendency of the contested matter before the presiding officer. In licensing proceedings, that explanation should ordinarily address why the public health and safety is protected and common defense and security is promoted despite the pendency of the contested matter. In no event, however, should the staff's explanation set forth a position on, or otherwise assume an advocacy position with respect to the contested matter in the adjudication before the presiding officer. The NRC staff's action on the application or matter is effective upon issuance except in proceedings involving an application to construct and/or operate a production or utilization facility, an application for the construction and operation of an ISFSI or an MRS at a site other than a reactor site, and proposed reactor licensing actions that involve significant hazards considerations.

Similar to the situation in informal hearings under Subpart L, the NRC staff is not required to be a party in most "fast track" proceedings, but would be required to be a party in any Subpart N proceeding involving an application denied by the staff, an enforcement action proposed by the staff, or a proceeding where the presiding officer determines that resolution of any issue would be aided materially by the staff's participation as a party. In all other instances, the NRC staff may choose to be a party, in which case it must notify the presiding officer and the parties that it desires party status.

Section 2.1404—Prehearing Conference

Section 2.1404 requires the presiding officer to conduct a prehearing conference within forty (40) days of the issuance of the order granting requests for hearing/petitions to intervene. At the prehearing conference, each party identifies its witnesses, provides a summary of the proposed testimony of each witness, reports on its efforts at settlement, and provides questions that the party wishes the presiding officer to ask at the hearing. The presiding officer memorializes the rulings and results of the prehearing conference in a written order.

Section 2.1405—Hearing

Section 2.1405 sets forth the requirements applicable to "fast track" hearings. The hearing commences no later than twenty (20) days after the prehearing conference required by § 2.1404. The hearing is open to the public and transcribed. At the hearing, the presiding officer receives oral testimony and questions the witnesses. The parties may not cross-examine the witnesses, but they have had the opportunity at the prehearing conference to provide questions for the presiding officer to use at hearing. However, as mentioned above a presiding officer may permit cross-examination under § 2.1402(b) if the presiding officer finds that cross-examination by the parties is necessary for the development of an adequate record for decision.

Each party may present oral argument and a final statement of position at the close of the hearing. Written post-hearing briefs and proposed findings are prohibited unless requested by the presiding officer.

Section 2.1406—Initial Decision—Issuance and Effectiveness

Section 2.1406 encourages the presiding officer to render a decision from the bench, to be reduced to writing within twenty (20) days of the close of the hearing. Where a decision is not rendered from the bench, it must be issued in writing within thirty (30) days of the close of the hearing. These periods may be extended only with the approval of the Chief Administrative Judge or the Commission. The initial decision is effective twenty (20) days after issuance of the written decision unless a party appeals or the Commission takes review on its own motion. The initial decision is stayed if a party appeals or the Commission reviews the initial decision on its own.

Section 2.1407—Appeal and Commission Review of Initial Decision

Under § 2.1407, a party may appeal as-of-right by filing a written appeal with the Commission within fifteen (15) days after the service of the initial decision. The written appeal is limited to twenty (20) pages and must address the matters and standards for review listed in § 2.1407. Other parties may file written answers within fifteen (15) days after service of the appeal, and are limited to twenty (20) pages. If there is no appeal, or after the Commission has acted upon the appeal and the decision becomes final agency action, the Secretary shall transmit the decision to the NRC staff for action in accordance with the decision.

13. Subpart O—Sections 2.1500—2.1509

Subpart O is a specialized hearing track that contains the Commission's procedures for conducting "legislative-style" hearings. The purpose of this new subpart is to provide for simplified, non-adversarial hearing procedures to assist the Commission in obtaining information and varying policy perspectives on specific subjects identified by the Commission. Subpart O may be used, in the Commission's sole discretion, in design certification rulemakings under Part 52 of this chapter, and in situations where the Commission has determined, under § 2.335(d), that a legislative hearing would assist it in resolving a petition filed under § 2.335(b).

Section 2.1500—Purpose and Scope

This section specifies the matters for which the Commission may decide, as a matter of discretion, to hold a legislative hearing under this subpart.

Section 2.1501—Definitions

This section sets forth two definitions, demonstrative information, and documentary information. These definitions are used in § 2.1506 to identify the information that must be submitted in written statements to be filed before the oral hearing phase of the legislative hearing.

Section 2.1502—Commission Decision To Hold Legislative Hearing

This section addresses the procedure and timing of a Commission decision to conduct a legislative hearing and the noticing requirements. In a design certification rulemaking, the Commission could determine to hold a legislative hearing either prior to issuing the notice of proposed rulemaking or as the result of comments received on the proposed rule. If the Commission decides, before publishing a notice of proposed rulemaking in the Federal Register, that it wishes to conduct a legislative hearing, the notice of proposed rulemaking must identify the issues to be addressed in the legislative hearing, the parties that will be invited to participate in the legislative hearing, whether any other parties may request to participate and the criteria for granting of such requests, and any special procedures to be used. In a proceeding where a party submits a petition under § 2.335, all parties to the proceeding will be invited to participate, as will interested States, governmental bodies, and affected Federally-recognized Indian Tribes who are participating in the underlying proceeding under § 2.315(c).

Section 2.1503—Authority of Presiding Officer

This section essentially provides the presiding officer with the authority to control the conduct of the legislative hearing to ensure that the hearing is conducted in a timely and fair manner.

Section 2.1504—Participation in Legislative Hearing

This section addresses the content and timing of requests to participate in the legislative hearing.

Section 2.1505—Role of the NRC Staff

Because of the nature of the legislative hearing, the NRC staff is not required to participate in the legislative hearing, but may be requested to answer presiding officer questions or provide other assistance as the presiding officer may request. The separation of functions limitations in § 2.348 do not apply to communications between the Commission or presiding officer and the NRC staff on the matters identified under § 2.1502(c)(1) as the subject of the legislative hearing (see discussion on § 2.1509).

Section 2.1506—Written Statements and Submission of Information

Ordinarily, all participants in a legislative hearing must submit written statements and materials they wish to be considered in a legislative hearing. These written materials must be filed no later than ten (10) days prior to the oral hearing.

Section 2.1507—Oral Hearing

This section addresses the conduct of the oral phase of the legislative hearing. The purpose of the hearing is to allow various stakeholders to express their opinions, analyses, and supporting facts, with the object of informing the Commission with respect to the policy questions relevant to the subject matter of the legislative hearing. Accordingly, the procedures for the legislative hearing are intended to provide for expeditious presentation of such information to the Commission in a format that minimizes formalism. For example, there is no cross-examination; instead the presiding officer is free to ask each witness those questions the presiding officer believes are warranted, based upon the written submissions and information submitted under § 2.1506 as supplemented by any oral presentations in the oral phase of the hearing.

Section 2.1508—Recommendation of Presiding Officer

This section sets forth the responsibilities of the presiding officer following the conclusion of the oral phase of the legislative hearing to certify a recommendation to the Commission. The information that is to be included in the certification is intended to assist the Commission in resolving the subject matter of the legislative hearing.

Section 2.1509—Ex Parte Communications and Separation of Functions

This section provides that the *ex parte* limitations on communications between the Commission or presiding officer and parties in § 2.347 also applies in a legislative hearing. The separation of functions limitations in § 2.348 applies only where the legislative hearing is held on a matter certified to the Commission under § 2.335, and then only with respect to the underlying contested matter, and not the issue identified under § 2.1502(c)(1).

III. Availability of Documents

The NRC is making the documents identified below available to interested persons through one or more of the following methods as indicated.

Public Document Room (PDR). The NRC Public Document Room is located at 11555 Rockville Pike, Rockville, Maryland.

Rulemaking Web site (Web). The NRC's interactive rulemaking Web site is located at *http://ruleforum.llnl.gov.* These documents may be viewed and downloaded electronically via this Web site.

NRC's Public Electronic Reading Room (PERR). The NRC's public electronic reading room is located at *http://www.nrc.gov/NRC/ADAMS/index.html.*

The NRC staff contact (NRC Staff). None.

Document	PDR	Web	PERR	NRC staff
Comments received	X	X	X	
Responses to Comments not Addressed in Statement of Considerations for Changes to the Adjudicatory Process: Final Rule.	X	.....	ML033510327	
SECY-01-0137	X	.....	ML012070084	
SRM (1-8-2002) on SECY-01-0137	X	.....	ML020080358	
SECY-02-0072	.....	.....	ML021150595	
SECY-02-0072A	.....	.....	ML022600516	
SRM (11-13-2003)	.....	.....	ML033180077	

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Public Law 104-113, requires that Federal agencies use technical standards that are developed by voluntary, private sector, consensus standards bodies unless using such a standard is inconsistent with applicable law or otherwise impractical. This final rule changes the NRC's procedures for the conduct of hearings in 10 CFR part 2. This final rule does not constitute the establishment of a government-unique standard as defined in Office of Management and Budget (OMB) Circular A-119 (1998).

V. Environmental Impact: Categorical Exclusion

The final rule amends the adjudicatory procedures in 10 CFR part 2 and makes conforming changes to other parts of title 10, and, therefore qualifies as an action eligible for the categorical exclusion from environmental review under 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement or environmental assessment has been prepared for this final rulemaking.

VI. Paperwork Reduction Act Statement

This final rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VII. Regulatory Analysis

The final rule emanates from a longstanding concern that the Commission's hearing process, using the full panoply of formal adjudicatory procedures under former Subpart G, is not as efficient or effective as it could be, thereby resulting in protracted, costly proceedings. To avoid such protracted proceedings in the future, the Commission has developed revised rules of procedure in 10 CFR part 2 that provide for a range of hearing procedures tailored to the type of proceeding and the nature of issues to be resolved in the proceeding. The

revised procedures enhance public participation by reducing unnecessary procedural burdens, produce more timely decisions, and reduce the resources that participants expend.

The final rule requires most NRC proceedings to be conducted using more informal hearing procedures. The trend in administrative law is to move away from formal, trial-type procedures. Instead, informal hearings and use of Alternative Dispute Resolution methods, such as settlement conferences, are often viewed as better, quicker, and less-costly means to resolve disputes.

The Commission will continue to use Subpart G procedures in enforcement proceedings (unless all parties agree to use Subpart L or N procedures), in proceedings on the initial application for construction authorization for a high-level radioactive waste repository and initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, as well as any proceeding to construct and operate a uranium enrichment facility under Section 193 of the Atomic Energy Act of 1954, as amended, (AEA). The Commission also will use Subpart G procedures in nuclear power reactor licensing proceedings where resolution of a contention or contested matter involves resolution of: (1) Issues of material fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.

The final rule should facilitate public participation in NRC proceedings by reducing some of the burdens. For example, the costs of discovery in formal adjudications should be reduced by the provision requiring parties to disclose voluntarily relevant documents at the outset of the proceeding. This should result in a diminished need for parties to file interrogatories and take depositions. By adding this form of discovery to all proceedings (formal and informal), the parties will have information that should assist in the resolution of issues and litigation of the case. Moreover, by requiring that contentions be filed in informal adjudications and providing for oral hearings (unless waived by all of the parties), informal proceedings should be more focused. This should permit parties to better focus the scope of their written and oral presentations on the specific disputes that must be resolved. By permitting the parties in informal hearings to propose questions that the presiding officer could choose to pose to witnesses, a more focused and complete record can be developed.

For less-complex disputes, a fast track option (Subpart N) is adopted. Under this option, cases can be resolved far more quickly with substantially reduced burdens to the participants as compared with the Subpart L hearing process.

Finally, the Commission is adopting "legislative-style" hearing procedures that may be used in the Commission's discretion in two relatively narrow situations to help develop a record on "legislative facts" that would assist the Commission decide questions of policy and discretion. The two situations are design certification rulemakings, and determination of a petition certified to the Commission under § 2.335 seeking consideration of a Commission rule or regulation.

The Commission does not believe the option of preserving the status quo by not proposing any rule changes is a preferred option. Experience has indicated that the agency hearing process can be improved through appropriate rule changes. The Commission believes that the final rule will improve the effectiveness of NRC hearings and at the same time reduce the overall burdens for all participants in NRC hearings: Members of the public, interested State and local governmental bodies, affected, Federally-recognized Indian Tribes, NRC staff, applicants and licensees.

This constitutes the regulatory analysis for the final rule.

VIII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule applies in the context of Commission adjudicatory proceedings concerning nuclear reactors or nuclear materials. Reactor licensees are large organizations that do not fall within the definition of a small business found in Section 3 of the Small Business Regulatory Enforcement Fairness Act of 1996, 15 U.S.C. 632, within the small business standards set forth in 13 CFR part 121, or within the size standards adopted by the NRC (10 CFR 2.810). Based upon the historically low number of requests for hearings involving materials licensees, it is not expected that this rule would have any significant economic impact on a substantial number of small businesses.

IX. Backfit Analysis

The NRC has determined that the backfit rule does not apply to this final rule because these amendments modify the procedures to be used in NRC adjudicatory proceedings, and do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis has not been prepared for this final rule.

List of Subjects

10 CFR Part 1

Organization and function (Government Agencies).

10 CFR Part 2

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

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 51

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

10 CFR Part 52

Administrative practice and procedure, Antitrust, Backfitting, Combined license, Early site permit, Emergency planning, Fees, Inspection, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Reporting and recordkeeping requirements, Standard design, Standard design certification.

10 CFR Part 54

Administrative practice and procedure, Age-related degradation, Backfitting, Classified information, Criminal penalties, Environmental protection, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 60

Criminal penalties, High-level waste, Nuclear materials, Nuclear power plants and reactors, Reporting and

recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 63

Criminal penalties, High-level waste, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 73

Criminal penalties, Export, Hazardous materials transportation, Import, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 75

Criminal penalties, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

10 CFR Part 76

Certification, Criminal penalties, Radiation protection, Reporting and record keeping requirements, Security measures, Special nuclear material, Uranium enrichment by gaseous diffusion.

10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalties, Export, Import, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

■ For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR Parts 1, 2, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76 and 110.

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

■ 1. The authority citation for part 1 continues to read as follows:

Authority: Secs. 23, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2033, 2201); sec. 29, Pub. L. 85–256, 71 Stat. 579, Pub. L. 95–209, 91 Stat. 1483 (42 U.S.C. 2039); sec. 191, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); secs. 201, 203, 204, 205, 209, 88 Stat. 1242, 1244, 1245, 1246, 1248, as amended (42 U.S.C. 5841, 5843, 5844, 5845, 5849); 5 U.S.C. 552, 553; Reorganization Plan No. 1 of 1980, 45 FR 40561, June 16, 1980; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 2. In § 1.25, paragraph (g) is revised to read as follows:

§ 1.25 Office of the Secretary of the Commission.

* * * * *

(g) Receives, processes, and controls motions and pleadings filed with the Commission; issues and serves adjudicatory orders on behalf of the Commission; receives and distributes public comments in rulemaking proceedings; issues proposed and final rules on behalf of the Commission; maintains the official adjudicatory and rulemaking dockets of the Commission; and exercises responsibilities delegated to the Secretary in 10 CFR 2.303 and 2.346;

* * * * *

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

■ 3. The authority citation for part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933. 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10143(0); sec. 102, Pub. L 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Section 2.102, 2.103, 2.104, 2.105, 2.321 also issued under secs. 102, 163, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161 b. i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101–410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104–134, 110 Stat. 1321–373 (28 U.S.C. 2461 note). Subpart C also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Section 2.700a also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.754, 2.712, also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553, Section 2.809 also issued under 5 U.S.C. 553, and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42. U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart N also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–550, 84 Stat. 1473 (42 U.S.C. 2135).

■ 4. Section 2.2 is revised to read as follows:

§ 2.2 Subparts.

Each subpart other than subpart C of this part sets forth special rules applicable to the type of proceeding described in the first section of that subpart. Subpart C sets forth general rules applicable to all types of proceedings except rulemaking, and should be read in conjunction with the subpart governing a particular proceeding. Subpart I of this part sets forth special procedures to be followed in proceedings in order to safeguard and prevent disclosure of Restricted Data.

■ 5. Section 2.3 is revised to read as follows:

§ 2.3 Resolution of conflict.

(a) In any conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.

(b) Unless otherwise specifically referenced, the procedures in this part do not apply to hearings in 10 CFR parts 4, 9, 10, 11, 12, 13, 15, 16, and subparts H and I of 10 CFR part 110.

■ 6. In § 2.4, a new definition of presiding officer is added, and the definitions of Commission adjudicatory employee, and NRC personnel are revised to read as follows:

§ 2.4 Definitions.

* * * * *

Commission adjudicatory employee means—

(1) The Commissioners and members of their personal staffs;

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(2) The employees of the Office of Commission Appellate Adjudication;
(3) The members of the Atomic Safety and Licensing Board Panel and staff assistants to the Panel;
(4) A presiding officer appointed under § 2.313, and staff assistants to a presiding officer;
(5) Special assistants (as defined in § 2.322);
(6) The General Counsel, the Solicitor, the Associate General Counsel for Licensing and Regulation, and employees of the Office of the General Counsel under the supervision of the Solicitor;
(7) The Secretary and employees of the Office of the Secretary; and
(8) Any other Commission officer or employee who is appointed by the Commission, the Secretary, or the General Counsel to participate or advise in the Commission's consideration of an initial or final decision in a proceeding. Any other Commission officer or employee who, as permitted by § 2.348, participates or advises in the Commission's consideration of an initial or final decision in a proceeding must be appointed as a Commission adjudicatory employee under this paragraph and the parties to the proceeding must be given written notice of the appointment.

* * * * *

NRC personnel means:
(1) NRC employees;
(2) For the purpose of §§ 2.336, 2.702, 2.709 and 2.1018 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and
(3) Members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings; and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC.

* * * * *

Presiding officer means the Commission, an administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or other person designated in accordance with the provisions of this part, presiding over the conduct of a hearing conducted under the provisions of this part.

* * * * *

■ 7. Section 2.100 is revised to read as follows:

§ 2.100 Scope of subpart.

This subpart prescribes the procedures for issuance of a license, amendment of a license at the request of the licensee, and transfer and renewal of a license.

■ 8. In § 2.101, paragraphs (a)(3)(ii), (b), (f)(1)and (g)(2) are revised to read as follows:

§ 2.101 Filing of application.

(a) * * *
(3) * * *

(ii) Serve a copy on the chief executive of the municipality in which the facility is to be located or, if the facility is not to be located within a municipality, on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application, a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, telephone number, and email address (if available) of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph, the applicant should not make public distribution of those parts of the application subject to § 2.390(d). The applicant shall submit to the Director of Nuclear Reactor Regulation an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served; and

* * * * *

(b) After the application has been docketed each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee except applicants under part 61 of this chapter, who must comply with paragraph (g) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, telephone number, and email address (if available) of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph the applicant should not make public distribution of those parts of the application subject to § 2.390(d). The applicant shall submit to the Director of Nuclear Material Safety and Safeguards an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

* * * * *

(f)(1) Each application for construction authorization for a HLW repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, and each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, and any environmental impact statement required in connection therewith pursuant to subpart A of part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

* * * * *

(g) * * *

(2)(i) With respect to any tendered document that is acceptable for docketing, the applicant will be requested to:

(A) Submit to the Director of Nuclear Material Safety and Safeguards such additional copies as required by the regulations in part 61 and subpart A of part 51 of this chapter;

(B) Serve a copy on the chief executive of the municipality in which the waste is to be disposed of or, if the waste is not to be disposed of within a municipality, serve a copy on the chief executive of the county in which the waste is to be disposed of;

(C) Make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards; and

(D) Serve a notice of availability of the application and environmental report on the chief executives or governing bodies of the municipalities or counties which have been identified in the application and environmental report as the location of all or part of the alternative sites if copies are not distributed under paragraph (g)(2)(i)(C) of this section to the executives or bodies.

(ii) All distributed copies shall be completely assembled documents identified by docket number. However, subsequently distributed amendments may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages. In complying with the requirements of paragraph (g) of this section the applicant may not make public distribution of those parts of the application subject to § 2.390(d).

* * * * *

■ 9. In § 2.102, paragraph (d)(3) is revised to read as follows:

§ 2.102 Administrative review of application.

* * * * *

(d) * * *

(3) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause the Attorney General's advice received pursuant to paragraph (d)(1) of this section to be published in the Federal Register promptly upon receipt, and will make such advice a part of the record in any proceeding on antitrust matters conducted in accordance with subsection 105c(5) and section 189a of the Act. The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will also cause to be published in the Federal Register a notice that the Attorney General has not rendered any such advice. Any notice published in the Federal Register under this paragraph will also include a notice of hearing, if appropriate, or will state that any person whose interest may be affected by the proceeding may, under § 2.309, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. The notice will state that petitions for leave to intervene and requests for hearing shall be filed within 30 days after publication of the notice.

■ 10. In § 2.103, the section heading and paragraph (a) are revised to read as follows:

§ 2.103 Action on applications for byproduct, source, special nuclear material, facility and operator licenses.

(a) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, finds that an application for a byproduct, source, special nuclear material, facility, or operator license complies with the requirements of the Act, the Energy Reorganization Act, and this chapter, he will issue a license. If the license is for a facility, or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, or for a construction authorization for a HLW repository at a geologic repository operations area under to parts 60 or 63 of this chapter, or if it is to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, will inform the State, Tribal and local officials specified in § 2.104(e) of the issuance of the license. For notice of issuance requirements for licenses issued under part 61 of this chapter, see § 2.106(d)..

* * * * *

■ 11. In § 2.104, paragraph (e) is revised to read as follows:

§ 2.104 Notice of hearing.

* * * * *

(e) The Secretary will give timely notice of the hearing to all parties and to other persons, if any, entitled by law to notice. The Secretary will transmit a notice of hearing on an application for a license for a production or utilization facility, for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, for a license under part 61 of this chapter, for a construction authorization for a HLW repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, and for a license under part 72 of this chapter to acquire, receive or possess spent fuel for the purpose of storage in an independent spent fuel storage installation (ISFSI) to the governor or other appropriate official of the State and to the chief executive of the municipality in which the facility is to be located or the activity is to be conducted or, if the facility is not to be located or the activity conducted within a municipality, to the chief executive of the county (or to the Tribal organization, if it is to be so located or conducted within an Indian reservation). The Secretary will transmit a notice of hearing on an application for a license under part 72 of this chapter to acquire, receive or possess spent fuel, high-level radioactive waste or radioactive material associated with high-level radioactive waste for the purpose of storage in a monitored retrievable storage installation (MRS) to the same persons who received the notice of docketing under § 72.16(e) of this chapter.

■ 12. In § 2.105, paragraphs (a)(5) and (a)(6) are revised to read as follows:

§ 2.105 Notice of proposed action.

(a) * * *

(5) A license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, or an amendment thereto, when the license or amendment would authorize actions which may significantly affect the health and safety of the public;

(6) An amendment to a construction authorization for a high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, when such an amendment would authorize actions which may significantly affect the health and safety of the public;

* * * * *

■ 13. In § 2.106, paragraph (c) is revised to read as follows:

§ 2.106 Notice of issuance.

* * * * *

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the Federal Register notice of, and will inform the State, local, and Tribal officials specified in § 2.104(e) of any action with respect to an application for construction authorization for a high-level radioactive waste repository at a

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geologic repository operations area, a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, or an amendment to such license for which a notice of proposed action has been previously published.

* * * * *

■ 14. In § 2.107, paragraph (a) is revised to read as follows:

§ 2.107 Withdrawal of application.

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

* * * * *

■ 15. In § 2.108, paragraph (c) is revised to read as follows:

§ 2.108 Denial of application for failure to supply information.

* * * * *

(c) When both a notice of receipt of the application and a notice of hearing have been published, the presiding officer, upon a motion made by the staff under § 2.323, will rule whether an application should be denied by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, under paragraph (a) of this section.

■ 16. In § 2.110, paragraph (a)(1) is revised to read as follows:

§ 2.110 Filing and administrative action on submittals for design review or early review of site suitability issues.

(a)(1) A submittal pursuant to appendix O of part 52 of this chapter shall be subject to §§ 2.101(a) and 2.390 to the same extent as if it were an application for a permit or license.

* * * * *

■ 17. In § 2.206, a new paragraph (c)(3) is added to read as follows:

§ 2.206 Requests for action under this subpart.

* * * * *

(c) * * *

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

■ 18. A new subpart C is added to part 2 to read as follows:

Subpart C—Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings

Sec.

Subpart C—Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings

§ 2.300 Scope of subpart C.

The provisions of this subpart apply to all adjudications conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR Part 2, unless specifically stated otherwise in this subpart.

§ 2.301 Exceptions.

Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that the conduct of military or foreign affairs functions is involved.

§ 2.302 Filing of documents.

(a) Documents must be filed with the Commission in adjudications subject to this part either by:

(1) First class mail addressed to: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff;

(2) Courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention: Rulemakings and Adjudications Staff;

(3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;*

(4) By facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff, at (301) 415–1101; verification number is (301) 415–1966.

(b) All documents offered for filing must be accompanied by proof of

service on all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. For purposes of service of documents, the staff of the Commission is considered a party.

(c) Filing by mail, electronic mail, or facsimile is considered complete as of the time of deposit in the mail or upon electronic mail or facsimile transmission.

§ 2.303 Docket.

The Secretary shall maintain a docket for each proceeding conducted under this part, commencing with either the initial notice of hearing, notice of proposed action, order, request for hearing or petition for leave to intervene, as appropriate. The Secretary shall maintain all files and records of proceedings, including transcripts and video recordings of testimony, exhibits, and all papers, correspondence, decisions and orders filed or issued. All documents, records, and exhibits filed in any proceeding must be filed with the Secretary as described in §§ 2.302 and 2.304.

§ 2.304 Formal requirements for documents; acceptance for filing.

(a) Each document filed in an adjudication subject to this part to which a docket number has been assigned must show the docket number and title of the proceeding.

(b) Each document must be bound on the left side and typewritten, printed, or otherwise reproduced in permanent form on good unglazed paper of standard letterhead size. Each page must begin not less than one inch from the top, with side and bottom margins of not less than one inch. Text must be double-spaced, except that quotations may be single-spaced and indented. The requirements of this paragraph do not apply to original documents or admissible copies offered as exhibits, or to specifically prepared exhibits.

(c) The original of each document must be signed in ink by the party or its authorized representative, or by an attorney having authority with respect to it. The document must state the capacity of the person signing, his or her address, and the date of signature. The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority that he or she has read it and knows the contents that to the best of his or her knowledge, information and belief the statements made in it are true, and that it is not interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken.

(d) Except as otherwise required by this part or by order, a pleading or other document, other than correspondence, must be filed in an original and two conformed copies.

(e) The first document filed by any person in a proceeding must designate the name and address of a person on whom service may be made. This document must also designate the electronic mail address and facsimile number, if any, of the person on whom service may be made.

(f) A document filed by electronic mail or facsimile transmission need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and two (2) copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff.

(g) *Acceptance for filing.* Any document that fails to conform to the requirements of this section may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any document that is not accepted for filing will not be entered on the Commission's docket.

§ 2.305 Service of papers, methods, proof.

(a) Service of papers by the Commission. Except for subpoenas, the Commission will serve all orders, decisions, notices, and other papers issued by it upon all parties.

(b) Who may be served. Any paper required to be served upon a party must be served upon that person or upon the representative designated by the party or by law to receive service of papers. When a party has appeared by attorney, service must be made upon the attorney of record.

(c) How service may be made. Service may be made by personal delivery or courier, by express mail or expedited delivery service, by first class, certified or registered mail, by e-mail or facsimile transmission, or as otherwise authorized by law. If service is made by e-mail or facsimile transmission, the original signed copy must be transmitted to the Secretary by personal delivery, courier, express mail or expedited delivery service, or first class, certified, or registered mail. In addition, if service is by e-mail, a paper copy must also be served by any other service method permitted under this paragraph. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer shall require service by the most expeditious means that is available to all parties in the proceeding, including express mail or expedited delivery service, and/or electronic or facsimile transmission, unless the presiding officer finds that this requirement would impose undue burden or expense on some or all of the parties.

(d) Service on the Secretary. (1) All pleadings must be served on the Secretary of the Commission in the same or equivalent manner, *i.e.*, personal delivery or courier, express mail or expedited delivery service, facsimile or electronic transmission, that they are served upon the adjudicatory tribunals and the parties to the proceedings, so that the Secretary will receive the pleading at approximately the same time that it is received by the tribunal to which the pleading is directed.

(2) When pleadings are personally delivered to tribunals while they are conducting proceedings outside the Washington, DC area, service on the Secretary may be accomplished by courier, express mail or expedited delivery service, or by electronic or facsimile transmission.

(3) Service of pre-filed testimony and demonstrative evidence (*e.g.*, maps and other physical exhibits) on the Secretary may be made by first class mail in all cases, unless the presiding officer directs otherwise.

(4) The addresses for the Secretary are:

(i) First class mail: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff.

(ii) Courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention: Rulemakings and Adjudications Staff.

(iii) E-mail addressed to the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; and

(iv) Facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff, at (301) 415–1101; verification number is (301) 415–1966.

(e) When service is complete. Service upon a party is complete:

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with that person's clerk or other person in charge or, if there is no one in charge, leaving it in a

conspicuous place in the office, or if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By mail, on deposit in the United States mail, properly stamped and addressed;

(3) By electronic mail, on transmission thereof, and service of a copy by another method of service permitted in paragraph (c) of this section;

(4) By facsimile transmission, on transmission thereof and receipt of electronic confirmation that one or more of the addressees for a party has successfully received the transmission. If the sender receives an electronic message that the facsimile transmission to an addressee was not deliverable or is otherwise informed that a transmission was unreadable, transmission to that person is not considered complete. In such an event, the sender shall reserve the document in accordance with paragraph (e)(1) through (e)(4) of this section; or

(5) When service cannot be effected in a manner provided by paragraphs (e)(1) to (4) inclusive of this section, in any other manner authorized by law.

(f) Service on the NRC staff. (1) Service shall be made upon the NRC staff of all papers and documents required to be filed with parties and the presiding officer in all proceedings, including those proceedings where the NRC staff informs the presiding officer of its determination not to participate as a party.

(2) If the NRC staff decides not to participate as a party in a proceeding, it shall, in its notification to the presiding officer and parties of its determination not to participate, designate a person and address for service of papers and documents.

§ 2.306 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by first class mail, five (5) days are added to the prescribed period. Two (2) days are added to the prescribed period when a document is served by express mail or expedited delivery service. No time is added when the notice or paper is served in person, by courier, electronic mail or facsimile transmission. The period allotted for the recipient's response commences upon confirmation of receipt under § 2.305(e)(3) or (4), except that if a document is served in person, by courier, electronic transmission, or facsimile, and is received by a party after 5 p.m., in the recipient's time zone on the date of transmission, the recipient's response date is extended by one (1) business day.

§ 2.307 Extension and reduction of time limits.

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

§ 2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter.

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) General requirements. Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing. Except as provided in paragraph (e) of this section, the Commission, presiding officer or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) Timing. Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the Federal Register.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the Federal Register.

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not, with the exception of a notice provided under § 2.102(d)(3), be less than 60 days from the date of publication of the notice in the Federal Register;

(ii) The time provided in § 2.102(d)(3); or

(iii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a Federal Register notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

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(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) Standing. (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)–(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) Discretionary Intervention. The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For

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each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application 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.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) Selection of hearing procedures. A request for hearing and/or petition for leave to intervene may also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) Answers to requests for hearing and petitions to intervene. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene—

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) The requestor/petitioner may file a reply to any answer withing seven (7) days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) Decision on request/petition. The presiding officer shall, within forty-five (45) days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission.

§ 2.310 Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32 through 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 of this chapter may be conducted under the procedures of subpart L of this part.

(b) Proceedings on enforcement matters must be conducted under the procedures of subpart G of this part, unless all parties agree and jointly request that the proceedings be conducted under the procedures of subpart L or subpart N of this part, as appropriate.

(c) Proceedings on the licensing of the construction and operation of a uranium enrichment facility must be conducted under the procedures of subpart G of this part.

(d) In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

(e) Proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant must be conducted under the procedures of subpart L of this part, unless a party requests that the proceeding be conducted under the procedures of subpart K of this part, or if all parties agree and jointly request that the proceeding be conducted under the procedures of subpart N of this part.

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(f) Proceedings on an application for initial construction authorization for a high-level radioactive waste repository at a geologic repository operations area noticed pursuant to §§ 2.101(f)(8) or 2.105(a)(5), and proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area must be conducted under the procedures of subparts G and J of this part. Subsequent amendments to a construction authorization for a high-level radioactive geologic repository, and amendments to a license to receive and possess high level radioactive waste at a high level waste geologic repository may be conducted under the procedures of subpart L of this part, unless all parties agree and jointly request that the proceeding be conducted under the procedures of subpart N of this part.

(g) Proceedings on an application for the direct or indirect transfer of control of an NRC license which transfer requires prior approval of the NRC under the Commission's regulations, governing statutes or pursuant to a license condition shall be conducted under the procedures of subpart M of this part, unless the Commission determines otherwise in a case-specific order.

(h) Except as determined through the application of paragraphs (b) through (g) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32 through 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 of this chapter, and proceedings on an application for the direct or indirect transfer of control of an NRC license may be conducted under the procedures of subpart N of this part if—

(1) The hearing itself is expected to take no more than two (2) days to complete; or

(2) All parties to the proceeding agree that it should be conducted under the procedures of subpart N of this part.

(i) In design certification rulemaking proceedings under part 52 of this chapter, any informal hearing held under § 52.51 of this chapter must be conducted under the procedures of subpart O of this part.

(j) In proceedings where the Commission grants a petition filed under § 2.335(b), the Commission may, in its discretion, conduct a hearing under the procedures of subpart O of this part to assist the Commission in developing a record on the matters raised in the petition.

§ 2.311 Interlocutory review of rulings on requests for hearing/petitions to intervene and selection of hearing procedures.

(a) An order of the presiding officer or of the Atomic Safety and Licensing Board on a request for hearing or a petition to intervene may be appealed to the Commission, only in accordance with the provisions of this section, within ten (10) days after the service of the order. The appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief. Any party who opposes the appeal may file a brief in opposition to the appeal within ten (10) days after service of the appeal. The supporting brief and any answer must conform to the requirements of § 2.341(c)(2). No other appeals from rulings on requests for hearings are allowed.

(b) An order denying a petition to intervene and/or request for hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.

(c) An order granting a petition to intervene and/or request for hearing is appealable by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied.

(d) An order selecting a hearing procedure may be appealed by any party on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in § 2.310. The appeal must be filed with the Commission no later than ten (10) days after issuance of the order selecting a hearing procedure.

§ 2.312 Notice of hearing.

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) A statement describing the specific hearing procedures or subpart that will be used for the hearing.

(b) The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding and the public interest.

§ 2.313 Designation of presiding officer, disqualification, unavailability, and substitution.

(a) Designation of presiding officer. The Commission may provide in the notice of hearing that one or more members of the Commission, an administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the matter, shall be the presiding officer. The Commission alone shall designate the presiding officer in a hearing conducted under subpart O. If the Commission does not designate the presiding officer for a hearing under subparts G, J, K, L, M, or N of this part, then the Chief Administrative Judge shall issue an order designating:

(1) An Atomic Safety and Licensing Board appointed under Section 191 of the Atomic Energy Act of 1954, as amended, or an administrative law judge appointed pursuant to 5 U.S.C. 3105, for a hearing conducted under subparts G, J, K, L, or N of this part; or

(2) An Atomic Safety and Licensing Board, an administrative law judge, or an administrative judge for a hearing conducted under subpart M of this part.

(b) Disqualification. (1) If a designated presiding officer or a designated member of an Atomic Safety and Licensing Board believes that he or she is disqualified to preside or to participate as a board member in the hearing, he or she shall withdraw by notice on the record and shall notify the Commission or the Chief Administrative Judge, as appropriate, of the withdrawal.

(2) If a party believes that a presiding officer or a designated member of an Atomic Safety and Licensing Board should be disqualified, the party may move that the presiding officer or the Licensing Board member disqualify himself or herself. The motion must be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the Licensing Board member does not disqualify himself, the motion must be referred to the Commission. The Commission will determine the sufficiency of the grounds alleged.

(c) Unavailability. If a presiding officer or a designated member of an Atomic Safety and Licensing Board becomes unavailable during the course of a hearing, the Commission or the Chief Administrative Judge, as appropriate, will designate another presiding officer or Atomic Safety and Licensing Board member. If he or she becomes unavailable after the hearing has been concluded, then:

(1) The Commission may designate another presiding officer;

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(2) The Chief Administrative Judge or the Commission, as appropriate, may designate another Atomic Safety and Licensing Board member to participate in the decision;

(3) The Commission may direct that the record be certified to it for decision.

(d) Substitution. If a presiding officer or a designated member of an Atomic Safety and Licensing Board is substituted for the one originally designated, any motion predicated upon the substitution must be made within five (5) days after the substitution.

§ 2.314 Appearance and practice before the Commission in adjudicatory proceedings.

(a) Standards of practice. In the exercise of their functions under this subpart, the Commission, the Atomic Safety and Licensing Boards, Administrative Law Judges, and Administrative Judges function in a quasi-judicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) Representation. A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation, or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law if the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance. The notice must state his or her name, address, telephone number, and facsimile number and email address, if any; the name and address of the person or entity on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) Reprimand, censure or suspension from the proceeding. (1) A presiding officer, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who refuses to comply with its directions, or who is disorderly, disruptive, or engages in contemptuous conduct.

(2) A reprimand, censure, or a suspension that is ordered to run for one day or less must state the grounds for the action in the record of the proceeding, and must advise the person disciplined of the right to appeal under paragraph (c)(3) of this section. A suspension that is ordered for a longer period must be in writing, state the grounds on which it is based, and advise the person suspended of the right to appeal and to request a stay under paragraphs (c)(3) and (c)(4) of this section. The suspension may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined under this section may file an appeal with the Commission within ten (10) days after issuance of the order. The appeal must be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Commission shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Commission may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Commission provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. The hearing must begin as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Commission, as appropriate, shall notify the State bar(s) to which the attorney is admitted. The notification must include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Commission.

(4) A suspension exceeding one (1) day is not effective for seventy-two (72) hours from the date the suspension order is issued. Within this time, a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension must be stayed until the reviewing tribunal rules on the motion. The stay request must be in writing and contain the information specified in § 2.342(b). The Commission shall rule on the stay request within ten (10) days after the filing of the motion. The Commission shall consider the factors specified in § 2.342(e)(1) and (e)(2) in determining whether to grant or deny a stay application.

§ 2.315 Participation by a person not a party.

(a) A person who is not a party (including persons who are affiliated with or represented by a party) may, in the discretion of the presiding officer, be permitted to make a limited appearance by making an oral or written statement of his or her position on the issues at any session of the hearing or any prehearing conference within the limits and on the conditions fixed by the presiding officer. However, that person may not otherwise participate in the proceeding. Such statements of position shall not be considered evidence in the proceeding.

(b) The Secretary will give notice of a hearing to any person who requests it before the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. If a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and affected, Federally-recognized Indian Tribe, which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. Each State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request to participate in a hearing, each designate a single representative for the hearing. The representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions. The representative shall identify those contentions on which it will participate in advance of any hearing held.

(d) If a matter is taken up by the Commission under § 2.341 or *sua sponte*, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "*amicus curiae*." Such a person shall submit the

amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before the Commission will be granted at the discretion of the Commission.

§ 2.316 Consolidation of parties.

On motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

§ 2.317 Separate hearings; consolidation of proceedings.

(a) Separate hearings. On motion by the parties or upon request of the presiding officer for good cause shown, or on its own initiative, the Commission may establish separate hearings in a proceeding if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

(b) Consolidation of proceedings. On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings, or may hold joint hearings with interested States and/or other Federal agencies on matters of concurrent jurisdiction, if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

§ 2.318 Commencement and termination of jurisdiction of presiding officer.

(a) Unless the Commission orders otherwise, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If a presiding officer has not been designated, the Chief Administrative Judge has jurisdiction or, if he or she is unavailable, another administrative judge or administrative law judge has jurisdiction. A proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued. When a notice of hearing provides that the presiding officer is to be an administrative judge or an administrative law judge, the Chief Administrative Judge will designate by order the administrative judge or administrative law judge, as appropriate, who is to preside. The presiding officer's jurisdiction in each proceeding terminates when the period within which the Commission may direct that the record be certified to it for final decision expires, when the Commission renders a final decision, or when the presiding officer withdraws from the case upon considering himself or herself disqualified, whichever is earliest.

(b) The Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.

§ 2.319 Power of the presiding officer.

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends, including the powers to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas authorized by law, including subpoenas requested by a participant for the attendance and testimony of witnesses or the production of evidence upon the requestor's showing of general relevance and reasonable scope of the evidence sought;

(c) Consolidate parties and proceedings in accordance with §§ 2.316 and 2.317 and/or direct that common interests be represented by a single spokesperson;

(d) Rule on offers of proof and receive evidence. In proceedings under this part, strict rules of evidence do not apply to written submissions. However, the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.

(e) Restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments;

(f) Order depositions to be taken as appropriate;

(g) Regulate the course of the hearing and the conduct of participants;

(h) Dispose of procedural requests or similar matters;

(i) Examine witnesses;

(j) Hold conferences before or during the hearing for settlement, simplification of contentions, or any other proper purpose;

(k) Set reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules;

(l) Certify questions to the Commission for its determination, either in the presiding officer's discretion, or on motion of a party or on direction of the Commission;

(m) Reopen a proceeding for the receipt of further evidence at any time before the initial decision;

(n) Appoint special assistants from the Atomic Safety and Licensing Board Panel under § 2.322;

(o) Issue initial decisions as provided in this part;

(p) Dispose of motions by written order or by oral ruling during the course of a hearing or prehearing conference. The presiding officer should ensure that parties not present for the oral ruling are notified promptly of the ruling;

(q) Issue orders necessary to carry out the presiding officer's duties and responsibilities under this part; and

(r) Take any other action consistent with the Act, this chapter, and 5 U.S.C. 551–558.

§ 2.320 Default.

If a party fails to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading, to appear at a hearing or prehearing conference, to comply with any prehearing order entered by the presiding officer, or to comply with any discovery order entered by the presiding officer, the Commission or the presiding officer may make any orders in regard to the failure that are just, including, among others, the following:

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter the order as appropriate; or

(b) Proceed without further notice to take proof on the issues specified.

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§ 2.321 Atomic Safety and Licensing Boards.

(a) The Commission or the Chief Administrative Judge may establish one or more Atomic Safety and Licensing Boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom have such technical or other qualifications as the Commission or the Chief Administrative Judge determines to be appropriate to the issues to be decided. The members of an Atomic Safety and Licensing Board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission. In proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, the Atomic Safety and Licensing Board shall perform the adjudicatory functions that the Commission determines are appropriate.

(b) The Commission or the Chief Administrative Judge may designate an alternate qualified in the conduct of administrative proceedings, or an alternate having technical or other qualifications, or both, for an Atomic Safety and Licensing Board established under paragraph (a) of this section. If a member of a board becomes unavailable, the Commission or the Chief Administrative Judge may constitute the alternate qualified in the conduct of administrative proceedings, or the alternate having technical or other qualifications, as appropriate, as a member of the board by notifying the alternate who will, as of the date of the notification, serve as a member of the board. If an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or Chief Administrative Judge may appoint a member of the Atomic Safety and Licensing Board Panel who is qualified in the conduct of administrative proceedings or a member having technical or other qualifications, as appropriate, as a member of the Atomic Safety and Licensing Board by notifying the appointee who will, as of the date of the notification, serve as a member of the board.

(c) An Atomic Safety and Licensing Board has the duties and may exercise the powers of a presiding officer as granted by § 2.319 and otherwise in this part. Any time when a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Judge may be exercised with respect to the proceeding by the chairman of the board having jurisdiction over it. Two members of an Atomic Safety and Licensing Board constitute a quorum if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.322 Special assistants to the presiding officer.

(a) In consultation with the Chief Administrative Judge, the presiding officer may, at his or her discretion, appoint personnel from the Atomic Safety and Licensing Board Panel established by the Commission to assist the presiding officer in taking evidence and preparing a suitable record for review. The appointment may occur at any appropriate time during the proceeding but must, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.313. The special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. The interrogators shall study the written testimony and sit with the presiding officer to hear the presentation and, where permitted in the proceeding, the cross-examination by the parties of all witnesses on the issues of the interrogators' expertise. The interrogators shall take a leading role in examining the witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, special masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special masters may rule on evidentiary issues brought before them, in accordance with § 2.333. Appeals from special masters' rulings may be taken to the presiding officer in accordance with procedures established in the presiding officer's order appointing the special master. Special masters' reports are advisory only; the presiding officer retains final authority with respect to the issues heard by the special master;

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer retains final authority on the issue for which the alternate member was designated; or

(4) Discovery master to rule on the matters specified in § 2.1018(a)(2).

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues that the presiding officer might otherwise have difficulty in quickly grasping. These briefings take place before the hearing on the subject involved and supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in § 2.313.

§ 2.323 Motions.

(a) Presentation and disposition. All motions must be addressed to the Commission or other designated presiding officer. A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises. All written motions must be filed with the Secretary and served on all parties to the proceeding.

(b) Form and content. Unless made orally on-the-record during a hearing, or the presiding officer directs otherwise, or under the provisions of subpart N of this part, a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

(c) Answers to motions. Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

(d) Accuracy in filing. All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in

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appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party.

(e) Motions for reconsideration. Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. A motion must be filed within ten (10) days of the action for which reconsideration is requested. The motion and any responses to the motion are limited to ten (10) pages.

(f) Referral and certifications to the Commission. (1) If, in the judgment of the presiding officer, prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity, the presiding officer may refer the ruling promptly to the Commission. The presiding officer must notify the parties of the referral either by announcement on-the-record or by written notice if the hearing is not in session.

(2) A party may petition the presiding officer to certify an issue to the Commission for early review. The presiding officer shall apply the alternative standards of § 2.341(f) in ruling on the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

(g) Effect of filing a motion, petition, or certification of question to the Commission. Unless otherwise ordered, neither the filing of a motion, the filing of a petition for certification, nor the certification of a question to the Commission stays the proceeding or extends the time for the performance of any act.

(h) Motions to compel discovery. Parties may file answers to motions to compel discovery in accordance with paragraph (c) of this section. The presiding officer, in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone, the presiding officer shall issue a written order on the motion summarizing the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter effective at the time of the ruling, if the terms of the ruling are incorporated in the subsequent written order.

§ 2.324 Order of procedure.

The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.325 Burden of proof.

Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof.

§ 2.326 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).

§ 2.327 Official recording; transcript.

(a) Recording hearings. A hearing will be recorded stenographically or by other means under the supervision of the presiding officer. If the hearing is recorded on videotape or some other video medium, before an official transcript is prepared under paragraph (b) of this section, that video recording will be considered to constitute the record of events at the hearing.

(b) Official transcript. For each hearing, a transcript will be prepared from the recording made in accordance with paragraph (a) of this section that will be the sole official transcript of the hearing. The transcript will be prepared by an official reporter who may be designated by the Commission or may be a regular employee of the Commission. Except as limited by section 181 of the Act or order of the Commission, the transcript will be available for inspection in the agency's public records system.

(c) Availability of copies. Copies of transcripts prepared in accordance with paragraph (b) of this section are available to the parties and to the public from the official reporter on payment of the charges fixed therefor. If a hearing is recorded on videotape or other video medium, copies of the recording of each daily session of the hearing may be made available to the parties and to the public from the presiding officer upon payment of a charge specified by the Chief Administrative Judge.

(d) Transcript corrections. Corrections of the official transcript may be made only in the manner provided by this paragraph. Corrections ordered or approved by the presiding officer must be included in the record as an appendix. When so incorporated, the Secretary shall make the necessary physical corrections in the official transcript so that it will incorporate the changes ordered. In making corrections, pages may not be substituted but, to the extent practicable, corrections must be made by running a line through the matter to be changed without obliteration and writing the matter as changed immediately above. If the correction consists of an insertion, it must be added by rider or interlineation as near as possible to the text which is intended to precede and follow it.

§ 2.328 Hearings to be public.

Except as may be requested under section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

§ 2.329 Prehearing conference.

(a) Necessity for prehearing conference; timing. The Commission or

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the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter or a testing facility, shall direct the parties or their counsel to appear at a specified time and place for a conference or conferences before trial. A prehearing conference in a proceeding involving a construction permit or operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter must be held within sixty (60) days after discovery has been completed or any other time specified by the Commission or the presiding officer.

(b) Objectives. The following subjects may be discussed, as directed by the Commission or the presiding officer, at the prehearing conference:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) Discouraging wasteful prehearing activities;

(4) Improving the quality of the hearing through more thorough preparation, and;

(5) Facilitating the settlement of the proceeding or any portions of it.

(c) Other matters for consideration. As appropriate for the particular proceeding, a prehearing conference may be held to consider such matters as:

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

(2) The necessity or desirability of amending the pleadings;

(3) Obtaining stipulations and admissions of fact and the contents and authenticity of documents to avoid unnecessary proof, and advance rulings from the presiding officer on the admissibility of evidence;

(4) The appropriateness and timing of summary disposition motions under subparts G and L of this part, including appropriate limitations on the page length of motions and responses thereto;

(5) The control and scheduling of discovery, including orders affecting disclosures and discovery under the discovery provisions in subpart G of this part.

(6) Identification of witnesses and documents, and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence, including the establishment of reasonable limits on the time allowed for presenting direct and, where permitted, cross-examination evidence;

(7) The disposition of pending motions;

(8) Settlement and the use of special procedures to assist in resolving any issues in the proceeding;

(9) The need to adopt special procedures for managing potentially difficult or protracted proceedings that may involve particularly complex issues, including the establishment of separate hearings with respect to any particular issue in the proceeding;

(10) The setting of a hearing schedule, including any appropriate limitations on the scope and time permitted for cross-examination where cross-examination is permitted; and

(11) Other matters that the Commission or presiding officer determines may aid in the just and orderly disposition of the proceeding.

(d) Reports. Prehearing conferences may be reported stenographically or by other means.

(e) *Prehearing conference order.* The presiding officer shall enter an order that recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and the issues or matters in controversy to be determined in the proceeding. Any objections to the order must be filed by a party within five (5) days after service of the order. Parties may not file replies to the objections unless the presiding officer so directs. The filing of objections does not stay the decision unless the presiding officer so orders. The presiding officer may revise the order in the light of the objections presented and, as permitted by § 2.319(l), may certify for determination to the Commission any matter raised in the objections the presiding officer finds appropriate. The order controls the subsequent course of the proceeding unless modified for good cause.

§ 2.330 Stipulations.

Apart from any stipulations made during or as a result of a prehearing conference, the parties may stipulate in writing at any stage of the proceeding or orally during the hearing, any relevant fact or the contents or authenticity of any document. These stipulations may be received in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. These stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

§ 2.331 Oral argument before the presiding officer.

When, in the opinion of the presiding officer, time permits and the nature of the proceeding and the public interest warrant, the presiding officer may allow, and fix a time for, the presentation of oral argument. The presiding officer will impose appropriate limits of time on the argument. The transcript of the argument is part of the record.

§ 2.332 General case scheduling and management.

(a) Scheduling order. The presiding officer shall, as soon as practicable after consulting with the parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that establishes limits for the time to file motions, conclude discovery, and take other actions in the proceeding. The scheduling order may also include:

(1) Modifications of the times for disclosures under §§ 2.336 and 2.704 and of the extent of discovery to be permitted;

(2) The date or dates for prehearing conferences, and hearings; and

(3) Any other matters appropriate in the circumstances of the proceeding.

(b) Modification of schedule. A schedule may not be modified except upon a finding by the presiding officer or the Commission of good cause. In making such a good cause determination, the presiding officer or the Commission should take into account the following factors, among other things:

(1) Whether the requesting party has exercised due diligence to adhere to the schedule;

(2) Whether the requested change is the result of unavoidable circumstances; and

(3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.

(c) Objectives of scheduling order. The scheduling order must have as its objectives proper case management purposes such as:

(1) Expediting the disposition of the proceeding;

(2) Establishing early and continuing control so that the proceeding will not be protracted because of lack of management;

(3) Discouraging wasteful prehearing activities;

(4) Improving the quality of the hearing through more thorough preparation; and

(5) Facilitating the settlement of the proceeding or any portions thereof, including the use of Alternative Dispute Resolution, when and if the presiding officer, upon consultation with the parties, determines that these types of efforts should be pursued.

(d) Effect of NRC staff's schedule on scheduling order. In establishing a

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schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. Hearings on safety issues may be commenced before publication of the NRC staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS. In addition, discovery against the NRC staff on safety or environmental issues, respectively, should be suspended until the staff has issued the SER or EIS, unless the presiding officer finds that the commencement of discovery against the NRC staff (as otherwise permitted by the provisions of this part) before the publication of the pertinent document will not adversely affect completion of the document and will expedite the hearing.

§ 2.333 Authority of the presiding officer to regulate procedure in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer:

(a) May limit the number of witnesses whose testimony may be cumulative;

(b) May strike argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence;

(c) Shall require each party or participant who requests permission to conduct cross-examination to file a cross-examination plan for each witness or panel of witnesses the party or participant proposes to cross-examine;

(d) Must ensure that each party or participant permitted to conduct cross-examination conducts its cross-examination in conformance with the party's or participant's cross-examination plan filed with the presiding officer;

(e) May take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and

(f) May impose such time limitations on arguments as the presiding officer determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

§ 2.334 Schedules for proceedings.

(a) Unless the Commission directs otherwise in a particular proceeding, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall, based on information and projections provided by the parties and the NRC staff, establish and take appropriate action to maintain a schedule for the completion of the evidentiary record and, as appropriate, the issuance of its initial decision.

(b) The presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding shall provide written notification to the Commission any time during the course of the proceeding when it appears that the completion of the record or the issuance of the initial decision will be delayed more than sixty (60) days beyond the time specified in the schedule established under § 2.334(a). The notification must include an explanation of the reasons for the projected delay and a description of the actions, if any, that the presiding officer or the Board proposes to take to avoid or mitigate the delay.

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima facie* showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

§ 2.336 General discovery.

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this part shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and provide:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion;

(2)(i) A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (*e.g.*, books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing.

(3) A list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(b) Except for proceedings conducted under subpart J of this part or as otherwise ordered by the Commission, the presiding officer, or the Atomic Safety and Licensing Board assigned to the proceeding, the NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

(1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;

(4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and

(5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(c) Each party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it. A party, including the NRC staff, is not excused from making the required disclosures because it has not fully completed its investigation of the case, it challenges the sufficiency of another entity's disclosures, or that another entity has not yet made its disclosures. All disclosures under this section must be accompanied by a certification (by sworn affidavit) that all relevant materials required by this section have been disclosed, and that the disclosures are accurate and complete as of the date of the certification.

(d) The duty of disclosure under this section is continuing, and any information or documents that are subsequently developed or obtained must be disclosed within fourteen (14) days.

(e)(1)The presiding officer may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action, or the use of the discovery provisions in subpart G of this part against the offending party, for the offending party's continuing unexcused failure to make the disclosures required by this section.

(2) The presiding officer may impose sanctions on a party that fails to provide any document or witness name required to be disclosed under this section, unless the party demonstrates good cause for its failure to make the disclosure required by this section. A sanction that may be imposed by the presiding officer is prohibiting the admission into evidence of documents or testimony of the witness proffered by the offending party in support of its case.

(f) The disclosures required by this section constitute the sole discovery permitted for NRC proceedings under this part unless there is further provision for discovery under the specific subpart under which the hearing will be conducted or unless the Commission provides otherwise in a specific proceeding.

§ 2.337 Evidence at a hearing.

(a) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(b) Objections. An objection to evidence must briefly state the grounds of objection. The transcript must include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on-the-record.

(c) Offer of proof. An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.

(d) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(e) Official record. An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(f) Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an

appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.

(g) Proceedings involving applications—(1) Facility construction permits. In a proceeding involving an application for construction permit for a production or utilization facility, the NRC staff shall offer into evidence any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act, any safety evaluation prepared by the NRC staff, and any environmental impact statement prepared in the proceeding under subpart A of part 51 of this chapter by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee.

(2) Other applications where the NRC staff is a party. In a proceeding involving an application for other than a construction permit for a production or utilization facility, the NRC staff shall offer into evidence:

(i) Any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act;

(ii) At the discretion of the NRC staff, a safety evaluation prepared by the NRC staff and/or NRC staff testimony and evidence on the contention/controverted matter prepared in advance of the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention/controverted matter provided to the presiding officer under §§ 2.1202(a); and

(iv) Any environmental impact statement or environmental assessment prepared in the proceeding under subpart A of part 51 of this chapter by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee if there is any, but only if there are contentions/controverted matters with respect to the adequacy of the environmental impact statement or environmental assessment.

(3) Other applications where the NRC staff is not a party. In a proceeding involving an application for other than a construction permit for a production or utilization facility, the NRC staff shall offer into evidence, and (with the exception of an ACRS report) provide one or more sponsoring witnesses, for:

(i) Any report submitted by the ACRS in the proceeding in compliance with section 182(b) of the Act;

(ii) At the discretion of the NRC staff, a safety evaluation prepared by the NRC staff and/or NRC staff testimony and evidence on the contention/controverted matter prepared in advance of the completion of the safety evaluation;

(iii) Any NRC staff statement of position on the contention/controverted matter under § 2.1202(a); and

(iv) Any environmental impact statement or environmental assessment prepared in the proceeding under subpart A of part 51 of this chapter by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his or her designee if there is any, but only if there are contentions/controverted matters with respect to the adequacy of the environmental impact statement or environmental assessment.

§ 2.338 Settlement of issues; alternative dispute resolution.

The fair and reasonable settlement and resolution of issues proposed for litigation in proceedings subject to this part is encouraged. Parties are encouraged to employ various methods of alternate dispute resolution to address the issues without the need for litigation in proceedings subject to this part.

(a) Availability. The parties shall have the opportunity to submit a proposed settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under paragraph (b) of this section.

(b) Settlement judge; alternative dispute resolution. (1) The presiding officer, upon joint motion of the parties, may request the Chief Administrative Judge to appoint a Settlement Judge to conduct settlement negotiations or remit the proceeding to alternative dispute resolution as the Commission may provide or to which the parties may agree. The order appointing the Settlement Judge may confine the scope of settlement negotiations to specified issues. The order must direct the Settlement Judge to report to the Chief Administrative Judge at specified time periods.

(2) If a Settlement Judge is appointed, the Settlement Judge shall:

(i) Convene and preside over conferences and settlement negotiations between the parties and assess the practicalities of a potential settlement;

(ii) Report to the Chief Administrative Judge describing the status of the settlement negotiations and recommending the termination or continuation of the settlement negotiations; and

(iii) Not discuss the merits of the case with the Chief Administrative Judge or any other person, or appear as a witness in the case.

(3) Settlement negotiations conducted by the Settlement Judge terminate upon the order of the Chief Administrative Judge issued after consultation with the Settlement Judge.

(4) No decision concerning the appointment of a Settlement Judge or the termination of the settlement negotiation is subject to review by, appeal to, or rehearing by the presiding officer or the Commission.

(c) Availability of parties' attorneys or representatives. The presiding officer (or Settlement Judge) may require that the attorney or other representative who is expected to try the case for each party be present and that the parties, or agents having full settlement authority, also be present or available by telephone.

(d) Admissibility in subsequent hearing. No evidence, statements, or conduct in settlement negotiations under this section will be admissible in any subsequent hearing, except by stipulation of the parties. Documents disclosed may not be used in litigation unless obtained through appropriate discovery or subpoena.

(e) Imposition of additional requirements. The presiding officer (or Settlement Judge) may impose on the parties and persons having an interest in the outcome of the adjudication additional requirements as the presiding officer (or Settlement Judge) finds necessary for the fair and efficient resolution of the case.

(f) Effects of ongoing settlement negotiations. The conduct of settlement negotiations does not divest the presiding officer of jurisdiction and does not automatically stay the proceeding. A hearing must not be unduly delayed because of the conduct of settlement negotiations.

(g) Form. A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.

(h) Content of settlement agreement. The proposed settlement agreement must contain the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;

(3) A statement that the order has the same force and effect as an order made after full hearing; and

(4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

(i) Approval of settlement agreement. Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement or compromise must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

§ 2.339 Expedited decisionmaking procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered under paragraph (a) of this section is subject to review by the Commission on its own motion within forty (40) days after its date.

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter, when:

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization.

§ 2.340 Initial decision in contested proceedings on applications for facility operating licenses; immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

(a) Production or utilization facility operating license. In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves such examination and decision upon referral of the question by the presiding officer. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

(b) Immediate effectiveness of certain decisions. Except as provided in paragraphs (d) through (g) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, an operating license or a license under 10 CFR Part 72 to store spent fuel in an independent spent fuel storage installation (ISFSI) at a reactor site is effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to review thereof and further decision by the Commission upon petition for review filed by any party under § 2.341 or upon its own motion.

(c) Issuance of license after initial decision. Except as provided in paragraphs (d) through (g) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or granting of a petition for review, shall issue a construction permit, a construction authorization, an operating license, or a license under 10 CFR part 72 to store spent fuel in an independent spent fuel storage installation at a reactor site, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

(d) Immediate effectiveness of initial decisions on a ISFSI and MRS. An initial decision directing the issuance of an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR Part 72 becomes effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards may not issue an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR part 72 until expressly authorized to do so by the Commission.

(e) [Reserved].

(f) Nuclear power reactor construction permits—(1) Presiding officers. Presiding officers shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The presiding officer's decisions concerning construction permits are not effective until the Commission actions outlined in paragraph (f)(2) of this section have taken place.

(2) Commission. Within sixty (60) days of the service of any presiding officer decision that would otherwise authorize issuance of a construction permit, the Commission will seek to issue a decision on any stay motions that are timely filed. These motions must be filed as provided by § 2.341. For the purpose of this paragraph, a stay motion is one that seeks to defer the effectiveness of a presiding officer decision beyond the period necessary for the Commission action described herein. If no stay papers are filed, the Commission will, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and will seek to issue a decision on whether a stay is warranted. However, the

Commission will not decide that a stay is warranted without giving the affected parties an opportunity to be heard. The initial decision will be considered stayed pending the Commission's decision. In deciding these stay questions, the Commission shall employ the procedures set out in § 2.342.

(g) Nuclear power reactor operating licenses—(1) Presiding officers. Presiding officers shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. A presiding officer's decision authorizing issuance of an operating license may not become effective if it authorizes operating at greater than five (5) percent of rated power until the Commission actions outlined in paragraph (g)(2) of this section have taken place. If a decision authorizes operation up to five (5) percent, the decision is effective and the Director shall issue the appropriate license in accordance with paragraph (c) of this section.

(2) The Commission. (i) Reserving the power to step in at an earlier time, the Commission will, upon receipt of the presiding officer's decision authorizing issuance of an operating license, other than a decision authorizing only fuel loading and low power (up to five (5) percent of rated power) testing, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission, insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

(ii) For operating license decisions other than those authorizing only fuel loading and low power testing consistent with the target schedule set forth below, the parties may file brief comments with the Commission pointing out matters which, in their view, pertain to the immediate effectiveness issue. To be considered, these comments must be received within ten (10) days of the presiding officer's decision. However, the Commission may dispense with comments by so advising the parties. An extensive stay will not be issued without giving the affected parties an opportunity to be heard.

(iii) The Commission intends to issue a stay decision within thirty (30) days of receipt of the presiding officer's decision. The presiding officer's initial decision will be considered stayed pending the Commission's decision insofar as it may authorize operations other than fuel loading and low power (up to five (5) percent of rated power) testing.

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. Furthermore, the Commission may, in a particular case, determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

(h) Lack of prejudice of Commission effectiveness decision. The Commission's effectiveness determination is entirely without prejudice to proceedings under §§ 2.341 or 2.342.

§ 2.341 Review of decisions and actions of a presiding officer.

(a)(1) Except for requests for review or appeals of actions under § 2.311 or in a proceeding on the high-level radioactive waste repository (which are governed by § 2.1015), review of decisions and actions of a presiding officer are treated under this section.

(2) Within forty (40) days after the date of a decision or action by a presiding officer, or within forty (40) days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than twenty-five (25) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within five (5) days of service of any answer. This reply brief may not be longer than five (5) pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) (1) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(2) Unless the Commission orders otherwise, any briefs on review may not exceed thirty (30) pages in length,

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exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of ten (10) pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) Interlocutory review. (1) A question certified to the Commission under § 2.319(l), or a ruling referred or issue certified to the Commission under § 2.323(f), will be reviewed if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

§ 2.342 Stays of decisions.

(a) Within ten (10) days after service of a decision or action of a presiding officer, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay may be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties must be by the same method, *e.g.*, electronic or facsimile transmission, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer may not be longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. Further replies to answers will not be entertained. Filing of and service of an answer on the other parties must be by the same method, *e.g.*, electronic or facsimile transmission, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by electronic or facsimile transmission message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

§ 2.343 Oral argument.

In its discretion, the Commission may allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative.

§ 2.344 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material issue; and

(4) The appropriate ruling, order, or denial of relief, with the effective date.

§ 2.345 Petition for reconsideration.

(a)(1) Any petition for reconsideration of a final decision must be filed by a party within ten (10) days after the date of the decision.

(2) Petitions for reconsideration of Commission decisions are subject to the requirements in § 2.341(d).

(b) A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid. The petition must state the relief sought. Within ten (10) days after a petition for reconsideration has been served, any other party may file an answer in opposition to or in support of the petition.

(c) Neither the filing nor the granting of the petition stays the decision unless the Commission orders otherwise.

§ 2.346 Authority of the Secretary.

When briefs, motions or other papers are submitted to the Commission itself, as opposed to the officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary is authorized to:

(a) Prescribe procedures for the filing of briefs, motions, or other pleadings, when the schedules differ from those prescribed by the rules of this part or when the rules of this part do not prescribe a schedule;

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the

Commission later then the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule or regulation of the Commission unless good cause is shown for the late filing;

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission;

(e) Extend the time for the Commission to rule on a petition for review under §§ 2.311 and 2.341;

(f) Extend the time for the Commission to grant review on its own motion under § 2.341;

(g) Direct pleadings improperly filed before the Commission to the appropriate presiding officer for action;

(h) Deny a request for hearings, where the request fails to comply with the Commission's pleading requirements set forth in this part, and fails to set forth an arguable basis for further proceedings;

(i) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Judge, as appropriate requests for hearing not falling under § 2.104, where the requestor is entitled to further proceedings; and

(j) Take action on minor procedural matters.

§ 2.347 Ex parte communications.

In any proceeding under this subpart—

(a) Interested persons outside the agency may not make or knowingly cause to be made to any Commission adjudicatory employee, any *ex parte* communication relevant to the merits of the proceeding.

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency, any *ex parte* communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes, or knowingly causes to be made a communication prohibited by this section shall ensure that it, and any responses to the communication, are promptly served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(e) (1) The prohibitions of this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section cease to apply to *ex parte* communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.341, the time has expired for Commission review of the decision.

(f) The prohibitions in this section do not apply to—

(1) Requests for and the provision of status reports;

(2) Communications specifically permitted by statute or regulation;

(3) Communications made to or by Commission adjudicatory employees in the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) Communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (*e.g.*, rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

§ 2.348 Separation of functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except—

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on-the-record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to—

(1) Communications to or from any Commission adjudicatory employee regarding—

(i) The status of a proceeding;

(ii) Matters for which the communications are specifically permitted by statute or regulation;

(iii) NRC participation in matters pending before a court or another agency; or

(iv) Generic issues involving public health and safety or other statutory responsibilities of the NRC (*e.g.*, rulemakings, congressional hearings on legislation, budgetary planning) not associated with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the General Counsel, and the Secretary and employees of the Office of the Secretary, regarding—

(i) Initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) Supervision of NRC staff to ensure compliance with the general policies and procedures of the agency;

(iii) NRC staff priorities and schedules or the allocation of agency resources; or

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding.

(3) None of the communications permitted by paragraph (b)(2) (i) through (iii) of this section is to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it, and any responses to the communication, are placed in the public record of the proceeding and served on the parties. In the case of oral communications, a written summary must be served and placed in the public record of the proceeding.

(d)(1) The prohibitions in this section apply—

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312; or

(ii) Whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a

Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.204, 2.205(e), or 2.312.

(2) The prohibitions of this section cease to apply to the disputed issues pertinent to a full or partial initial decision when the time has expired for Commission review of the decision in accordance with § 2.341.

(e) Communications to, from, and between Commission adjudicatory employees not prohibited by this section may not serve as a conduit for a communication that otherwise would be prohibited by this section or for an ex parte communication that otherwise would be prohibited by § 2.347.

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion before the decision is filed, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

§ 2.390 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), (e), and (f) of this section, final NRC records and documents,[1] including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rulemaking proceeding subject to this part shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC Public Document Room, except for matters that are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and

(ii) Are in fact properly classified under that Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), but only if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types or matters to be withheld.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged, or confidential commercial or financial information.

(1) The submitter shall request withholding at the time the document is submitted and shall comply with the document marking and affidavit requirements set forth in this paragraph. The NRC has no obligation to review documents not so marked to determine whether they contain information eligible for withholding under paragraph (a) of this section. Any documents not so marked may be made available to the public at the NRC Web site, *http://www.nrc.gov* or at the NRC Public Document Room.

(i) The submitter shall ensure that the document containing information sought to be withheld is marked as follows:

(A) The top of the first page of the document and the top of each page containing such information must be marked with language substantially similar to: "confidential information submitted under 10 CFR 2.390"; "withhold from public disclosure under 10 CFR 2.390"; or "proprietary" to indicate it contains information the submitter seeks to have withheld.

(B) Each document, or page, as appropriate, containing information sought to be withheld from public disclosure must indicate, adjacent to the information, or at the top if the entire page is affected, the basis (*i.e.*, trade secret, personal privacy, *etc.*) for proposing that the information be withheld from public disclosure under paragraph (a) of this section.

(ii) The Commission may waive the affidavit requirements on request, or on its own initiative, in circumstances the Commission, in its discretion, deems appropriate. Otherwise, except for personal privacy information, which is not subject to the affidavit requirement, the request for withholding must be accompanied by an affidavit that—

(A) Identifies the document or part sought to be withheld;

(B) Identifies the official position of the person making the affidavit;

(C) Declares the basis for proposing the information be withheld, encompassing considerations set forth in § 2.390(a);

[1] Such records and documents do not include handwritten notes and drafts.

(D) Includes a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public; and

(E) Indicates the location(s) in the document of all information sought to be withheld.

(iii) In addition, an affidavit accompanying a withholding request based on paragraph (a)(4) of this section must contain a full statement of the reason for claiming the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section. In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper. The affiant must designate with appropriate markings information submitted in the affidavit as a trade secret, or confidential or privileged commercial or financial information within the meaning of § 9.17(a)(4) of this chapter, and such information shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(2) A person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the basis for and effects of licensing or rulemaking actions, and that it is within the discretion of the Commission to withhold such information from public disclosure.

(3) The Commission shall determine whether information sought to be withheld from public disclosure under this paragraph:

(i) Is a trade secret or confidential or privileged commercial or financial information; and (ii) If so, should be withheld from public disclosure.

(4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(5) If the Commission determines, under paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure under this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it will be returned to the applicant.

(6) Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the document. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding. *In camera* sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such *in camera* session will be made publicly available.

(c) The Commission either may grant or deny a request for withholding under this section.

(1) If the request is granted, the Commission will notify the submitter of its determination to withhold the information from public disclosure.

(2) If the Commission denies a request for withholding under this section, it will provide the submitter with a statement of reasons for that determination. This decision will specify the date, which will be a reasonable time thereafter, when the document will be available at the NRC Web site, *http://www.nrc.gov*. The document will not be returned to the submitter.

(3) Whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document, and the document will be returned unless the information—

(i) Forms part of the basis of an official agency decision, including but not limited to, a rulemaking proceeding or licensing activity;

(ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;

(iii) Was revealed, or relied upon, in an open Commission meeting held in accordance with 10 CFR part 9, subpart C;

(iv) Has been requested in a Freedom of Information Act request; or

(v) Has been obtained during the course of an investigation conducted by the NRC Office of Investigations.

(d) The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

(2) Information submitted in confidence to the Commission by a foreign source.

(e) Submitting information to NRC for consideration in connection with NRC licensing or regulatory activities shall be deemed to constitute authority for the NRC to reproduce and distribute sufficient copies to carry out the Commission's official responsibilities.

(f) The presiding officer, if any, or the Commission may, with reference to the NRC records and documents made available pursuant to this section, issue orders consistent with the provisions of this section and § 2.705(c).

■ 19. In § 2.402, paragraph (b) is revised to read as follows:

§ 2.402 Separate hearings on separate issues; consolidation of proceedings.

* * * * *

(b) If a separate hearing is held on a particular phase of the proceeding, the Commission or presiding officers of each affected proceeding may, under § 2.317, consolidate for hearing on that phase two or more proceedings to consider common issues relating to the applications involved in the proceedings, if it finds that this action will be conducive to the proper dispatch of its business and to the ends of justice. In specifying the place of this consolidated hearing, due regard will be given to the convenience and necessity of the parties, petitioners for leave to intervene, or the attorneys or representatives of such persons, and the public interest.

■ 20. Section 2.405 is revised to read as follows:

§ 2.405 Initial decisions in consolidated hearings.

At the conclusion of any hearing held under this subpart, the presiding officer will render a partial initial decision that may be appealed under § 2.341. No construction permit or full power operating license will be issued until an initial decision has been issued on all phases of the hearing and all issues under the Act and the National Environmental Policy Act of 1969 appropriate to the proceeding have been resolved.

■ 21. In § 2.604, paragraphs (b) and (c) are revised to read as follows:

§ 2.604 Notice of hearing on application for early review of site suitability issues.

* * * * *

(b) After docketing of part two of the application, as provided in §§ 2.101(a–1) and 2.603, a supplementary notice of hearing will be published under § 2.104 with respect to the remaining unresolved issues in the proceeding within the scope of § 2.104. This supplementary notice of hearing will provide that any person whose interest may be affected by the proceeding and who desires to participate as a party in the resolution of the remaining issues shall file a petition for leave to intervene pursuant to § 2.309 within the time prescribed in the notice. This supplementary notice will also provide appropriate opportunities for participation by a representative of an interested State under § 2.315(c) and for limited appearances under § 2.315(a).

(c) Any person who was permitted to intervene as a party under the initial notice of hearing on site suitability issues and who was not dismissed or did not withdraw as a party may continue to participate as a party to the proceeding with respect to the remaining unresolved issues, provided that within the time prescribed for filing of petitions for leave to intervene in the supplementary notice of hearing, he or she files a notice of his intent to continue as a party, along with a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which he or she wishes to continue to participate as a party and setting forth with particularity the basis for his contentions with regard to each aspect or aspects. A party who files a non-timely notice of intent to continue as a party may be dismissed from the proceeding, absent a determination that the party has made a substantial showing of good cause for failure to file on time, and with particular reference to the factors specified in §§ 2.309(c)(1)(i) through (iv) and 2.309(d). The notice will be ruled upon by the Commission or presiding officer designated to rule on petitions for leave to intervene.

* * * * *

■ 22. In § 2.606, paragraph (a) is revised to read as follows:

§ 2.606 Partial decisions on site suitability issues.

(a) The provisions of §§ 2.331, 2.339, 2.340(b), 2.343, 2.712, and 2.713 shall apply to any partial initial decision rendered in accordance with this subpart. Section 2.340(c) shall not apply to any partial initial decision rendered in accordance with this subpart. A limited work authorization may not be issued under 10 CFR 50.10(e) and no construction permit may be issued without completion of the full review required by section 102(2) of the National Environmental Policy Act of 1969, as amended, and subpart A of part 51 of this chapter. The authority of the Commission to review such a partial initial decision sua sponte, or to raise sua sponte an issue that has not been raised by the parties, will be exercised within the same time period as in the case of a full decision relating to the issuance of a construction permit.

* * * * *

■ 23. Subpart G is revised to read as follows:

Subpart G—Rules for Formal Adjudications

Sec.

Subpart G—Rules for Formal Adjudications

§ 2.700 Scope of subpart G.

The provisions of this subpart apply to and supplement the provisions set forth in subpart C of this part with respect to enforcement proceedings initiated under subpart B of this part unless otherwise agreed to by the parties, proceedings conducted with respect to the initial licensing of a uranium enrichment facility, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention necessitates resolution of: issues of material fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, proceedings for initial applications for construction authorization for high-level radioactive waste repository noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings for initial applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area, and any other proceeding as ordered by the Commission. If there is any conflict between the provisions of this subpart and those set forth in subpart C of this part, the provisions of this subpart control.

§ 2.701 Exceptions.

Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

§ 2.702 Subpoenas.

(a) On application by any party, the designated presiding officer or, if he or she is not available, the Chief Administrative 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, and may withhold the subpoena if such a showing is not made. However, the officer may not determine the admissibility of evidence.

(b) Every subpoena will bear the name of the Commission, the name and office of the issuing officer and the title of the hearing, and will command the person to whom it is directed to attend and give testimony or produce specified documents or other things at a designated time and place. The subpoena will also advise of the quashing procedure provided in paragraph (f) of this section.

(c) Unless the service of a subpoena is acknowledged on its face by the witness or is served by an officer or employee of the Commission, it must be served by a person who is not a party to the hearing and is not less than eighteen (18) years of age. Service of a subpoena must be made by delivery of a copy of the subpoena to the person named in it and tendering that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commission, fees and mileage need not be tendered and the subpoena may be served by registered mail.

(d) Witnesses summoned by subpoena must be paid the fees and mileage paid to witnesses in the district courts of the United States by the party at whose instance they appear.

(e) The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgment of service with the officer before whom the witness is required to testify or produce evidence or with the Secretary. Failure to make proof of service does not affect the validity of the service.

(f) On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may:

(1) Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or

(2) Condition denial of the motion on just and reasonable terms.

(g) On application and for good cause shown, the Commission will seek judicial enforcement of a subpoena issued to a party and which has not been quashed.

(h) The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in their custody.

§ 2.703 Examination by experts.

(a) A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may permit the individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, upon finding:

(1) That cross-examination by that individual would serve the purpose of furthering the conduct of the proceeding;

(2) That the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination;

(3) That the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination; and

(4) That the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination, and has submitted a cross-examination plan in accordance with § 2.711(c).

(b) Examination or cross-examination conducted under this section must be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom this examination or cross-examination is conducted and his or her attorney is responsible for the conduct of examination or cross-examination by such individuals.

§ 2.704 Discovery—required disclosures.

(a) Initial disclosures. Except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, a party other than the NRC staff shall, without awaiting a discovery request, provide to other parties:

(1) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed issues alleged with particularity in the pleadings, identifying the subjects of the information; and

(2) A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed issues alleged with particularity in the pleadings. When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing;

(3) Unless otherwise stipulated or directed by the presiding officer, these disclosures must be made within forty-five (45) days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329. A party shall make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures.

(b) Disclosure of expert testimony. (1) In addition to the disclosures required by paragraph (a) of this section, a party other than the NRC staff shall disclose to other parties the identity of any person who may be used at trial to present evidence under § 2.711.

(2) Except in proceedings with pre-filed written testimony, or as otherwise stipulated or directed by the presiding officer, this disclosure must be accompanied by a written report prepared and signed by the witness, containing: A complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(3) These disclosures must be made at the times and in the sequence directed by the presiding officer. In the absence

of other directions from the presiding officer, or stipulation by the parties, the disclosures must be made at least ninety (90) days before the hearing commencement date or the date the matter is to be presented for hearing. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(2) of this section, the disclosures must be made within thirty (30) days after the disclosure made by the other party. The parties shall supplement these disclosures when required under paragraph (e) of this section.

(c) Pretrial disclosures. (1) In addition to the disclosures required in the preceding paragraphs, a party other than the NRC staff shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(i) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(ii) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, when available, a transcript of the pertinent portions of the deposition testimony; and

(iii) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(2) Unless otherwise directed by the presiding officer or the Commission, these disclosures must be made at least thirty (30) days before commencement of the hearing at which the issue is to be presented.

(3) A party may object to the admissibility of documents identified under paragraph (c) of this section. A list of those objections must be served and filed within fourteen (14) days after service of the disclosures required by paragraphs (c)(1) and (2) of this section, unless a different time is specified by the presiding officer or the Commission. Objections not so disclosed, other than objections as to a document's admissibility under § 2.711(e), are waived unless excused by the presiding officer or Commission for good cause shown.

(d) Form of disclosures; filing. Unless otherwise directed by order of the presiding officer or the Commission, all disclosures under paragraphs (a) through (c) of this section must be made in writing, signed, served, and promptly filed with the presiding officer or the Commission.

(e) Supplementation of responses. A party who has made a disclosure under this section is under a duty to supplement or correct the disclosure to include information thereafter acquired if ordered by the presiding officer or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) of this section within a reasonable time after a party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) With respect to testimony of an expert from whom a report is required under paragraph (b) of this section, the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information must be disclosed by the time the party's disclosures under § 2.704(c) are due.

§ 2.705 Discovery—additional methods.

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written interrogatories (§ 2.706); interrogatories to parties (§ 2.706); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§ 2.707); and requests for admission (§ 2.708).

(b) Scope of discovery. Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. When any book, document, or other tangible thing sought is reasonably available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, sufficient response to an interrogatory on materials would be the location, the title and a page reference to the relevant book, document, or tangible thing. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery begins only after the prehearing conference and relates only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, discovery may not take place after the beginning of the prehearing conference held under § 2.329 except upon leave of the presiding officer upon good cause shown. It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Upon his or her own initiative after reasonable notice or in response to a motion filed under paragraph (c) of this section, the presiding officer may alter the limits in these rules on the number of depositions and interrogatories, and may also limit the length of depositions under § 2.706 and the number of requests under §§ 2.707 and 2.708. The presiding officer shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if he or she determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties' resources, the importance of the issue in the proceeding, and the importance of the proposed discovery in resolving the issues.

(3) Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing

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has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney for a party concerning the proceeding.

(4) Claims of privilege or protection of trial preparation materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. Identification of these privileged materials must be made within the time provided for disclosure of the materials, unless otherwise extended by order of the presiding officer or the Commission.

(5) Nature of interrogatories. Interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party. Interrogatories may not be addressed to, or be construed to require:

(i) Reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position; or

(ii) Performance of additional research or analytical work beyond that which is needed to support the party's position on any particular matter.

(c) Protective order. (1) Upon motion by a party or the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the presiding officer;

(vi) That, subject to the provisions of §§ 2.709 and 2.390, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(vii) That studies and evaluations not be prepared.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) Sequence and timing of discovery. Except when authorized under these rules or by order of the presiding officer, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f) of this section, nor may a party seek discovery after the time limit established in the proceeding for the conclusion of discovery. Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the presiding officer or, with respect to a response to an interrogatory, request for production, or request for admission, within a reasonable time after a party learns that the response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of parties; planning for discovery. Except when otherwise ordered, the parties shall, as soon as practicable and in any event no more than thirty (30) days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329, meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the proceeding or any portion thereof, to make or arrange for the disclosures required by § 2.704, and to develop a proposed discovery plan.

(1) The plan must indicate the parties' views and proposals concerning:

(i) What changes should be made in the timing, form, or requirement for disclosures under § 2.704, including a statement as to when disclosures under § 2.704(a)(1) were made or will be made;

(ii) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(iii) What changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(iv) Any other orders that should be entered by the presiding officer under paragraph (c) of this section.

(2) The attorneys of record and all unrepresented parties that have appeared in the proceeding are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the presiding officer within ten (10) days after the meeting a written report outlining the plan.

(g) Signing of disclosures, discovery requests, responses, and objections. (1) Every disclosure made in accordance with § 2.704 must be signed by at least one attorney of record in the attorney's individual name, whose address must be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name, whose address must be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(i) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the

needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(3) If a request, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(4) If a certification is made in violation of the rule without substantial justification, the presiding officer, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may, in appropriate circumstances, include termination of that person's right to participate in the proceeding.

(h) Motion to compel discovery. (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request, for an order compelling a response or inspection in accordance with the request. The motion must set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. The motion must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer. Failure to answer or respond may not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section. For purposes of this paragraph, an evasive or incomplete answer or response will be treated as a failure to answer or respond.

(2) In ruling on a motion made under this section, the presiding officer may issue a protective order under paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the NRC staff under § 2.709(a), or the production of NRC documents under §§ 2.709(b) or § 2.390, except for paragraphs (c) and (e) of this section.

§ 2.706 Depositions upon oral examination and written interrogatories; interrogatories to parties.

(a) Depositions upon oral examination and written interrogatories. (1) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(2) [Reserved]

(3) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(4) Before any questioning, the deponent shall either be sworn or affirm the truthfulness of his or her answers. Examination and cross-examination must proceed as at a hearing. Each question propounded must be recorded and the answer taken down in the words of the witness. Objections on questions of evidence must be noted in short form without the arguments. The officer may not decide on the competency, materiality, or relevancy of evidence but must record the evidence subject to objection. Objections on questions of evidence not made before the officer will not be considered waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(5) When the testimony is fully transcribed, the deposition must be submitted to the deponent for examination and signature unless he or she is ill, cannot be found, or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

(6) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers must be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

(7) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party does not make a person his or her own witness for any purpose by taking his deposition.

(8) A deponent whose deposition is taken and the officer taking a deposition are entitled to the same fees as are paid for like services in the district courts of the United States. The fees must be paid by the party at whose instance the deposition is taken.

(9) The witness may be accompanied, represented, and advised by legal counsel.

(10) The provisions of paragraphs (a)(1) through (a)(9) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.709.

(b) Interrogatories to parties. (1) Any party may serve upon any other party (other than the NRC staff) written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings must be filed with the Secretary of the Commission, and must be served on the presiding officer and all parties to the proceeding.

(2) Each interrogatory must be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection must be stated in lieu of an answer. The answers must be signed by the person making them, and the

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objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within fourteen (14) days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.706(a)(7)).

§ 2.707 Production of documents and things; entry upon land for inspections and other purposes.

(a) Request for discovery. Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of § 2.704 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of § 2.704.

(b) Service. The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in § 2.704, the request may be served after the proceeding is set for hearing.

(c) Contents. The request must identify the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) Response. The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified.

(e) NRC records and documents. The provisions of paragraphs (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of NRC records or documents is subject to the provisions of §§ 2.709 and 2.390.

§ 2.708 Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his or her answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document for which an admission of genuineness and authenticity is requested must be delivered with the request unless a copy has already been furnished.

(b)(1) Each requested admission is considered made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either:

(i) A sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them; or

(ii) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(2) Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request must be answered within the time designated.

(c) Admissions obtained under the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 2.709 Discovery against NRC staff.

(a)(1) In a proceeding in which the NRC staff is a party, the NRC staff will make available one or more witnesses, designated by the Executive Director for Operations or a delegee of the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, that is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise. However, the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations or a delegee of the Executive Director for Operations, require the attendance and testimony of named NRC personnel.

(2) A party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts, as designated by the Executive Director for Operations, or a delegee of the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the NRC staff answer the interrogatories.

(3) A deposition of a particular named NRC employee or answer to interrogatories by NRC personnel under paragraphs (a)(1) and (2) of this section may not be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, or after the beginning of the prehearing conference held in accordance with § 2.329, except upon leave of the presiding officer for good cause shown.

(4) The provisions of § 2.704(c) and (e) apply to interrogatories served under this paragraph.

(5) Records or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing under paragraph (b) of this section and § 2.390.

(b) A request for the production of an NRC record or document not available under § 2.390 by a party to an initial licensing proceeding may be served on the Executive Director for Operations or a delegee of the Executive Director for Operations, without leave of the Commission or the presiding officer. The request must identify the records or documents requested, either by individual item or by category, describe each item or category with reasonable particularity, and state why that record or document is relevant to the proceeding.

(c) If the Executive Director for Operations, or a delegee of the Executive Director for Operations, objects to producing a requested record or document on the ground that it is not relevant or it is exempted from disclosure under § 2.390 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is

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reasonably obtainable from another source, the Executive Director for Operations, or a delegee of the Executive Director for Operations, shall advise the requesting party.

(d) If the Executive Director for Operations, or a delegee of the Executive Director for Operations, objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application must set forth the relevancy of the record or document to the issues in the proceeding. The application will be processed as a motion in accordance with § 2.323 (a) through (d). The record or document covered by the application must be produced for the *in camera* inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine:

(1) The relevancy of that record or document;

(2) Whether the document is exempt from disclosure under § 2.390;

(3) Whether the disclosure is necessary to a proper decision in the proceeding; and

(4) Whether the document or the information therein is reasonably obtainable from another source.

(e) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under § 2.390 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, the presiding officer shall order the Executive Director for Operations, or a delegee of the Executive Director for Operations, to produce the document.

(f) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.390, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations or a delegee of the Executive Director for Operations, to produce the document or records (or any other order issued ordering production of the document or records) may contain any protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating under § 2.315(c), and 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 party other than the Commission staff, it must also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe additional procedures to 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 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 under § 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 is considered to be an order issued under Section 161.b of the Atomic Energy Act.

(g) A ruling by the presiding officer or the Commission for the production of a record or document will specify the time, place, and manner of production.

(h) A request under this section may not be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held under § 2.329 except upon leave of the presiding officer for good cause shown.

(i) The provisions of § 2.705 (c) and (e) apply to production of NRC records and documents under this section.

§ 2.710 Motions for summary disposition.

(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. Summary disposition motions must be filed no later than twenty (20) days after the close of discovery. The moving party shall attach 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. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall attach 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 considered 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 will be entertained.

(b) Affidavits must set forth the facts that would be admissible in evidence, and must demonstrate affirmatively that the affiant is competent to testify to the matters stated in the affidavit. 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 answer. The 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 answer is filed, the decision sought, if appropriate, must 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 the party's opposition, the presiding officer may refuse the application for summary decision, order a continuance to permit affidavits to be obtained, or make an order as is appropriate. A determination to that effect must be made a matter of record.

(d)(1) The presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted. The presiding officer may dismiss summarily or hold in abeyance untimely 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 and thereby extend the proceeding.

(2) 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 permit for a production or utilization facility, 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 permit shall be issued.

(e) The presiding officer shall issue an order no later than forty (40) days after any responses to the summary disposition motion are filed, indicating whether the motion is granted, or denied, and the bases therefore.

§ 2.711 Evidence.

(a) General. Every party to a proceeding has the right to present oral or documentary evidence and rebuttal evidence and to conduct, in accordance with an approved cross-examination plan that contains the information specified in paragraph (c) of this section, any cross-examination required for full and true disclosure of the facts.

(b) Testimony. The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its proposed written testimony on every other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity to examine it. Written testimony must be incorporated into the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit.

(c) Cross-examination. (1) The presiding officer shall require a party seeking an opportunity to cross-examine to request permission to do so in accordance with a schedule established by the presiding officer. A request to conduct cross-examination must be accompanied by a cross-examination plan containing the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

(2) The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(d) Non-applicability to subpart B proceedings. Paragraphs (b) and (c) of this section do not apply to proceedings initiated under subpart B of this part for modification, suspension, or revocation of a license or to proceedings for imposition of a civil penalty, unless otherwise directed by the presiding officer.

(e) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(f) Objections. An objection to evidence must briefly state the grounds of objection. The transcript must include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on-the-record.

(g) Offer of proof. An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.

(h) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(i) Official record. An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(j) Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and concisely set forth the information relied upon to controvert the fact.

§ 2.712 Proposed findings and conclusions.

(a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law, briefs and a proposed form of order or decision within the time provided by this section, except as otherwise ordered by the presiding officer:

(1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law and briefs, and a proposed form of order or decision.

(2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed.

(3) A party who has the burden of proof may reply within five (5) days after filing of proposed findings and conclusions of law and briefs by other parties.

(b) Failure to file proposed findings of fact, conclusions of law, or briefs when directed to do so may be considered a default, and an order or initial decision may be entered accordingly.

(c) Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on-the-record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law must be set forth in numbered paragraphs as to all material issues of law or discretion presented on-the-record. An intervenor's proposed findings of fact and conclusions of law must be confined to issues which that party placed in controversy or sought to place in controversy in the proceeding.

§ 2.713 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with § 2.341 or the Commission takes review sua sponte.

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(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may:

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration under § 2.345; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on-the-record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order, or denial of relief with the effective date;

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

■ 24. Section 2.901 is revised to read as follows:

§ 2.901 Scope of subpart I.

This subpart applies, as applicable, to all proceedings under subparts G, J, K, L, M, and N of this part.

■ 25. In § 2.902, paragraph (e) is revised to read as follows:

§ 2.902 Definitions.

* * * * *

(e) *Party*, in the case of proceedings subject to this subpart includes a person admitted as a party under § 2.309 or an interested State admitted under § 2.315(c).

■ 26. Section 2.1000 is revised to read as follows:

§ 2.1000 Scope of subpart J.

The rules in this subpart, together with the rules in subparts C and G of this part, govern the procedure for an application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), and for an application for a license to receive and possess high level radioactive waste at a geologic repository operations area. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart C, except for the following provisions: §§ 2.301; 2.303; 2.307; 2.309; 2.312; 2.313; 2.314; 2.315; 2.316; 2.317(a); 2.318; 2.319; 2.320; 2.321; 2.322; 2.323; 2.324; 2.325; 2.326; 2.327; 2.328; 2.330; 2.331; 2.333; 2.335; 2.338; 2.339; 2.342; 2.343; 2.344; 2.345; 2.346; 2.348; and 2.390. The procedures in this subpart take precedence over those in 10 CFR part 2, subpart G, except for the following provisions: §§ 2.701, 2.702; 2.703; 2.708; 2.709; 2.710; 2.711; 2.712.

■ 27. In § 2.1001, the definitions of Documentary material, Interested governmental participant, Licensing Support Network, Party, and Pre-license application phase are revised to read as follows:

§ 2.1001 Definitions

* * * * *

Documentary material means:

(1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter;

(2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; and

(3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related "circulated drafts," relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

* * * * *

Interested governmental participant means any person admitted under § 2.315(c) of this part to the proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter.

Licensing Support Network means the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to a proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter.

* * * * *

Party for the purpose of this subpart means the DOE, the NRC staff, the host State, any affected unit of local government as defined in Section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), and a person admitted under § 2.309 to the proceeding on an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and an application for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 and 63 of this chapter; provided that a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of § 2.309.

* * * * *

Pre-license application phase means the time period before a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter is docketed under § 2.101(f)(3), and the time period before a license application to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 is docketed under § 2.101(f)(3).

* * * * *

28. In § 2.1003, the introductory text of paragraph (a) is revised to read as follows:

§ 2.1003 Availability of material.

(a) Subject to the exclusions in § 2.1005 and paragraphs (b) and (c) of this section, DOE shall make available, no later than six months in advance of submitting its application for either a construction authorization for a HLW repository at a geologic repository operations area under parts 60 or 63 of this chapter, or a license to receive and possess high-level radioactive waste at a

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geologic repository operations area under parts 60 or 63 of this chapter, the NRC shall make available no later than thirty days after the DOE certification of compliance under § 2.1009(b), and each other potential party, interested governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b):

* * * * *

29. In § 2.1006, paragraph (a) is revised to read as follows:

§ 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(a)(4), the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.390 may be asserted by potential parties, interested States, local governmental bodies, Federally-recognized Indian Tribes, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by States, local governmental bodies, and Federally-recognized Indian Tribes.

* * * * *

■ 30. In § 2.1010, paragraph (e) is revised to read as follows:

§ 2.1010 Pre-license application presiding officer.

* * * * *

(e) The Pre-License Application presiding officer possesses all the general powers specified in §§ 2.319 and 2.321(c).

* * * * *

■ 31. In § 2.1012, paragraph (b) is revised to read as follows:

§ 2.1012 Compliance.

* * * * *

(b)(1) A person, including a potential party given access to the Licensing Support Network under this subpart, may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of § 2.1003. Admission of such a party or interested governmental participant under §§ 2.309 or 2.315, respectively, is conditioned on accepting the status of the proceeding at the time of admission.

* * * * *

■ 32. In § 2.1013, paragraphs (a)(1), (a)(2), (b) and (c)(1) are revised to read as follows:

§ 2.1013 Use of the electronic docket during the proceeding.

(a)(1) As specified in § 2.303, the Secretary of the Commission will maintain the official docket of the proceeding on the application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, and for applications for a license to receive and possess high level radioactive waste at a geologic repository operations area under parts 60 or 63 of this Chapter.

(2) Commencing with the docketing in an electronic form of an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, the Secretary of the Commission, upon determining that the application can be properly accessed under the Commission's electronic docket rules, will establish an electronic docket to contain the official record materials of the high-level radioactive waste licensing proceeding in searchable full text, or, for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been made available to the parties in electronic form before the commencement of that portion of the hearing in which the exhibit will be offered. The electronic docket will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. For any hearing sessions recorded stenographically or by other means, transcripts will be entered into the electronic docket on a daily basis in order to afford next-day availability at the hearing. However, for any hearing sessions recorded on videotape or other video medium, if a copy of the video recording is made available to all parties on a daily basis that affords next-day availability at the hearing, a transcript of the session prepared from the video recording will be entered into the electronic docket within twenty-four (24) hours of the time the transcript is tendered to the electronic docket by the transcription service.

(c)(1) All filings in the adjudicatory proceeding on an application for either a construction authorization for a HLW repository at a geologic repository operations area under parts 60 or 63 of this chapter, or a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, shall be transmitted electronically by the submitter to the presiding officer, parties, and the Secretary of the Commission, according to established format requirements. Parties and interested governmental participants will be required to use a password security code for the electronic transmission of these documents.

* * * * *

§ 2.1014 [Removed]

■ 33. Section 20.1014 is removed.

■ 34. In § 2.1015, paragraphs (b) and (d) are revised to read as follows:

§ 2.1015 Appeals.

* * * * *

(b) A notice of appeal from a Pre-License Application presiding officer order issued under § 2.1010, a presiding officer prehearing conference order issued under § 2.1021, a presiding officer order granting or denying a motion for summary disposition issued in accordance with § 2.1025, or a presiding officer order granting or denying a petition to amend one or more contentions under § 2.309, must be filed with the Commission no later than ten (10) days after service of the order. A supporting brief must accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten (10) days after service of the appeal.

* * * * *

(d) When, in the judgment of a Pre-License Application presiding officer or presiding officer, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Pre-License Application presiding officer or presiding officer may refer the ruling promptly to the Commission, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Pre-License Application presiding officer or presiding officer certify under § 2.319

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rulings not immediately appealable under paragraph (b) of this section.

* * * * *

§ 2.1016 [Removed]

■ 35. Section 2.1016 is removed.

■ 36. In § 2.1018, paragraphs (a)(1)(v), (c), (f)(3), and (g) are revised to read as follows:

§ 2.1018 Discovery.

(a)(1) * * *

(v) Requests for admissions pursuant to § 2.708;

* * * * *

(c)(1) Upon motion by a party, potential party, interested governmental participant, or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order that justice requires to protect a party, potential party, interested governmental participant, or other person from annoyance, embarrassment, oppression, or undue burden, delay, or expense, including one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery;

(iv) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the presiding officer;

(vi) That, subject to the provisions of § 2.390 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(vii) That studies and evaluations not be prepared.

(2) If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party, potential party, interested governmental participant or other person provide or permit discovery.

* * * * *

(f) * * *

(3) An independent request for issuance of a subpoena may be directed to a nonparty for production of documents. This section does not apply to requests for the testimony of the NRC regulatory staff under § 2.709.

(g) The presiding officer, under § 2.322, may appoint a discovery master to resolve disputes between parties concerning informal requests for information as provided in paragraphs (a)(1) and (a)(2) of this section.

§ 2.1019 [Amended]

■ 37. In § 2.1019, paragraph (j) is removed.

■ 38. In § 2.1021, the introductory sentence of paragraph (a) is revised to read as follows:

§ 2.1021 First prehearing conference.

(a) In any proceeding involving an application for a construction authorization for a HLW repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, the Commission or the presiding officer will direct the parties, interested governmental participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, within seventy days after the notice of hearing is published, or such other time as the Commission or the presiding officer may deem appropriate, for a conference to:

* * * * *

■ 39. In § 2.1022, the introductory text of paragraph (a), and paragraph (a)(1) are revised to read as follows:

§ 2.1022 Second prehearing conference.

(a) The Commission or the presiding officer in a proceeding on either an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, 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) Any amended contentions submitted, which must be reviewed under the criteria in § 2.309(c) of this part;

* * * * *

■ 40. In § 2.1023, paragraph (a) and (b)(2) are revised to read as follows:

§ 2.1023 Immediate effectiveness.

(a) Pending review and final decision by the Commission, and initial decision resolving all issues before the presiding officer in favor of issuance or amendment of either an authorization to construct a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter will be immediately effective upon issuance except:

(1) As provided in any order issued in accordance with § 2.342 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

* * * * *

(b) * * *

(2) As provided in any order issued in accordance with § 2.342 of this part that stays the effectiveness of an initial decision; or

* * * * *

■ 41. In § 2.1026, paragraph (b)(1) is revised to read as follows:

§ 2.1026 Schedule.

* * * * *

(b)(1) Pursuant to § 2.307, the presiding officer may approve extensions of no more than fifteen (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 unforseen circumstances, requests for extensions of more than fifteen (15) days must be filed no later than five (5) days in advance of the required time set forth in this subpart for a filing by a party to the proceeding.

* * * * *

■ 42. Section 2.1027 is revised to read as follows:

§ 2.1027 Sua sponte.

In any initial decision in a proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Presiding Officer, other than the Commission, 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.

■ 43. Section 2.1103 is revised to read as follows:

§ 2.1103 Scope of subpart K.

The provisions of this subpart, together with subpart C and applicable

provisions of subparts G and L of this part, govern all adjudicatory proceedings on applications filed after January 7, 1983, for a license or license amendment under part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means. This subpart also applies to proceedings on applications for a license under part 72 of this chapter to store spent nuclear fuel in an independent spent fuel storage installation located at the site of a civilian nuclear power reactor. This subpart shall not apply to the first application for a license or license amendment to expand the spent fuel storage capacity at a particular site through the use of a new technology not previously approved by the Commission for use at any other nuclear power plant. This subpart shall not apply to proceedings on applications for transfer of a license issued under part 72 of this chapter. Subpart M of this part applies to license transfer proceedings.

■ 44. In § 2.1109, paragraphs (a)(1) and (c) are revised to read as follows:

§ 2.1109 Requests for oral argument.

(a)(1) In its request for hearing/petition to intervene filed in accordance with § 2.309 or in the applicant's or the NRC staff's response to a request for a hearing/petition to intervene, any party may invoke the hybrid hearing procedures in this Subpart by requesting an oral argument. If it is determined that a hearing will be held, the presiding officer shall grant a timely request for oral argument.

* * * * *

(c) If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, the presiding officer shall conduct the proceeding in accordance with the subpart under which the proceeding was initially conducted as determined in accordance with § 2.310.

* * * * *

§ 2.1111 [Reserved]

■ 45. Section 2.1111 is removed.

■ 46. In § 2.1113, paragraph (b) is redesignated as paragraph (c), paragraph (a) is revised, and a new paragraph (b) is added to read as follows:

§ 2.1113 Oral argument.

(a) Twenty-five (25) days prior to the date set for oral argument, each party, including the NRC staff, shall submit to the presiding officer a detailed written summary of all the facts, data, and arguments which are known to the party at such time and on which the party proposes to rely at the oral argument either to support or to refute the existence of a genuine and substantial dispute of fact. Each party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission. Each party's written summary and supporting information shall be simultaneously served on all other parties to the proceeding.

(b) Ten (10) days prior to the date set for oral argument, each party, including the NRC staff, may submit to the presiding officer a reply limited to addressing whether the written summaries, facts, data, and arguments filed under paragraph (a) of this section support or refute the existence of a genuine and substantial dispute of fact. Each party's reply shall be simultaneously served on all other parties to the proceeding.

* * * * *

■ 47. Section 2.1117 is revised to read as follows:

§ 2.1117 Burden of proof.

The applicant bears the ultimate burden of proof (risk of non-persuasion) with respect to the contention in the proceeding. The proponent of the request for an adjudicatory hearing bears the burden of demonstrating under § 2.1115(b) that an adjudicatory hearing should be held.

■ 48. A new § 2.1119 is added to read as follows:

§ 2.1119 Applicability of other sections.

In proceedings subject to this part, the provisions of subparts A, C, and L of this part are also applicable, except where inconsistent with the provisions of this subpart.

■ 49. Subpart L is revised to read as follows:

Subpart L—Informal Hearing Procedures for NRC Adjudications

Sec.

Subpart L—Informal Hearing Procedures for NRC Adjudications

§ 2.1200 Scope of subpart L.

The provisions of this subpart, together with subpart C of this part, govern all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act, and 10 CFR part 2, except for proceedings on the licensing of the construction and operation of a uranium enrichment facility, proceedings on an initial application for construction authorization for a high-level radioactive waste geologic repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, proceedings on enforcement matters unless all parties otherwise agree and request the application of Subpart L procedures, and proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.

§ 2.1201 Definitions.

The definitions of terms contained in § 2.4 apply to this subpart unless a different definition is provided in this subpart.

§ 2.1202 Authority and role of NRC staff.

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its own review of the application or matter which is the subject of the hearing and as authorized by law, the NRC staff is expected to issue its approval or denial of the application promptly, or take other appropriate action on the underlying regulatory matter for which a hearing was provided. When the NRC staff takes its action, it shall notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's position on the matters in controversy before the presiding officer with respect to the staff

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action. The NRC staff's action on the matter is effective upon issuance by the staff, except in matters involving:

(1) An application to construct and/or operate a production or utilization facility;

(2) An application for an amendment to a construction authorization for a high-level radioactive waste repository at a geologic repository operations area falling under either 10 CFR 60.32(c)(1) or 10 CFR part 63;

(3) An application for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR part 72; and

(4) Production or utilization facility licensing actions that involve significant hazards considerations as defined in 10 CFR 50.92.

(b)(1) The NRC staff is not required to be a party to a proceeding under this subpart, except where:

(i) The proceeding involves an application denied by the NRC staff or an enforcement action proposed by the NRC staff; or

(ii) The presiding officer determines that the resolution of any issue in the proceeding would be aided materially by the NRC staff's participation in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the presiding officer determines that the NRC staff's participation is necessary, the presiding officer shall issue an order identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff participation will materially aid in resolution of the issue(s).

(2) Within fifteen (15) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

(3) Once the NRC staff chooses to participate as a party, it shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.

§ 2.1203 Hearing file; prohibition on discovery.

(a)(1) Within thirty (30) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file.

(2) The hearing file must be made available to the parties either by service of hard copies or by making the file available at the NRC Web site, *http://www.nrc.gov*.

(3) The hearing file also must be made available for public inspection and copying at the NRC Web site, *http://www.nrc.gov*, and/or at the NRC Public Document Room.

(b) The hearing file consists of the application, if any, and any amendment to the application, and, when available, any NRC environmental impact statement or assessment and any NRC report related to the proposed action, as well as any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. Hearing file documents already available at the NRC Web site and/or the NRC Public Document Room when the hearing request/petition to intervene is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file.

(c) The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials as required in paragraphs (a) and (b) of this section.

(d) Except as otherwise permitted by subpart C of this part, a party may not seek discovery from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise.

§ 2.1204 Motions and requests.

(a) General requirements. In proceedings under this subpart, requirements for motions and requests and responses to them are as specified in § 2.323.

(b) Requests for cross-examination by the parties. (1) In any oral hearing under this subpart, a party may file a motion with the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The motion must be accompanied by a cross-examination plan containing the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

(2) The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(3) The presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.

§ 2.1205 Summary disposition.

(a) Unless the presiding officer or the Commission directs otherwise, motions for summary disposition may be submitted to the presiding officer by any party no later than forty-five (45) days before the commencement of hearing. The motions must be in writing and must include a written explanation of the basis of the motion, and affidavits to support statements of fact. Motions for summary disposition must be served on the parties and the Secretary at the same time that they are submitted to the presiding officer.

(b) Any other party may serve an answer supporting or opposing the motion within twenty (20) days after service of the motion.

(c) The presiding officer shall issue a determination on each motion for summary disposition no later than fifteen (15) days before the date scheduled for commencement of hearing. In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.

§ 2.1206 Informal hearings.

Hearings under this subpart will be oral hearings as described in § 2.1207, unless, within fifteen (15) days of the service of the order granting the request for hearing, the parties unanimously agree and file a joint motion requesting a hearing consisting of written submissions. A motion to hold a hearing consisting of written submissions will not be entertained unless there is unanimous consent of the parties.

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§ 2.1207 Process and schedule for submissions and presentations in an oral hearing.

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

(1) Initial written statements of position and written testimony with supporting affidavits on the admitted contentions. These materials must be filed on the dates set by the presiding officer.

(2) Written responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants. These materials must be filed within twenty (20) days of the service of the materials submitted under paragraph (a)(1) of this section unless the presiding officer directs otherwise.

(3)(i) Proposed questions for the presiding officer to consider for propounding to the persons sponsoring the testimony. Unless the presiding officer directs otherwise, these questions must be received by the presiding officer no later than twenty (20) days after the service of the materials submitted under paragraph (a)(1) of this section, unless that date is less than five (5) days before the scheduled commencement of the oral hearing, in which case the questions must be received by the presiding officer no later than five (5) days before the scheduled commencement of the hearing. Proposed questions need not be filed with any other party.

(ii) Proposed questions directed to rebuttal testimony for the presiding officer to consider for propounding to persons sponsoring the testimony. Unless the presiding officer directs otherwise, these questions must be received by the presiding officer no later than seven (7) days after the service of the rebuttal testimony submitted under paragraph (a)(2) of this section, unless that date is less than five (5) days before the scheduled commencement of the oral hearing, in which case the questions must be received by the presiding officer no later than five (5) days before the scheduled commencement of the hearing. Proposed questions directed to rebuttal need not be filed with any other party.

(iii) Questions submitted under paragraphs (a)(3)(i) and (ii) of this section may be propounded at the discretion of the presiding officer. All questions must be kept by the presiding officer in confidence until they are either propounded by the presiding officer, or until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide all proposed questions to the Commission's Secretary for inclusion in the official record of the proceeding.

(b) Oral hearing procedures. (1) The oral hearing must be transcribed.

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

(3) Participants may designate and present their own witnesses to the presiding officer.

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

(5) The presiding officer may accept written testimony from a person unable to appear at the hearing, and may request that person to respond in writing to questions.

(6) Participants and witnesses will be questioned orally or in writing and only by the presiding officer or the presiding officer's designee (*e.g.*, a Special Assistant appointed under § 2.322). The presiding officer will examine the participants and witnesses using questions prepared by the presiding officer or the presiding officer's designee, questions submitted by the participants at the discretion of the presiding officer, or a combination of both. Questions may be addressed to individuals or to panels of participants or witnesses. No party may submit proposed questions to the presiding officer at the hearing, except upon request by, and in the sole discretion of, the presiding officer.

§ 2.1208 Process and schedule for a hearing consisting of written presentations.

(a) Unless otherwise limited by this subpart or by the presiding officer, participants in a hearing consisting of written presentations may submit:

(1) Initial written statements of position and written testimony with supporting affidavits on the admitted contentions. These materials must be filed on the dates set by the presiding officer;

(2) Written responses, rebuttal testimony with supporting affidavits directed to the initial statements and testimony of witnesses and other participants, and proposed written questions for the presiding officer to consider for submission to the persons sponsoring testimony under paragraph (a)(1) of this section. These materials must be filed within twenty (20) days of the service of the materials submitted under paragraph (a)(1) of this section unless the presiding officer directs otherwise;

(3) Written questions on the written responses and rebuttal testimony submitted under paragraph (a)(2) of this section, which the presiding officer may, in his or her discretion, require the persons offering the written responses and rebuttal testimony to provide responses. These questions must be filed within seven (7) days of service of the materials submitted under paragraph (a)(2) of this section unless the presiding officer directs otherwise; and

(4) Written concluding statements of position on the contentions. These statements shall be filed within twenty (20) days of the service of written responses to the presiding officer's questions to the participants or, in the absence of questions from the presiding officer, within twenty (20) days of the service of the materials submitted under paragraph (a)(2) of this section unless the presiding officer directs otherwise.

(b) The presiding officer may formulate and submit written questions to the participants that he or she considers appropriate to develop an adequate record.

§ 2.1209 Findings of fact and conclusions of law.

Each party shall file written post-hearing proposed findings of fact and conclusions of law on the contentions addressed in an oral hearing under § 2.1207 or a written hearing under § 2.1208 within thirty (30) days of the close of the hearing or at such other time as the presiding officer directs.

§ 2.1210 Initial decision and its effect.

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the presiding officer shall render an initial decision after completion of an informal hearing under this subpart. That initial decision constitutes the final action of the Commission on the contested matter forty (40) days after the date of issuance, unless:

(1) Any party files a petition for Commission review in accordance with § 2.1212;

(2) The Commission, in its discretion, determines that the presiding officer's initial decision is inconsistent with the staff's action as described in the notice required by § 2.1202(a) and that the inconsistency warrants Commission review, in which case the Commission will review the initial decision; or

(3) The Commission takes review of the decision sua sponte.

(b) The Commission may direct that the presiding officer certify the record to it without an initial decision and prepare a final decision if the Commission finds that due and timely execution of its functions warrants certification.

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(c) An initial decision must be in writing and must be based only upon information in the record or facts officially noticed. The record must include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice and an opportunity to comment as provided in §§ 2.1207 or 2.1208. The initial decision must include:

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact or law admitted as part of the contentions in the proceeding;

(2) The appropriate ruling, order, or grant or denial of relief with its effective date;

(3) The action the NRC staff shall take upon transmittal of the decision to the NRC staff under paragraph (e) of this section, if the initial decision is inconsistent with the NRC staff action as described in the notice required by § 2.1202(a); and

(4) The time within which a petition for Commission review may be filed, the time within which any answers to a petition for review may be filed, and the date when the decision becomes final in the absence of a petition for Commission review or Commission sua sponte review.

(d) Pending review and final decision by the Commission, an initial decision resolving all issues before the presiding officer is immediately effective upon issuance except:

(1) As provided in any order issued in accordance with § 2.1211 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by this part (e.g., § 2.340) or by the Commission in special circumstances.

(e) Once an initial decision becomes final, the Secretary shall transmit the decision to the NRC staff for action in accordance with the decision.

§ 2.1211 Immediate effectiveness of initial decision directing issuance or amendment of licenses under part 61 of this chapter.

An initial decision directing the issuance of a license under part 61 of this chapter (relating to land disposal of radioactive waste or any amendments to such a license authorizing actions which may significantly affect the health and safety of the public) will become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards may not issue a license under part 61 of this chapter, or any amendment to such a license that may significantly affect the health and safety of the public until expressly authorized to do so by the Commission.

§ 2.1212 Petitions for Commission review of initial decisions.

Parties may file petitions for review of an initial decision under this subpart in accordance with the procedures set out in § 2.341. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

§ 2.1213 Application for a stay.

(a) Any application for a stay of the effectiveness of the NRC staff's action on a matter involved in a hearing under this subpart must be filed with the presiding officer within five (5) days of the issuance of the notice of the NRC staff's action under § 2.1202(a) and must be filed and considered in accordance with paragraphs (b), (c) and (d) of this section.

(b) An application for a stay of the NRC staff's action may not be longer than ten (10) pages, exclusive of affidavits, and must contain:

(1) A concise summary of the action which is requested to be stayed; and

(2) A concise statement of the grounds for a stay, with reference to the factors specified in paragraph (d) of this section.

(c) Within ten (10) days after service of an application for a stay of the NRC staff's action under this section, any party and/or the NRC staff may file an answer supporting or opposing the granting of a stay. Answers may not be longer than ten (10) pages, exclusive of affidavits, and must concisely address the matters in paragraph (b) of this section as appropriate. Further replies to answers will not be entertained.

(d) In determining whether to grant or deny an application for a stay of the NRC staff's action, the following will be considered:

(1) Whether the requestor will be irreparably injured unless a stay is granted;

(2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;

(3) Whether the granting of a stay would harm other participants; and

(4) Where the public interest lies.

(e) Any application for a stay of the effectiveness of the presiding officer's initial decision or action under this subpart shall be filed with the Commission in accordance with § 2.342.

■ 50. The heading for subpart M is revised to read as follows:

Subpart M—Procedures for Hearings on License Transfer Applications

■ 51. Section 2.1300 is revised to read as follows:

§ 2.1300 Scope of subpart M.

The provisions of this subpart, together with subpart C of this part, govern all adjudicatory proceedings on an application for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition. This subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

§ 2.1306 [Removed]

■ 52. Section 2.1306 is removed.

§ 2.1307 [Removed]

■ 53. Section 2.1307 is removed.

■ 54. Section 2.1308 is revised to read as follows:

§ 2.1308 Oral hearings.

Hearings under this subpart will be oral hearings, unless, within 15 days of the service of the notice or order granting the hearing, the parties unanimously agree and file a joint motion requesting a hearing consisting of written comments. No motion to hold a hearing consisting of written comments will be entertained absent consent of all the parties.

§ 2.1312 [Removed]

■ 55. Section 2.1312 is removed.

§ 2.1313 [Removed]

■ 56. Section 2.1313 is removed.

§ 2.1314 [Removed]

■ 57. Section 2.1314 is removed.

■ 58. In § 2.1315, paragraph (a) is revised to read as follows:

§ 2.1315 Generic determination regarding license amendments to reflect transfers.

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

* * * * *

§ 2.1317 [Removed]

■ 59. Section 2.1317 is removed.

§ 2.1318 [Removed]

■ 60. Section 2.1318 is removed.

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■ 61. In § 2.1321, the introductory paragraph is republished and paragraph (a) is revised to read as follows:

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

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

(a) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials must be filed on the date set by the Commission or the presiding officer.

* * * * *

■ 62. In § 2.1322, the introductory text of paragraph (a) is republished, and paragraph (a)(1) is revised to read as follows:

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

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

(1) Initial written statements of position and written testimony with supporting affidavits on the issues. These materials must be filed on the date set by the Commission or the presiding officer.

* * * * *

■ 63. In § 2.1323, paragraph (d) is revised to read as follows:

§ 2.1323 Presentation of testimony in an oral hearing.

* * * * *

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

* * * * *

§ 2.1326 [Removed]

■ 64. Section 2.1326 is removed.

§ 2.1328 [Removed]

■ 65. Section 2.1328 is removed.

§ 2.1329 [Removed]

■ 66. Section 2.1329 is removed.

§ 2.1330 [Removed]

■ 67. Section 2.1330 is removed.

■ 68. In § 2.1331, paragraph (b) is revised to read as follows:

§ 2.1331 Commission action.

* * * * *

(b) The decision on issues designated for hearing under § 2.309 will be based on the record developed at hearing.

■ 69. A new Subpart N is added to read as follows:

Subpart N—Expedited Proceedings with Oral Hearings

Sec.

Subpart N—Expedited Proceedings with Oral Hearings

§ 2.1400 Purpose and scope of subpart N.

The purpose of this subpart is to provide simplified procedures for the expeditious resolution of disputes among parties in an informal hearing process. The provisions of this subpart, together with subpart C of this part, govern all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and 10 CFR part 2 except for proceedings on the licensing of the construction and operation of a uranium enrichment facility, proceedings on an initial application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings on an initial application for authorization to receive and possess high-level radioactive waste at a geologic repository operations area, proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, proceedings on enforcement matters unless all parties otherwise agree and request the application of subpart N procedures, and proceedings for the direct or indirect control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.

§ 2.1401 Definitions.

The definitions of terms in § 2.4 apply to this subpart unless a different definition is provided in this subpart.

§ 2.1402 General procedures and limitations; requests for other procedures.

(a) Generally-applicable procedures. For proceedings conducted under this subpart:

(1) Except where provided otherwise in this subpart or specifically requested by the presiding officer or the Commission, written pleadings and briefs (regardless of whether they are in the form of a letter, a formal legal submission, or otherwise) are not permitted;

(2) Requests to schedule a conference to consider oral motions may be in writing and served on the Presiding officer and the parties;

(3) Motions for summary disposition before the hearing has concluded and motions for reconsideration to the presiding officer or the Commission are not permitted;

(4) All motions must be presented and argued orally;

(5) The presiding officer will reflect all rulings on motions and other requests from the parties in a written decision. A verbatim transcript of oral rulings satisfies this requirement;

(6) Except for the information disclosure requirements set forth in subpart C of this part, requests for discovery will not be entertained; and

(7) The presiding officer may issue written orders and rulings necessary for the orderly and effective conduct of the proceeding;

(b) Other procedures. If it becomes apparent at any time before a hearing is held that a proceeding selected for adjudication under this subpart is not appropriate for application of this subpart, the presiding officer or the Commission may, on its own motion or at the request of a party, order the proceeding to continue under another appropriate subpart. If a proceeding under this subpart is discontinued because the proceeding is not appropriate for application of this subpart, the presiding officer may issue written orders necessary for the orderly continuation of the hearing process under another subpart.

(c) Request for cross-examination. A party may present an oral motion to the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The presiding officer may allow cross-examination by the parties if he or she determines that cross-examination by the parties is necessary for the development of an adequate record for decision.

§ 2.1403 Authority and role of the NRC staff.

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its own review of the application or matter which is the subject of the hearing and as authorized by law, the NRC staff is expected to issue its approval or denial of the application promptly, or take

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other appropriate action on the matter which is the subject of the hearing. When the NRC staff takes its action, it shall notify the presiding officer and the parties to the proceeding of its action. The NRC staff's action on the matter is effective upon issuance, except in matters involving:

(1) An application to construct and/or operate a production or utilization facility;

(2) An application for the construction and operation of an independent spent fuel storage installation located at a site other than a reactor site or a monitored retrievable storage facility under 10 CFR part 72; or

(3) Production or utilization facility licensing actions that involve significant hazards considerations as defined in 10 CFR 50.92.

(b)(1) The NRC staff is not required to be a party to proceedings under this subpart, except where:

(i) The proceeding involves an application denied by the NRC staff or an enforcement action proposed by the staff; or

(ii) The presiding officer determines that the resolution of any issue in the proceeding would be aided materially by the NRC staff's participation in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the presiding officer determines that the NRC staff's participation is necessary, the presiding officer shall issue an order identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff participation will materially aid in resolution of the issue(s).

(2) Within fifteen (15) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

(3) Once the NRC staff chooses to participate as a party, it shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.

§ 2.1404 Prehearing conference.

(a) No later than forty (40) days after the order granting requests for hearing/petitions to intervene, the presiding officer shall conduct a prehearing conference. At the discretion of the presiding officer, the prehearing conference may be held in person or by telephone or through the use of video conference technology.

(b) At the prehearing conference, each party shall provide the presiding officer and the parties participating in the conference with a statement identifying each witness the party plans to present at the hearing and a written summary of the oral and written testimony of each proposed witness. If the prehearing conference is not held in person, each party shall forward the summaries of the party's witnesses' testimony to the presiding officer and the other parties by such means that will ensure the receipt of the summaries by the commencement of the prehearing conference.

(c) At the prehearing conference, the parties shall describe the results of their efforts to settle their disputes or narrow the contentions that remain for hearing, provide an agreed statement of facts, if any, identify witnesses that they propose to present at hearing, provide questions or question areas that they would propose to have the presiding officer cover with the witnesses at the hearing, and discuss other pertinent matters. At the conclusion of the conference, the presiding officer will issue an order specifying the issues to be addressed at the hearing and setting forth any agreements reached by the parties. The order must include the scheduled date for any hearing that remains to be held, and address any other matters as appropriate.

§ 2.1405 Hearing.

(a) No later than twenty (20) days after the conclusion of the prehearing conference, the presiding officer shall hold a hearing on any contention that remains in dispute. At the beginning of the hearing, the presiding officer shall enter into the record all agreements reached by the parties before the hearing.

(b) A hearing will be recorded stenographically or by other means, under the supervision of the presiding officer. A transcript will be prepared from the recording that will be the sole official transcript of the hearing. The transcript will be prepared by an official reporter who may be designated by the Commission or may be a regular employee of the Commission. Except as limited by section 181 of the Act or order of the Commission, the transcript will be available for inspection in the agency's public records system. Copies of transcripts are available to the parties and to the public from the official reporter on payment of the charges fixed therefor. If a hearing is recorded on videotape or other video medium, copies of the recording of each daily session of the hearing may be made available to the parties and to the public from the presiding officer upon payment of a charge fixed by the Chief Administrative Judge. Parties may purchase copies of the transcript from the reporter.

(c) Hearings will be open to the public, unless portions of the hearings involving proprietary or other protectable information are closed in accordance with the Commission's regulations.

(d) At the hearing, the presiding officer will not receive oral evidence that is irrelevant, immaterial, unreliable or unduly repetitious. Testimony will be under oath or affirmation.

(e) The presiding officer may question witnesses who testify at the hearing, but the parties may not do so.

(f) Each party may present oral argument and a final statement of position at the close of the hearing. Written post-hearing briefs and proposed findings are not permitted unless ordered by the presiding officer.

§ 2.1406 Initial decision—issuance and effectiveness.

(a) Where practicable, the presiding officer will render a decision from the bench. In rendering a decision from the bench, the presiding officer shall state the issues in the proceeding and make clear its findings of fact and conclusions of law on each issue. The presiding officer's decision and order must be reduced to writing and transmitted to the parties as soon as practicable, but not later than twenty (20) days, after the hearing ends. If a decision is not rendered from the bench, a written decision and order will be issued not later than thirty (30) days after the hearing ends. Approval of the Chief Administrative Judge must be obtained for an extension of these time periods, and in no event may a written decision and order be issued later than sixty (60) days after the hearing ends without the express approval of the Commission.

(b) The presiding officer's written decision must be served on the parties and filed with the Commission when issued.

(c) The presiding officer's initial decision is effective and constitutes the final action of the Commission twenty (20) days after the date of issuance of the written decision unless any party

appeals to the Commission in accordance with § 2.1407 or the Commission takes review of the decision sua sponte or the regulations in this part specify other requirements with regard to the effectiveness of decisions on certain applications.

§ 2.1407 Appeal and Commission review of initial decision.

(a)(1) Within fifteen (15) days after service of a written initial decision, a party may file a written appeal seeking the Commission's review on the grounds specified in paragraph (b) of this section. Unless otherwise authorized by law, a party must file an appeal with the Commission before seeking judicial review.

(2) An appeal under this section may not be longer than twenty (20) pages and must contain the following:

(i) A concise statement of the specific rulings and decisions that are being appealed;

(ii) A concise statement (including record citations) where the matters of fact or law raised in the appeal were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why, in the appellant's view, the decision or action is erroneous; and

(iv) A concise statement why the Commission should review the decision or action, with particular reference to the grounds specified in paragraph (b) of this section.

(3) Any other party to the proceeding may, within fifteen (15) days after service of the appeal, file an answer supporting or opposing the appeal. The answer may not be longer than twenty (20) pages and should concisely address the matters specified in paragraph (a)(2) of this section. The appellant does not have a right to reply. Unless it directs additional filings or oral arguments, the Commission will decide the appeal on the basis of the filings permitted by this paragraph.

(b) In considering the appeal, the Commission will give due weight to the existence of a substantial question with respect to the following considerations:

(1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(2) A necessary legal conclusion is without governing precedent or is a departure from, or contrary to, established law;

(3) A substantial and important question of law, policy or discretion has been raised by the appeal;

(4) The conduct of the proceeding involved a prejudicial procedural error; or

(5) Any other consideration which the Commission may deem to be in the public interest.

(c) Once a decision becomes final agency action, the Secretary shall transmit the decision to the NRC staff for action in accordance with the decision.

■ 70. A new Subpart O is added to read as follows:

Subpart O—Legislative Hearings

Sec.

Subpart O—Legislative Hearings

§ 2.1500 Purpose and scope.

The purpose of this subpart is to provide for simplified, legislative hearing procedures to be used, at the Commission's sole discretion, in:

(a) Any design certification rulemaking hearings under subpart B of part 52 of this chapter that the Commission may choose to conduct; and

(b) Developing a record to assist the Commission in resolving, under § 2.335(d), a petition filed under § 2.335(b).

§ 2.1501 Definitions.

Demonstrative information means physical things, not constituting documentary information.

Documentary information means information, ordinarily contained in documents or electronic files, but may also include photographs and digital audio files.

§ 2.1502 Commission decision to hold legislative hearing.

(a) The Commission may, in its discretion, hold a legislative hearing in either a design certification rulemaking under § 52.51(b) of this chapter, or a proceeding where a question has been certified to it under § 2.335(d).

(b) Notice of Commission decision—(1) Hearing in design certification rulemakings. If, at the time a proposed design certification rule is published in the Federal Register under § 52.51(a) of this chapter, the Commission decides that a legislative hearing should be held, the information required by paragraph (c) of this section must be included in the Federal Register notice for the proposed design certification rule. If, following the submission of written public comments submitted on the proposed design certification rule which are submitted in accordance with § 52.51(a) of this chapter, the Commission decides to conduct a legislative hearing, the Commission shall publish a notice in the Federal Register and on the NRC Web site indicating its determination to conduct a legislative hearing. The notice shall contain the information specified in paragraph (c) of this section, and specify whether the Commission or a presiding officer will conduct the legislative hearing.

(2) Hearings under § 2.335(d). If, following a certification of a question to the Commission by a Licensing Board under § 2.335(d), the Commission decides to hold a legislative hearing to assist it in resolving the certified question, the Commission shall issue an order containing the information required by paragraph (c) of this section. The Commission shall serve the order on all parties in the proceeding. In addition, if the Commission decides that persons and entities other than those identified in paragraph (c)(2) may request to participate in the legislative hearing, the Commission shall publish a notice of its determination to hold a legislative hearing in the Federal Register and on the NRC Web site. The notice shall contain the information specified in paragraph (c) of this section, and refer to the criteria in § 2.1504 which will be used in determining requests to participate in the legislative hearing.

(c) If the Commission decides to hold a legislative hearing, it shall, in accordance with paragraph (b) of this section:

(1) Identify with specificity the issues on which it wishes to compile a record;

(2) Identify, in a hearing associated with a question certified to the Commission under § 2.335(d), the parties and interested State(s), governmental bodies, and Federally-recognized Indian Tribe under § 2.315(c), who may participate in the legislative hearing;

(3) Identify persons and entities that may, in the discretion of the Commission, be invited to participate in the legislative hearing;

(4) Indicate whether other persons and entities may request, in accordance with § 2.1504, to participate in the legislative hearing, and the criteria that the Commission or presiding officer will

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use in determining whether to permit such participation;

(5) Indicate whether the Commission or a presiding officer will conduct the legislative hearing;

(6) Specify any special procedures to be used in the legislative hearing;

(7) Set the dates for submission of requests to participate in the legislative hearing, submission of written statements and demonstrative and documentary information, and commencement of the oral hearing; and

(8) Specify the location where the oral hearing is to be held. Ordinarily, oral hearings will be held in the Washington, DC metropolitan area.

§ 2.1503 Authority of presiding officer.

If the Commission appoints a presiding officer to conduct the legislative hearing, the presiding officer shall be responsible for expeditious development of a sufficient record on the Commission-identified issues, consistent with the direction provided by the Commission under § 2.1502(c). The presiding officer has the authority otherwise accorded to it under §§ 2.319(a), (c), (e), (g), (h), and (i), 2.324, and 2.333 to control the course of the proceeding, and may exercise any other authority granted to it by the Commission in accordance with § 2.1502(c)(6).

§ 2.1504 Request to participate in legislative hearing.

(a) Any person or entity who wishes to participate in a legislative hearing noticed under either § 2.1502(b)(1) or (b)(2) shall submit a request to participate by the date specified in the notice. The request must address:

(1) A summary of the person's position on the subject matter of the legislative hearing; and

(2) The specific information, expertise or experience that the person possesses with respect to the subject matter of the legislative hearing.

(b) The Commission or presiding officer shall, within ten (10) days of the date specified for submission of requests to participate, determine whether the person or entity has met the criteria specified by the Commission under § 2.1502(c)(4) for determining requests to participate in the legislative hearing, and issue an order to that person or entity informing them of the presiding officer's decision. A presiding officer's determinations in this regard are final and not subject to any motion for reconsideration or appeal to the Commission; and the Commission's determination in this regard are final and are not subject to a motion for reconsideration.

§ 2.1505 Role of the NRC staff.

The NRC staff shall be available to answer any Commission or presiding officer's questions on staff-prepared documents, provide additional information or documentation that may be available to the staff, and provide other assistance that the Commission or presiding officer may request without requiring the NRC staff to assume the role of an advocate. The NRC staff may request to participate in the legislative hearing by providing notice to the Commission or presiding officer, as applicable, within the time period established for submitting a request to participate; or if no notice is provided under § 2.1502(b)(2), within ten (10) days of the Commission's order announcing its determination to conduct a legislative hearing.

§ 2.1506 Written statements and submission of information.

All participants shall file written statements on the Commission-identified issues, and may submit documentary and demonstrative information. Written statements, copies of documentary information, and a list and short description of any demonstrative information to be submitted must be received by the NRC (and in a hearing on issues stemming from a § 2.335(b) petition, by the parties in the proceeding in which the petition was filed) no later than ten (10) days before the commencement of the oral hearing.

§ 2.1507 Oral hearing.

(a) Not less than five (5) days before the commencement of the oral hearing, the presiding officer shall issue an order setting forth the grouping and order of appearance of the witnesses at the oral hearing. The order shall be filed upon all participants by email or facsimile transmission if possible, otherwise by overnight mail.

(b) The Commission or presiding officer may question witnesses. Neither the Commission nor the presiding officer will ordinarily permit participants to submit recommended questions for the Commission or presiding officer to propound to witnesses. However, if the Commission or presiding officer believe that the conduct of the oral hearing will be expedited and that consideration of such proposed questions will assist in developing a more focused hearing record, the Commission or presiding officer may, in its discretion, permit the participants to submit recommended questions for the Commission or presiding officer's consideration.

(c) The Commission or presiding officer may request, or upon request of a participant may, in the presiding officer's discretion, permit the submission of additional information following the close of the oral hearing. Such information must be submitted no later than five (5) days after the close of the oral hearing and must be served at the same time upon all participants at the oral hearing.

§ 2.1508 Recommendation of presiding officer.

(a) If the Commission is not acting as a presiding officer, the presiding officer shall, within thirty (30) days following the close of the legislative hearing record, certify the record to the Commission on each of the issues identified by the Commission.

(b) The presiding officer's certification for each Commission-identified issue shall contain:

(1) A transcript of the oral phase of the legislative hearing;

(2) A list of all participants;

(3) A list of all witnesses at the oral hearing, and their affiliation with a participant;

(4) A list, and copies of, all documentary information submitted by the participants with ADAMS accession numbers;

(5) All demonstrative information submitted by the participants;

(6) Any written answers submitted by the NRC staff in response to questions posed by the presiding officer with ADAMS accession numbers;

(7) A certification that all documentary information has been entered into ADAMS, and have been placed on the NRC Web site unless otherwise protected from public disclosure;

(8) A certification by the presiding officer that the record contains sufficient information for the Commission to make a reasoned determination on the Commission-identified issue; and

(9) At the option of the presiding officer, a summary of the information in the record and a proposed resolution of the Commission-identified issue with a supporting basis.

§ 2.1509 Ex parte communications and separation of functions.

Section 2.347 applies in a legislative hearing. Section 2.348 applies in a legislative hearing only where the hearing addresses an issue certified to the Commission under § 2.335(d), and then only with respect to the underlying contested matter.

Appendix A to Part 2—[Removed]

■ 71. Appendix A to part 2 is removed.

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■ 72. Appendix D to 10 CFR Part 2 is revised to read as follows:

Appendix D to Part 2—Schedule for the Proceeding on Application for Either a Construction Authorization for a High-Level Waste Repository at a Geologic Repository Operations Area, or a License To Receive and Possess High-Level Radioactive Waste at a Geologic Repository Operations Area

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5)	FEDERAL REGISTER Notice of Hearing.
30	2.309(b)(2)	Petition to intervene/request for hearing, w/contentions.
30		Petition for status as interested government participant.
55	2.315(c)	Answers to intervention & interested government participant petitions.
62	2.309(h)(1)	Petitioner's response to answers.
70		Prehearing Conference.
100	2.309(h)(2)	Prehearing Conference Order; identifies participants in proceeding, admits contentions, sets discovery and other schedules.
110	2.1021	Appeals from Prehearing Conference Order.
120		Briefs in opposition to appeals.
150	2.1021, 2.329	Commission ruling on appeals from Prehearing Conference Order.
548		Staff issues SER. .2.1015(b) 150.2.1015(b)
578		Prehearing conference.
608	2.1015(b)	Discovery complete; Prehearing Conference order finalizes issues for hearing and sets schedule for prefiled testimony and hearing.
618	2.1015(b)	Appeals from Prehearing Conference Order.
628		Briefs in opposition to appeals; last date for filing motions for summary disposition.
648		Last date for responses to summary disposition motions.
658		Commission ruling on appeals from Prehearing Conference Order; last date for party opposing motion to file response to new facts and arguments in responses supporting motion.
698	2.1015(b)	Decision on summary disposition motions (may be determination to dismiss or hold in abeyance).
720	2.1015(b), 2.710(a)	Evidentiary hearing begins.
810	2.710(a)	Evidentiary hearing ends.
840		Applicant's proposed findings.
850		Other parties' proposed findings.
855		Applicant's reply to other parties' proposed findings.
955		Initial decision.
965	2.710(e)	Stay motion, petition for reconsideration, notice of appeal.
975		Other parties' response to stay motion, petition for reconsideration.
995		Commission ruling on stay motion.
985		Appellant's briefs.
1015	2.712(a)(1)	Appellees' briefs.
1125	2.712(a)(2) 2.712(a)(3) 2.713 342(a), 2.345(a), 2.1015(c)(1) 2.342(d), 2.345(b) 2.1015(c)(2) 2.1015(c)(3)	Commission decision.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 73. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955 as amended (42 U.S.C. 2131, 2235), sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Section 50.37 also issued under E.O. 12829, 3 CFR 1993 Comp., p. 570; E.O. 12958, as amended, 3 CFR, 1995 Comp., p. 333; E.O. 12968, 3 CFR 1995 Comp., p. 391. Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80—50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C 2237).

■ 74. In § 50.57, paragraph (c) is revised to read as follows:

§ 50.57 Issuance of operating license.

* * * * *

(c) An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, under this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the

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facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Before taking any action on such a motion that any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section. If no party opposes the motion, the presiding officer will issue an order in accordance with § 2.319(p) authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation.

■ 75. In § 50.91, the introductory paragraph, and paragraphs (a)(4) and (a)(6)(v) are revised to read as follows:

§ 50.91 Notice for public comment; State consultation.

The Commission will use the following procedures for an application requesting an amendment to an operating license for a facility licensed under §§ 50.21(b) or 50.22 or for a testing facility, except for amendments subject to hearings governed by 10 CFR part 2, subpart L. For amendments subject to 10 CFR part 2, subpart L, the following procedures will apply only to the extent specifically referenced in § 2.309(b) of this chapter, except that notice of opportunity for hearing must be published in the Federal Register at least thirty (30) days before the requested amendment is issued by the Commission:

(a) * * *

(4) Where the Commission makes a final determination that no significant hazards consideration is involved and that the amendment should be issued, the amendment will be effective on issuance, even if adverse public comments have been received and even if an interested person meeting the provisions for intervention called for in § 2.309 of this chapter has filed a request for a hearing. The Commission need hold any required hearing only after it issues an amendment, unless it determines that a significant hazards consideration is involved, in which case the Commission will provide an opportunity for a prior hearing.

* * * * *

(6) * * *

(v) Will provide a hearing after issuance, if one has been requested by a person who satisfies the provisions for intervention specified in § 2.309 of this chapter;

* * * * *

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

■ 76. The authority citation for part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95–604, Title II, 92 Stat. 3033–3041; and sec. 193, Pub. L. 101–575, 104 Stat. 2835 42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 51.80, and 51.97 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100–203, 101 Stat. 1330–223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 77. In § 51.15, paragraph (b) is revised to read as follows:

§ 51.15 Time schedules.

* * * * *

(b) As specified in 10 CFR part 2, the presiding officer, the Atomic Safety and Licensing Board or the Commissioners acting as a collegial body may establish a time schedule for all or any part of an adjudicatory or rulemaking proceeding to the extent that each has jurisdiction.

■ 78. Section 51.16 is revised to read as follows:

§ 51.16 Proprietary information.

(a) Proprietary information, such as trade secrets or privileged or confidential commercial or financial information, will be treated in accordance with the procedures provided in § 2.390 of this chapter.

(b) Any proprietary information which a person seeks to have withheld from public disclosure shall be submitted in accordance with § 2.390 of this chapter. When submitted, the proprietary information should be clearly identified and accompanied by a request, containing detailed reasons and justifications, that the proprietary information be withheld from public disclosure. A non-proprietary summary describing the general content of the proprietary information should also be provided.

■ 79. In § 51.109, paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 51.109 Public hearings in proceedings for issuance of materials license, including construction authorization, with respect to a geologic repository.

(a)(1) In a proceeding for issuance of a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 and 63 of this chapter, and in a proceeding for issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area under parts 60 and 63 of this chapter, the NRC staff shall, upon the publication of the notice of hearing in the Federal Register, present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, or as soon thereafter as may be practicable. In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect within thirty (30) days after the publication of the notice of hearing in the Federal Register. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.326 of this chapter.

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PART 52—EARLY SITE PERMITS; STANDARD DESIGN CERTIFICATIONS; AND COMBINED LICENSES FOR NUCLEAR POWER PLANTS

■ 80. The authority citation for part 52 continues to read:

Authority: Secs. 103, 104, 161, 182, 183, 186, 189, 68 Stat. 936, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2133, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 81. Section 52.21 is revised to read as follows:

§ 52.21 Hearings.

An early site permit is a partial construction permit and is therefore subject to all procedural requirements in 10 CFR part 2 which are applicable to construction permits, including the requirements for docketing in § 2.101(a)(1)-(4), and the requirements for issuance of a notice of hearing in §§ 2.104(a), (b)(1)(iv) and (v), (b)(2) to the extent it runs parallel to (b)(1)(iv) and (v), and (b)(3), provided that the designated sections may not be construed to require that the environmental report or draft or final environmental impact statement include an assessment of the benefits of the proposed action. In the hearing, the presiding officer shall also determine whether, taking into consideration the site criteria contained in 10 CFR part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site can be constructed and operated without undue risk to the health and safety of the public. All hearings conducted on applications for early site permits filed under this part are governed by the procedures contained in subparts C, G and L of part 2 of this chapter.

■ 82. In § 52.29, paragraph (b) is revised to read as follows:

§ 52.29 Application for renewal.

* * * * *

(b) Any person whose interests may be affected by renewal of the permit may request a hearing on the application for renewal. The request for a hearing must comply with 10 CFR 2.309. If a hearing is granted, notice of the hearing will be published in accordance with 10 CFR 2.309.

* * * * *

■ 83. In § 52.39, paragraph (a)(2)(ii) is revised to read as follows:

§ 52.39 Finality of early site permit determinations.

(a) * * *

(2) * * *

(ii) A petition alleging that the site is not in compliance with the terms of the early site permit must include, or clearly reference, official NRC documents, documents prepared by or for the permit holder, or evidence admissible in a proceeding under subpart C of 10 CFR part 2, which show, prima facie, that the acceptance criteria have not been met. The permit holder and NRC staff may file answers to the petition within the time specified in 10 CFR 2.323 for answers to motions by parties and staff. If the Commission, in its judgment, decides, on the basis of the petitions and any answers thereto, that the petition meets the requirements of this paragraph, that the issues are not exempt from adjudication under 5 U.S.C. 554(a)(3), that genuine issues of material fact are raised, and that settlement or other informal resolution of the issues is not possible, then the genuine issues of material fact raised by the petition must be resolved in accordance with the provisions in 5 U.S.C. 554, 556, and 557 which are applicable to determining applications for initial licenses.

* * * * *

■ 84. In § 52.43, paragraph (b) is revised to read as follows:

§ 52.43 Relationship to appendices M, N, and O of this part.

* * * * *

(b) Appendix O governs the NRC staff review and approval of preliminary and final standard designs. A NRC staff approval under appendix O in no way affects the authority of the Commission or the presiding officer in any proceeding under 10 CFR part 2. Subpart B of part 52 governs Commission approval, or certification, of standard designs by rulemaking.

* * * * *

■ 85. Section 52.51 is revised to read as follows:

§ 52.51 Administrative review of applications.

(a) A standard design certification is a rule that will be issued in accordance with the provisions of subpart H of 10 CFR part 2, as supplemented by the provisions of this section. The Commission shall initiate the rulemaking after an application has been filed under § 52.45 and shall specify the procedures to be used for the rulemaking. The notice of proposed rulemaking published in the Federal Register must provide an opportunity for the submission of comments on the proposed design certification rule. If, at the time a proposed design certification rule is published in the Federal Register under § 52.51(a), the Commission decides that a legislative hearing should be held, the information required by 10 CFR 2.1502(c) must be included in the Federal Register notice for the proposed design certification

(b) Following the submission of comments on the proposed design certification rule, the Commission may, at its discretion, hold a legislative hearing under the procedures in Subpart O of part 2 of this chapter. The Commission shall publish a notice in the Federal Register of its decision to hold a legislative hearing. The notice shall contain the information specified in paragraph (c) of this section, and specify whether the Commission or a presiding officer will conduct the legislative hearing.

(c) Notwithstanding anything in 10 CFR 2.390 to the contrary, proprietary information will be protected in the same manner and to the same extent as proprietary information submitted in connection with applications for construction permits and operating licenses under 10 CFR part 50, provided that the design certification shall be published in chapter I of this title.

■ 86. In § 52.63, paragraph (a)(1) is revised to read as follows:

§ 52.63 Finality of standard design certifications.

(a)(1) Notwithstanding any provision in 10 CFR 50.109, while a standard design certification is in effect under §§ 52.55 or 52.61, the Commission may not modify, rescind, or impose new requirements on the certification, whether on its own motion, or in response to a petition from any person, unless the Commission determines in a rulemaking that a modification is necessary either to bring the certification or the referencing plants into compliance with the Commission's regulations applicable and in effect at the time the certification was issued, or to assure adequate protection of the public health and safety or the common defense and security. The rulemaking procedures must provide for notice and opportunity for public comment.

* * * * *

■ 87. In Appendix A to Part 52, Section VIII, paragraphs B.5.f., C.3. and C.5. are revised to read as follows:

Appendix A to Part 52—Design Certification Rule for the U.S. Advanced Boiling Water Reactor

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VIII. Processes for Changes and Departures

* * * * *

B. * * *

5. * * *

f. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an applicant or licensee who references this appendix has not complied with VIII.B.5 of this appendix when departing from Tier 2 information, may petition to admit into the proceeding such a contention. In addition to compliance with the general requirements of 10 CFR 2.309, the petition must demonstrate that the departure does not comply with VIII.B.5 of this appendix. Further, the petition must demonstrate that the change bears on an asserted noncompliance with an ITAAC acceptance criterion in the case of a 10 CFR 52.103 preoperational hearing, or that the change bears directly on the amendment request in the case of a hearing on a license amendment. Any other party may file a response. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. The Commission may admit such a contention if it determines the petition raises a genuine issue of fact regarding compliance with VIII.B.5 of this appendix.

* * * * *

C. * * *

3. The Commission may require plant-specific departures on generic technical specifications and other operational requirements that were completely reviewed and approved, provided a change to a design feature in the generic DCD is not required and special circumstances as defined in 10 CFR 2.335 are present. The Commission may modify or supplement generic technical specifications and other operational requirements that were not completely reviewed and approved or require additional technical specifications and other operational requirements on a plant-specific basis, provided a change to a design feature in the generic DCD is not required.

* * * * *

5. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an operational requirement approved in the DCD or a technical specification derived from the generic technical specifications must be changed may petition to admit into the proceeding such a contention. Such petition must comply with the general requirements of 10 CFR 2.309 and must demonstrate why special circumstances as defined in 10 CFR 2.335 are present, or for compliance with the Commission's regulations in effect at the time this appendix was approved, as set forth in Section V of this appendix. Any other party may file a response thereto. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. All other issues with respect to the plant-specific technical specifications or other operational requirements are subject to a hearing as part of the license proceeding.

* * * * *

■ 88. In Appendix B to part 52, Section VIII, paragraphs B.5.f., C.3. and C.5. are revised to read as follows:

Appendix B to Part 52—Design Certification Rule for the System 80+ Design

* * * * *

VIII. Processes for Changes and Departures

* * * * *

B. * * *

5. * * *

f. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an applicant or licensee who references this appendix has not complied with VIII.B.5 of this appendix when departing from Tier 2 information, may petition to admit into the proceeding such a contention. In addition to compliance with the general requirements of 10 CFR 2.309, the petition must demonstrate that the departure does not comply with VIII.B.5 of this appendix. Further, the petition must demonstrate that the change bears on an asserted noncompliance with an ITAAC acceptance criterion in the case of a 10 CFR 52.103 preoperational hearing, or that the change bears directly on the amendment request in the case of a hearing on a license amendment. Any other party may file a response. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. The Commission may admit such a contention if it determines the petition raises a genuine issue of fact regarding compliance with VIII.B.5 of this appendix.

* * * * *

C. * * *

3. The Commission may require plant-specific departures on generic technical specifications and other operational requirements that were completely reviewed and approved, provided a change to a design feature in the generic DCD is not required and special circumstances as defined in 10 CFR 2.335 are present. The Commission may modify or supplement generic technical specifications and other operational requirements that were not completely reviewed and approved or require additional technical specifications and other operational requirements on a plant-specific basis, provided a change to a design feature in the generic DCD is not required.

* * * * *

5. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an operational requirement approved in the DCD or a technical specification derived from the generic technical specifications must be changed may petition to admit into the proceeding such a contention. Such petition must comply with the general requirements of 10 CFR 2.309 and must demonstrate why special circumstances as defined in 10 CFR 2.335 are present, or for compliance with the Commission's regulations in effect at the time this appendix was approved, as set forth in Section V of this appendix. Any other party may file a response thereto. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. All other issues with respect to the plant-specific technical specifications or other operational requirements are subject to a hearing as part of the license proceeding.

* * * * *

■ 89. In Appendix C to Part 52, Section VIII, paragraphs B.5.f., C.3. and C.5. are revised to read as follows:

Appendix C to Part 52—Design Certification Rule for the AP600 Design

* * * * *

VIII. Processes for Changes and Departures

* * * * *

B. * * *

5. * * *

f. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an applicant or licensee who references this appendix has not complied with VIII.B.5 of this appendix when departing from Tier 2 information, may petition to admit into the proceeding such a contention. In addition to compliance with the general requirements of 10 CFR 2.309, the petition must demonstrate that the departure does not comply with VIII.B.5 of this appendix. Further, the petition must demonstrate that the change bears on an asserted noncompliance with an ITAAC acceptance criterion in the case of a 10 CFR 52.103 preoperational hearing, or that the change bears directly on the amendment request in the case of a hearing on a license amendment. Any other party may file a response. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. The Commission may admit such a contention if it determines the petition raises a genuine issue of fact regarding compliance with VIII.B.5 of this appendix.

* * * * *

C. * * *

3. The Commission may require plant-specific departures on generic technical specifications and other operational requirements that were completely reviewed and approved, provided a change to a design feature in the generic DCD is not required and special circumstances as defined in 10 CFR 2.335 are present. The Commission may modify or supplement generic technical

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specifications and other operational requirements that were not completely reviewed and approved or require additional technical specifications and other operational requirements on a plant-specific basis, provided a change to a design feature in the generic DCD is not required.

* * * * *

5. A party to an adjudicatory proceeding for either the issuance, amendment, or renewal of a license or for operation under 10 CFR 52.103(a), who believes that an operational requirement approved in the DCD or a technical specification derived from the generic technical specifications must be changed may petition to admit into the proceeding such a contention. Such petition must comply with the general requirements of 10 CFR 2.309 and must demonstrate why special circumstances as defined in 10 CFR 2.335 are present, or for compliance with the Commission's regulations in effect at the time this appendix was approved, as set forth in Section V of this appendix. Any other party may file a response thereto. If, on the basis of the petition and any response, the presiding officer determines that a sufficient showing has been made, the presiding officer shall certify the matter directly to the Commission for determination of the admissibility of the contention. All other issues with respect to the plant-specific technical specifications or other operational requirements are subject to a hearing as part of the license proceeding.

* * * * *

■ 90. In Appendix N to Part 52, the three introductory paragraphs are revised to read as follows:

Appendix N to Part 52—Standardization of Nuclear Power Plant Designs: Licenses To Construct and Operate Nuclear Power Reactors of Duplicate Design at Multiple Sites

Section 101 of the Atomic Energy Act of 1954, as amended, and § 50.10 of this chapter require a Commission license to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any production or utilization facility. The regulations in part 50 of this chapter require the issuance of a construction permit by the Commission before commencement of construction of a production or utilization facility, except as provided in § 50.10(e) of this chapter, and the issuance of an operating license before the operation of the facility.

The Commission's regulations in Part 2 of this chapter specifically provide for the holding of hearings on particular issues separately from other issues involved in hearings in licensing proceedings, and for the consolidation of adjudicatory proceedings and of the presentations of parties in adjudicatory proceedings such as licensing proceedings (§§ 2.316, 2.317).

This appendix sets out the particular requirements and provisions applicable to situations in which applications are filed by one or more applicants for licenses to construct and operate nuclear power reactors of essentially the same design to be located at different sites.

* * * * *

■ 91. In Appendix O to part 52, paragraph 6 is revised to read as follows:

Appendix O to Part 52—Standardization of Design: Staff Review of Standard Designs

* * * * *

6. The determination and report by the regulatory staff shall not constitute a commitment to issue a permit or license, or in any way affect the authority of the Commission, Atomic Safety and Licensing Board Panel, and other presiding officers in any proceeding under part 2 of this chapter.

* * * * *

PART 54—REQUIREMENTS FOR RENEWAL OF OPERATING LICENSES FOR NUCLEAR POWER PLANTS

■ 92. The authority citation for part 54 continues to read as follows:

Authority: Secs. 102, 103, 104, 161, 181, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs 201, 202, 206, 88 Stat. 1242, 1244, as amended (42 U.S.C. 5841, 5842). Section 54.17 also issued under E.O. 12829, 3 CFR, 1993 Comp., p.570; E.O. 12958, as amended, 3 CFR, 1995 Comp., p. 333; E.O. 12968, 3 CFR, 1995 Comp., p.391.

■ 93. In § 54.29, paragraph (c) is revised to read as follows:

§ 54.29 Standards for issuance of a renewed license.

* * * * *

(c) Any matters raised under § 2.335 have been addressed.

PART 60—DISPOSAL OF HIGH LEVEL WASTE IN GEOLOGICAL REPOSITORIES

■ 94. The authority citation for part 60 continues to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–01, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213g, 2228, as amended (42 U.S.C. 10134, 10141), and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 95. Section 60.1 is revised to read as follows:

§ 60.1 Purpose and scope.

This part prescribes rules governing the licensing (including issuance of a construction authorization) of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982, as amended. This part does not apply to any activity licensed under another part of this chapter. This part does not apply to the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, in accordance with the Nuclear Waste Policy Act of 1992, as amended, and the Energy Policy Act of 1992, subject to part 63 of this chapter. This part also gives notice to all persons who knowingly provide to any licensee, applicant, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's or applicant's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 60.11.

■ 96. In § 60.22, paragraph (a) is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and must be filed with the Director.

* * * * *

■ 97. In § 60.63, paragraph (a) is revised to read as follows:

§ 60.63 Participation in license reviews.

(a) State, local governmental bodies, and affected, Federally-recognized Indian Tribes may participate in license reviews as provided in subpart J of part 2 of this chapter. A State in which a repository for high-level radioactive waste is proposed to be located and any affected, Federally-recognized Indian Tribe shall have an unquestionable legal right to participate as a party in such proceedings.

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■ 98. Section 60.130 is revised to read as follows:

§ 60.130 General considerations.

(a) Pursuant to the provisions of § 60.21(c)(2)(i), an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area, and an application for a license to receive, possess, store, and dispose of high-level radioactive waste in the geologic repository operations area, must include the principal design criteria for a proposed facility. The principal design criteria establish the necessary design, fabrication, construction, testing, maintenance, and performance requirements for structures, systems, and components important to safety and/or important to waste isolation. Sections 60.131 through 60.134 specify minimum requirements for the principal design criteria for the geologic repository operations area.

(b) These design criteria are not intended to be exhaustive. However, omissions in §§ 60.131 through 60.134 do not relieve DOE from any obligation to provide such features in a specific facility needed to achieve the performance objectives.

PART 63—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC REPOSITORY AT YUCCA MOUNTAIN, NEVADA

■ 99. The authority citation for part 63 continues to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213g, 2238, as amended (42 U.S.C. 10134, 10141), and Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 100. Section 63.1 is revised to read as follows:

§ 63.1 Purpose and scope.

This part prescribes rules governing the licensing (including issuance of a construction authorization) of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992. As provided in 10 CFR 60.1, the regulations in part 60 of this chapter do not apply to any activity licensed under another part of this chapter. This part also gives notice to all persons who knowingly provide to any licensee, applicant, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's or applicant's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 63.11.

■ 101. In § 63.22, paragraph (a) is revised to read as follows:

§ 63.22 Filing and distribution of application.

(a) An application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area at Yucca Mountain, and an application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site that has been characterized, any amendments to the application, and an accompanying environmental impact statement and any supplements, must be signed by the Secretary of Energy or the Secretary's authorized representative and must be filed with the Director in triplicate on paper and optical storage media.

* * * * *

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 102. The authority citation for part 70 continues to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended, (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282, 2297f); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec. 193, 104 Stat. 2835 as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243); sec. 1704, 112 Stat. 2704 (44 U.S.C. 3504 note).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93–377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.81 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.82 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

■ 103. Section 70.23a is revised to read as follows:

§ 70.23a Hearing required for uranium enrichment facility.

The Commission will hold a hearing under 10 CFR part 2, subparts A, C, G, and I, on each application for issuance of a license for construction and operation of a uranium enrichment facility. The Commission will publish public notice of the hearing in the Federal Register at least thirty (30) days before the hearing.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

■ 104. The authority citation for part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2704 (44 U.S.C. 3504 note).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 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). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

■ 105. Section 72.202 is revised to read as follows:

§ 72.202 Participation in license reviews.

States, local governmental bodies and affected, Federally-recognized Indian Tribes may participate in license reviews as provided in Subpart C of Part 2 of this chapter.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

■ 106. The authority citation for part 73 continues to read as follows:

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec. 147, 94 Stat. 780 (42 U.S.C.

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2073, 2167, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 5841, 5844, 2297f). Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

■ 107. In § 73.21, paragraph (c)(1)(vi) is revised to read as follows:

§ 73.21 Requirements for the protection of safeguards information.

* * * * *

(c) * * *

(1) * * *

(vi) An individual to whom disclosure is ordered under § 2.709(f) of this chapter.

* * * * *

PART 75—SAFEGUARDS ON NUCLEAR MATERIAL—IMPLEMENTATION OF US/IAEA AGREEMENT

■ 108. The authority citation for part 75 continues to read as follows:

Authority: Secs. 53, 63, 103, 104, 122, 161, 68 Stat. 930, 932, 936, 937, 939, 948, as amended (42 U.S.C. 2073, 2093, 2133, 2134, 2152, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 75.4 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161).

■ 109. In § 75.12, paragraph (c) is revised to read as follows:

§ 75.12 Communication of information to IAEA.

* * * * *

(c) A request made under § 2.390(b) of this chapter will not be treated as a request under this section unless the application makes specific reference to this section, nor shall a determination to withhold information from public disclosure necessarily require a determination that this information not be transmitted physically to the IAEA.

* * * * *

PART 76—CERTIFICATION OF GASEOUS DIFFUSION PLANTS

■ 110. The authority citation for part 76 continues to read as follows:

Authority: Secs. 161, 68 Stat. 948, as amended, secs. 1312, 1701, as amended, 106 Stat. 2932, 2951, 2952, 2953, 110 Stat. 1321–349 (42 U.S.C. 2201, 2297b–11, 2297f); secs. 201, as amended, 204, 206, 88 Stat. 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846). Sec 234(a), 83 Stat. 444, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243(a)); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sec. 76.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat 2951 (42 U.S.C. 5851). Sec. 76.22 is also issued under sec. 193(f), as amended, 104 Stat. 2835, as amended by Pub. L. 104–134, 110 Stat. 1321, 1321–349 (42 U.S.C. 2243(f)). Sec. 76.35(j) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) STET.

■ 111. In § 76.41, paragraph (b) is revised to read as follows:

§ 76.41 Record underlying decisions.

* * * * *

(b) All public comments and correspondence in any proceeding regarding an application for a certificate must be made a part of the public docket of the proceeding, except as provided under 10 CFR 2.390.

■ 112. In § 76.70, paragraph (c)(2)(v) is revised to read as follows:

§ 76.70 Post-issuance.

* * * * *

(c) * * *

(2) * * *

(v) Provide that the Commission may make a final decision after consideration of the written submissions or may in its discretion adopt by order, upon the Commission's own initiative or at the request of the Corporation or an interested person, further procedures for a hearing of the issues before making a final enforcement decision. These procedures may include requirements for further participation in the proceeding, such as the requirements for intervention under Part 2, subparts C, G or L of this chapter. Submission of written comments by interested persons do not constitute entitlement to further participation in the proceeding. Further procedures will not normally be provided for at the request of an interested person unless the person is adversely affected by the order.

* * * * *

■ 113. In § 76.72, paragraphs (a), (b), (c), and (d) are revised to read as follows:

§ 76.72 Miscellaneous procedural matters.

(a) The filing of any petitions for review or any responses to these petitions are governed by the procedural requirements set forth in 10 CFR 2.302(a) and (c), 2.304, 2.305, 2.306, and 2.307. Additional guidance regarding the filing and service of petitions for review of the Director's decision and responses to these petitions may be provided in the Director's decision or by order of the Commission.

(b) The Secretary of the Commission has the authority to rule on procedural matters set forth in 10 CFR 2.346.

(c) There are no restrictions on ex parte communications or on the ability of the NRC staff and the Commission to communicate with one another at any stage of the regulatory process, with the exception that the rules on ex parte communications and separation of functions set forth in 10 CFR 2.347 and 2.348 apply to proceedings under 10 CFR Part 2 for imposition of a civil penalty.

(d) The procedures set forth in 10 CFR 2.205, and in 10 CFR part 2, subparts C, G, L and N will be applied in connection with NRC action to impose a civil penalty pursuant to Section 234 of the Atomic Energy Act of 1954, as amended, or Section 206 of the Energy Reorganization Act of 1974 and the implementing regulations in 10 CFR part 21 (Reporting of Defects and Noncompliance), as authorized by section 1312(e) of the Atomic Energy Act of 1954, as amended.

* * * * *

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

■ 114. The authority citation for part 110 continues to read as follows:

Authority: Secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2071, 2073, 2074, 2077, 2092–2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154–2158, 2201, 2231–2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec 5, Pub. L. 101–575, 104 Stat 2835 (42 U.S.C.2243); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Sections 110.1(b)(2) and 110.1(b)(3) also issued under Pub. L. 96–92, 93 Stat. 710 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c and 57d., 88 Stat. 473, 475 (42 U.S.C. 2074). Section 110.27 also issued under sec. 309(a), Pub. L. 99–440. Section 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Section 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Sections 110.80–110.113 also issued under 5 U.S.C. 552, 554. Sections 110.130–110.135 also issued under 5 U.S.C. 553. Sections 110.2 and 110.42 (a)(9) also issued under sec. 903, Pub. L. 102–496 (42 U.S.C. 2151 *et seq.*).

■ 115. In § 110.73, paragraph (b) is revised to read as follows:

§ 110.73 Availability of NRC records.

* * * * *

(b) Proprietary information provided under this part may be protected under Part 9 and § 2.390(b), (c), and (d) of this chapter.

Dated at Rockville, Maryland, this 24th day of December 2003.

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For the Nuclear Regulatory Commission.
Annette L. Vietti-Cook,
Secretary of the Commission.
[FR Doc. 04–34 Filed 1–13–04; 8:45 am]
BILLING CODE 7590–01–P

Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervener* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervener*	No. 04-1145

DECLARATION OF JEAN-CLAUDE VAN ITALLIE
SUPPORTING STANDING OF CITIZENS AWARENESS NETWORK, INC.

I, Jean-Claude van Itallie, declare as follows:

1. My name is Jean-Claude van Itallie. I live at 63 Davenport Road in the Town of Rowe, Massachusetts. I own my home and land at this address. The extent of my land is about 460 acres.

2. I have owned the house and most of the acreage since 1968 when I purchased it from my family and another family. My family had owned the land since the late 1940s. I have lived here since 1968.

3. I believe my house and land are approximately six miles from Yankee Atomic Electric Company's decommissioned Yankee Rowe reactor.

4. I am a member of Citizens Awareness Network, Inc. [CAN] of Rowe, Massachusetts, and have authorized CAN and its attorney to represent me in the above captioned case. I believe that the NRC's latest rule changes make is nearly impossible for me to effectively raise my concerns about the recently submitted second Yankee Rowe License Termination Plan [LTP] when and if the NRC offers a hearing opportunity on the plan. CAN and I want to participate in hearings to decide whether the LTP is adequate to assure clean-up of the reactor site and whether the plan provides reasonable assurance that, after license release of the site for public use, public health and safety will not be compromised.

5. As a neighbor of the Yankee Nuclear Power Station in Rowe, Massachusetts, I am concerned about radioactive and other reactor site contamination that Yankee Rowe allowed to infiltrate the groundwater. I like to walk the roads and woods here, and would like to freely drink from springs or streams. I am concerned that these water sources are contaminated by tritium from the Yankee Rowe reactor site.

6. My concern has increased, as I know that Yankee Atomic Electric Company submitted a previous LTP to the Nuclear Regulatory Commission [NRC]. Based upon my experience of the decommissioning of the reactor and the plan submitted in 1997, I do not trust Yankee Atomic's ability or intention to restore the property to the pristine condition it was in when I was young.

7. When the NRC allows Yankee Rowe to the land around the reactor, I want to be able to o walk about there and enjoy nature. I do not want to have to worry that the clean up was botched and water on the site is dangerous to drink due to tritium contamination.

8. If the NRC allows an inadequate site clean up, I will be deprived of the enjoyment of walking freely on the Yankee Rowe site without fear of contamination. Doubtless too the property values in this area would be adversely affected. People will not value land where the water is contaminated.

9. If the NRC allows the Yankee Rowe LTP to be approved without adequate assurance of site cleanup, my health will be harmed and my enjoyment of the natural beauty of my home and its surroundings will be diminished. I intend to request a hearing on the LTP.

10. Under the new NRC regulations, however, I will not be entitled to a formal hearing as I was in 1998 when Yankee submitted its first LTP. I think this change in the hearing process -- particularly in light of what happened to us in the original LTP proceeding -- is unfair and probably illegal.

11. After the Yankee Atomic Electric Company submitted its first LTP in late December 1997, the NRC held a public meeting to discuss that LTP. A few weeks later the NRC published a notice of hearing. I filed a declaration in support of a group I belonged to, the New England Coalition, so that they could request a hearing and intervene on my behalf.

12. In June of 1998, the NRC's Atomic Safety and Licensing Board [ASLB] rejected our request for a hearing based on lack of standing.

13. We appealed. By the time the NRC had heard the appeal it was October 1998. They decided that we did have standing.

14. We had a prehearing conference on our case at the end of January 1999. By May, after the NRC finally released an Environmental Assessment on the LTP, we filed National

Environmental Policy Act [NEPA] contentions with the support of an expert in hydrogeology. The ASLB met the following month and agreed to take up the NEPA contentions on groundwater pollution due to tritium. Yankee's attorney then told the Board that they were withdrawing their LTP and would submit another one sometime in the next twenty years. So we never did get a hearing on the first LTP. All we got were pre-hearing conferences on the papers we had filed.

15. The existence of a nearby radioactively contaminated site threatens my health and diminishes my aesthetic enjoyment of my home and the countryside around it. I believe I am entitled to a hearing on whether Yankee Rowe will be cleaned up adequately.

16. Not only does the existence of radioactive pollution at Yankee Rowe interfere with the quiet use and enjoyment of my property, it has the same effect on neighbors and friends who visit me. It is likely to have an adverse effect on the value of my property.

17. I am deeply concerned that under the NRC's new hearing rules I will never get a formal hearing on the clean up of the Yankee Rowe site.

18. During the first LTP hearings the judges would have allowed us to put on witnesses, to get documents and information from Yankee, and to have the opportunity to examine NRC and Yankee Atomic witnesses. Under the new rules I may not even get a hearing. If I do get one, I will not have the right to ask for all the documents and information I need from Yankee and the NRC staff. I will not be able to present my witnesses or cross-examine witnesses from the NRC and Yankee Atomic. I think this is unfair and illegal.

19. During the first LTP hearings the judges accepted our concerns about the problems of site clean up at Yankee Rowe. These problems still exist. The only change is that the NRC adopted new rules that will stop me from getting a full, formal hearing on my concerns.

20. Only if this Court overturns the NRC's new rules will I have an opportunity to get a formal adjudicatory hearing on my concerns about the Yankee Rowe LTP. Without this Court's action in overturning the new rules, I, through CAN's attorney, will not be able to request information I need to present my case from Yankee Atomic, nor will I be able to present witnesses or examine Yankee Atomic and NRC staff witnesses. It is a matter of simple justice that I, a person living near the radioactively contaminated Yankee Rowe site, should be allowed to request and receive such a hearing.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 2004.

Jean-Claude van Itallie

Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervener* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervener*	No. 04-1145

DECLARATION OF DEBORAH BOOTH KATZ
SUPPORTING STANDING OF CITIZENS AWARENESS NETWORK, INC.

I, Deborah Booth Katz, declare as follows:

1. My name is Deborah Booth Katz. I live at 80 Davenport Road in the Town of Rowe, Massachusetts. My husband Fred and I own our home, out buildings, and land at this address. We have lived here together since 1978.

2. I believe that my house and land are approximately 5 miles from Yankee Atomic Electric Company's Yankee Rowe reactor site that is still undergoing decommissioning.

3. I am Executive Director of the Citizens Awareness Network, Inc., [CAN]. The Board of Directors has authorized me to represent the Board's position on these issues.

4. I have authorized CAN and its attorney to represent me in the above captioned case because I believe that the NRC's latest rule changes make is nearly impossible for me to effectively raise my concerns about the recently submitted second Yankee Rowe License Termination Plan.

5. CAN and I want to participate in hearings on that plan to decide whether the LTP is adequate to assure clean-up of the reactor site and whether the plan provides reasonable assurance that, after license release of the site for public use, public health and safety will not be compromised.

6. As CAN's Executive Director, and speaking for the Board of Directors, I am also concerned about the adverse impacts the NRC's rule change will have on CAN's ability to survive as an organization. Our members rely upon us to represent their interests and advocate for them as necessary in NRC hearings. Many members and myself view the elimination of formal hearings as a severe limitation on meaningful participation in NRC nuclear licensing decisions. CAN, as a small non-profit business organization relies heavily upon contributions of its members and support of small foundations and other grant making organizations. Our members and the grantors have reacted to the NRC's rule change by becoming reluctant to provide continued support for our work. The NRC never asked CAN about the effects that its latest rule change would have on CAN's ability to continue to do business.

7. As a neighbor of the Yankee Nuclear Power Station in Rowe, Massachusetts, I am concerned about radioactive and other reactor site contamination that Yankee Rowe allowed to get into the groundwater. I like to walk the roads and woods here. I would like to be able to drink from springs or streams without needing to be concerned that the water may be contaminated by tritium from the Yankee Rowe reactor site.

8. My concern has increased, as I know that Yankee Atomic Electric Company submitted another license termination plan to the Nuclear Regulatory Commission. Based upon my previous experience in this Court, *CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995), a subsequent hearing on the decommissioning plan, the actual decommissioning work on the reactor, and the aborted hearing process on the 1997 License Termination Plan, I do not trust Yankee Atomic's and the NRC's ability or intention to see that the site is restored to a "green field" condition.

9. When the NRC allows the Yankee Rowe lands to be released, I want to be able to enter on the Yankee Rowe reactor site grounds to walk about and enjoy nature. I do not want to have to worry about an ineffective clean up job leaving water on (and likely off) the site that is dangerous to drink due to tritium contamination.

10. If the NRC allows the site clean up to be done inadequately, I will be deprived of the enjoyment of walking freely on the publicly released Yankee Rowe lands or in adjacent areas without fear of getting contaminated. Also, the property values in this area will be adversely affected. No one wants to have a home in an area with a contaminated site and contaminated water.

11. Because of the harms that would occur to me if the NRC allowed the Yankee Rowe License Termination plan to be approved without adequate assurance of site cleanup--the continuing adverse effects on my being able to enjoy my property and neighborhood and live without fear of contamination in the local environment, and the adverse effect on the value of my property -- I, with CAN's help, intend to request a hearing on the Yankee Rowe License Termination Plan [LTP]. CAN supports me and Mr. van Itallie and other members who are seeking that hearing. CAN intends to request a hearing in our behalf

from the NRC as soon as one is offered. Under the new NRC regulations, however, neither CAN nor I will be entitled to the formal hearing in which we were supposed to be able to participate in 1999 on Yankee Atomic's original LTP.

12. Yankee Atomic submitted the original LTP in late December 1997. The NRC held a public meeting to discuss it in January of 1998. A few weeks later, the NRC offered a hearing on the plan to interested persons. CAN filed declarations supporting the standing of CAN so that CAN could request a hearing and intervene in that hearing. I was CAN's pro se representative in that process. In June, the NRC's Atomic Safety and Licensing Board rejected our request for a hearing based on lack of standing. We appealed. By the time the NRC responded positively to our appeal it was October of 1998. They decided that we did have standing. We had a prehearing conference on our case at the end of January 1999. By mid-May, after the NRC finally released an Environmental Assessment on the LTP, we filed NEPA contentions with the support of an expert in hydrogeology employed by New England Coalition on Nuclear Pollution, another participant in the hearing process. The Atomic Safety and Licensing Board met the following month. They agreed to take up the NEPA contentions on groundwater pollution due to tritium contamination and Yankee Atomic's inadequate monitoring and site clean up plans on that issue. Yankee Atomic's lawyer told the Board that they were withdrawing the LTP and said they would come back with another application sometime in the next twenty years. Frankly, I and CAN and its members did not think that all of us would be around when that happened. We never did get a hearing on the first LTP. All we got was "pre-hearing" conferences on our contentions and other filings.

13. As a near-by landowner and homeowner whose aesthetic enjoyment of her home and property is diminished by knowing there is a radioactively contaminated site near me, I believe I am entitled to a formal, adjudicatory hearing on whether that site will be adequately cleaned up.

14. I am also very concerned that neither CAN nor I will get the hearing we are entitled to get on the clean up of the Yankee Rowe site. The reason for this is the change in the NRC's hearing rules. At the first LTP pre-hearings, CAN was to be permitted to put on witnesses, obtain discovery of documents and information from Yankee Atomic, and examine NRC, Yankee Atomic, and any other witnesses. Under the new NRC rules, CAN and I may not even get a hearing. I believe that is now entirely up to the discretion of a hearing officer. If we do get one, we are not likely to have the right to get discovery, present witnesses, and cross-examine witnesses. We think this is unfair and illegal. We raised legitimate concerns in 1999 about the clean up at the Yankee Rowe site. The Atomic Safety and Licensing Board Panel in that case found those concerns sufficient to warrant a hearing, including NEPA contentions on tritium contamination.

15. The same problems still exist today at the Yankee Rowe site. Looking at the declarations of Robert J. Ross, hydrogeologist, and Richard Clapp, epidemiologist, it is plain that the NRC and Yankee Atomic never addressed the problems and dangers that were there in

1999 and probably for years before that. A formal hearing with the opportunity to present Mr. Ross, Mr. Clapp and other witnesses and evidence, get discovery of information as needed from Yankee Atomic, and have a chance to examine the witnesses Yankee and others present would allow CAN's and my concerns to be addressed, and, in all likelihood worked into the plans to clean up the site.

16. The only chance CAN and I and other CAN members will have of getting a hearing on our legitimate concerns over cleanup of Yankee Rowe is if this Court overturns the new NRC rules. Unless that happens, I believe that the organization I work for, its other members and I will, at a minimum, be harmed in the ways I have described.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 27, 2004.

Deborah Booth Katz

Before the
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervener* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervener*	No. 04-1145

DECLARATION OF ROBERT J. ROSS, CGWP, PG,
SUPPORTING STANDING OF CITIZENS AWARENESS NETWORK,INC.

I, Robert J. Ross, declare in the above captioned matter that:

1. I am the principal hydrogeologist at Ross Environmental Associates, Inc., a private consulting firm based in Stowe, Vermont. A statement of my qualifications is posted at http://www.ross-environmental.com.

2. I filed an expert declaration in the initial Yankee Rowe License Termination Plan case in 1999.

3. Citizens Awareness Network, Inc., retained my services in this case to review the current status of hydrogeologic concerns, if, any, at the Yankee Atomic Electric Company's [YAEC] Yankee Rowe [YR] nuclear reactor site.

4. To prepare this declaration, in addition to the current Yankee Rowe License Termination Plan, I have reviewed the following documents: (a) Yankee Atomic Electric Company (YAEC) – Ground Water Data for YNPS (DESD-TDYR-01-001) – 05/19/03; (b) Yankee Atomic Electric Company – Ground Water Sampling Results for YNPS – 01/20/04; (c) Hydrogeologic Report of 2003 Supplemental Investigation (YA-REPT-00-004-04) - Yankee Nuclear Power Station Rowe, Massachusetts prepared by David Scott, Hydrogeologist (03/15/04); (d) Handouts for "Review of 2003 Supplemental Hydrogeologic Investigation" dated May 11, 2004 received via email from Mr. Gerry P. Van Nordennen, for use in a teleconference on the hydrogeologic monitoring and related issues at the Yankee Rowe reactor site on that day.

5. Based on my review of these documents, although I believe the recent methodology (rotosonic drilling and low-flow ground water sampling) used by YAEC to evaluate the hydrogeologic and subsurface soil contaminant conditions at the site are appropriate for characterizing the complex hydrogeologic setting at the Yankee Rowe facility, there are several data gaps that still need to be addressed. A summary of significant deficiencies follow below.

6. The 2003 YAEC Hydrogeologic Report and recent correspondence identify three aquifers underlying the site: shallow stratified drift, glaciolacustine sediments, and bedrock. Based on data collected to date, YAEC identified contamination in each of the aquifers.

7. The U.S. EPA Maximum Contaminant Level (MCL) for tritium of 20,000 Pico curies per liter (pCi/L) has been exceeded at the site.

8. There is no clear explanation for the presence of tritium at over 45,000 pCi/L in the samples collected from monitoring well MW-107C. This well is located adjacent to the Spent Fuel Pool, which was drained and empty since June 2003. The current status of reporting leaves it an open question as to whether this high level of contamination was missed during previous studies or whether it relates to a new or recent spill that may have occurred during work completed at the Spent Fuel Pool in June 2003.

9. Reported ground water quality data for 2003 (July and November) was collected over a large time span. Generally, ground water quality data should be collected within as short a timeframe as possible. This deficiency was acknowledged during the Tele-conference of May 11, 2004. This raises serious questions about the quality and validity of the data.

10. YAEC's evaluation of ground water quality data should be correlated with ground water elevation data for corresponding sampling events to assess the possible relationship between contaminant trends and fluctuating ground water elevations. Furthermore, ground water elevation data should be collected within a one day period. These deficiencies were acknowledged during the Tele-conference and additional ground water elevation data from a one-day monitoring event was provided. However, in order for YAEC's monitoring to be reliable, ground water elevation monitoring events must be completed within a one-day monitoring period.

11. Yankee Atomic Electric Company's hydrogeological reports have not adequately characterized the horizontal and vertical extent of subsurface contamination. YAEC needs to conduct additional work in order to characterize possible impacts within and down-gradient of suspected contamination release areas.

12. YAEC needs to conduct additional work in order to properly evaluate the vertical hydraulic flow regime at the Yankee Rowe facility. Ground water elevation data at nested well couplets must be collected on the same day to properly evaluate the potential hydraulic connection between the various hydrogeologic units.

13. Tritium was detected in the bedrock aquifer based on ground water data collected from monitoring well MW-105B during the July and November 2003 sampling events. Current information does not identify the likely migration pathway between the source area(s) and the bedrock formation.

14. Review of the 2003 hydrogeologic study and the handouts for the May 11 Tele-conference indicate that the "stratigraphy is more complex than previously thought". During the 2003 hydrogeologic study, a series of three wells were installed as nested couplets at selected locations. The proposed work also recommends the installation of nested couplets consisting of three monitoring wells. Based on the thickness of the overburden (maximum depth of 295 feet) and complexity of the hydrogeology, the premise that nested couplets consisting of three monitoring wells is inadequate to properly characterize site conditions.

15. Review of the geologic cross-sections and "undisturbed ground water" samples indicates several possible contaminated zones that were not fully characterized. Examples of this are highlighted from data collected during the installation of the MW-107 series wells, which identified a sandy layer at 41-45 feet below grade (bg) with "undisturbed ground water" concentrations of tritium at 35,300 pCi/L, and from data collected during the installation of the MW-104 series wells, which identified sandy layers at 115-118, 135-139, and 163.5-175 feet bg with "undisturbed ground water" concentrations of tritium between 4,810 and 8,770 pCi/L. No permanent monitoring wells were installed within any of these zones (see geologic cross-sections A-A' and D-D'). During the Tele-conference, Mr. David Scott indicated that sufficient water was present within many of the sand lenses identified during soil boring.

16. The vertical extent of subsurface soil contamination beneath facility structures does not appear to have been completely characterized. Immediate characterization of the likely source area(s) is extremely important with respect to insuring the protection of human health and nearby sensitive receptors.

17. The contaminant plumes shown on the site plans and figures are confusing. Standard convention is to use isopleths of equal concentrations, as shown on the figures, but with fill areas representing a range of concentrations of tritium (i.e. one range > 45,000 pCi/L, another range = 44,999 - 5,000 pCi/L, and another range = 4,999 – 2,500 pCi/L). Also, the color scheme and concentration ranges are not consistent between figures. This makes it difficult to compare data between the different zones. The 2003 Hydrogeologic Report also indicates that the non-radiological ground water quality data would be discussed in a separate report (page 9). Review of this data is important to properly characterize site conditions with respect to possible impacts to human health and the environment.

18. In consideration of the above observations, it is my professional opinion that there are serious defects in the YAEC hydrogeological site characterization to date. These defects mean that based on its current studies, YAEC cannot provide reasonable assurance that radioactive contamination is contained at the YR site.

19. In consideration of the above observations, it is my professional opinion that based on its current studies, YAEC cannot provide reasonable assurance that persons hiking and recreating in the area around the YR site would not be exposed to radioactive tritium contamination in the water above EPA action levels. If the site were opened to public use under the current License Termination Plan, YR could not assure that persons roaming the site and drinking water on the site would be able to avoid exposure to tritium in concentrations above the EPA action levels for drinking water.

20. In consideration of the above observations, it is my professional opinion that based on its current studies; YAEC cannot provide reasonable assurance that their License Termination Plan, unless modified in terms of its methodologies of conducting hydrogeological monitoring, will be adequate to protect public health and safety at license termination.

I declare under penalty of perjury that the foregoing is true and correct. Executed May 20, 2004

Robert J. Ross, CGWP, PG
Ross Environmental Associates, Inc.
73 School Street
P.O. Box 1533
Stowe, VT 05672
(802) 253-4280

Before the

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., *Petitioner* and NATIONAL WHISTLEBLOWER CENTER and COMMITTEE FOR SAFETY AT PLANT ZION, *Petitioners' Intervener* -v- UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Respondents* and NUCLEAR ENERGY INSTITUTE, *Respondents' Intervener*	No. 04-1145

DECLARATION OF RICHARD CLAPP SUPPORTING STANDING OF CITIZENS AWARENESS NETWORK

I, Richard Clapp, declare as follows:

1. My name is Richard Clapp. I am Professor of Public Health at Boston University School of Public Health.

2. In addition to my undergraduate degree in Biology from Dartmouth (1967), I hold an MPH degree from Harvard in Health Services (1974) and a Sc. D degree in Epidemiology from Boston University (1989). From 1980 to 1989 I served as Director of the Massachusetts Cancer Registry of the Massachusetts Department of Public Health, Boston, Massachusetts. My biographical sketch is attached hereto as Exhibit 'A'.

3. The Citizens Awareness Network, Inc., of Rowe, Massachusetts, has retained me as an expert witness to support a declaration of one of its members, Jean-Claude van Itallie of Rowe, Massachusetts, who has authorized CAN to represent him in the above captioned case, and upon whose declaration, as a representative member of CAN, CAN predicates its standing in this matter.

4. I am familiar with studies that have been done concerning the incidence of certain types of disease in the vicinity of the nuclear power reactor sites in Massachusetts and elsewhere.

5. I have read the declarations of Jean-Claude van Itallie and hydrogeologist Robert Ross, and offer the following professional opinions about the substance of Mr. van Itallie's concerns regarding the public health effects tritium contamination in the aquifers identified below the Yankee Rowe site and, potentially, off site, and, my professional opinion as to whether there is reasonable assurance of public health and safety to Mr. van Itallie.

6. Internalized radionuclides that emit β-particles *are carcinogenic to humans* (Group 1).[1] This means that ingestion of beta emitting substances can cause cancer in human beings. In making this overall evaluation, the Working Group took into consideration the following:

   - β-Particles emitted by radionuclides, irrespective of their source, produce the same pattern of secondary ionizations and the same pattern of localized damage to biological molecules, including DNA. These effects, observed *in vitro*, include DNA double-strand breaks, chromosomal aberrations, gene mutations and cell transformation.

   - All radionuclides that emit β-particles and that have been adequately studied, have been shown to cause cancer in humans and in experimental animals. This includes hydrogen-3, which produces β-particles of very low energy, but for which there is nonetheless *sufficient evidence* of carcinogenicity in experimental animals.

   - β-Particles emitted by radionuclides, irrespective of their source, have been shown to cause chromosomal aberrations in circulating lymphocytes and gene mutations in humans *in vivo*.

   - The evidence from studies in humans and experimental animals suggests that similar doses to the same tissues — for example lung cells or bone surfaces — from β-particles emitted during the decay of different radionuclides produce the same types of non-neoplastic effects and cancers.

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[1] 78 IARC "Ionizing Radiation, part 2: Some Internally Deposited Radionuclides," (http://www-cie.iarc.fr/htdocs/announcements/vol78.htm) (2000); *see generally* Group 1 in Table (http://www-cie.iarc.fr/past%26future/evaltab78.html); for definition of Groups, *see* Preamble Evaluation (http://193.51.164.11/monoeval/preamble.html); information about IARC, *see* Biennial Report (http://www.iarc.fr/PUB/BIENNIAL-REPORT/indexdownload.html).

7. This means that Citizens Awareness Network's declarant, Mr. van Itallie, a person likely to come in contact with tritium contaminated water in the vicinity on the Yankee Rowe reactor site, would have an increased risk of developing cancer if he consumes contaminated water. At a minimum, drinking water contaminated with tritium will cause physical damage to the genetic material in his cells.

8. My professional opinion, based upon reviewing the information contained in the declaration of hydrogeologist Robert Ross and Citizens Awareness Network member Jean-Claude van Itallie, is that the tritium contaminated water at the Yankee Rowe site and--as Mr. Ross points out, perhaps also in springs outside the perimeter fence at Yankee Rowe--poses an imminent threat to Mr. van Itallie.

9. It is also my professional opinion that an environmental impact study needs to be done on the extent, hazards, and potential for remediation of the tritium contamination at the Yankee Rowe site.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 28, 2004.

Richard Clapp

Richard Clapp

Before the

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.,
Petitioner

and

NATIONAL WHISTLEBLOWER CENTER and
COMMITTEE FOR SAFETY AT PLANT ZION,
Petitioners' Intervener

-v-

UNITED STATES NUCLEAR REGULATORY
COMMISSION and UNITED STATES OF AMERICA,
Respondents

and

NUCLEAR ENERGY INSTITUTE,
Respondents' Intervener

No. 04-1145

Petitioner's
Exhibit 'A'
Biographical Sketch

EXHIBIT 'A'
BIOGRAPHICAL SKETCH OF DECLARANT RICHARD CLAPP, PROFESSOR OF PUBLIC HEALTH, SUPPORTING CAN'S STANDING

CURRENT ACADEMIC APPOINTMENT
Professor of Public Health, Boston University School of Public Health

EDUCATION
A.B., Biology, Dartmouth College (1967)
MPH, Health Service, Harvard (1974)
Sc. D., Epidemiology, Boston University (1989)

PROFESSIONAL EXPERIENCE

1970-1972	Program Research Analyst, New York City Health Services Administration, New York, NY
1972-1974	Deputy Director, Prison Health Project, Massachusetts Department of Public Health, Boston, MA
1974-1975	Manager, Pediatric and Psychiatric Group Practices, Massachusetts General Hospital, Boston, MA
1975-1976	Executive Director, Lynn Community Health and Counseling Center, Lynn, MA
1977-1978	Director, Childhood Lead Poisoning Prevention, Massachusetts Dept. of Public Health, Boston, MA

1979-1980	Acting Director, Occupational and Environmental Health Studies, Equifax Health Systems Division, Reading, MA
1980-1989	Director, Massachusetts Cancer Registry, Massachusetts Department of Public Health, Boston, MA
1989-1994	Director, Center for Environmental Health Studies, John Snow, Inc., Boston, MA
1994-present	Consultant, John Snow, Inc., Boston, MA
1992-1995	Assistant Professor of Public Health, B.U. School of Public Health
1995-2002	Associate Professor of Public Health, B.U. School of Public Health
2002-present	Professor of Public Health, B.U. School of Public Health
2002-2004	Senior Environmental Health Scientist, Tellus Institute, Boston, MA

TEACHING APPOINTMENTS

1989-1995	Assistant Clinical Professor, Tufts University School of Medicine, Boston, MA
1990-1993	Adjunct Assistant Professor, Boston University School of Public Health, Boston, MA
1993-1995	Assistant Professor, B.U. School of Public Health, Boston, MA
1995-2002	Associate Professor, B.U. School of Public Health, Boston, MA
2002-present	Professor, B.U. School of Public Health, Boston, MA

RECENT PUBLICATIONS

Newcomb P, Longnecker MP, Mittendorf R, Greenberg ER, Clapp RW, et al: "Lactation and a Reduced Risk of Premenopausal Breast Cancer." New Eng J Med 330(2):81-87, 1994.

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D C 20555 0001

September 4, 1998

OFFICE OF THE SECRETARY

MEMORANDUM TO: Karen D. Cyr
General Counsel

FROM: John C. Hoyle, Secretary

SUBJECT: STAFF REQUIREMENTS - SECY-98-197 - PROPOSED RULE – REVISION TO PART 2 ESTABLISHING SUBPART M TO GOVERN REQUESTS FOR LICENSE TRANSFER APPROVAL AND ASSOCIATED REQUESTS FOR HEARINGS

The Commission has approved publication of the proposed rule to establish Subpart M to 10 CFR Part 2 to govern the procedures used for license transfer approval and associated requests for hearings.

The Office of the General Counsel should incorporate the changes noted in the attachment and publish the proposed rule in the Federal Register for a 30-day comment period.

The staff should seek legislation that supports the NRC's reading of section 189a of the Atomic Energy Act to reflect the reading that formal adjudications are not required. Further, with the anticipated application from USEC for the AVLIS uranium enrichment process expected early next year, the NRC should consider seeking legislation that would modify section 193's inflexible approach to hearings.

The staff should review and advise the Commission on the legislative and rulemaking options that would further enhance the Commission's ability to utilize informal procedures in any proceeding in which formalized trial-type procedures are currently used.
(OGC) (SECY Suspense: 12/31/98)

Attachment:
As stated

cc: Chairman Jackson
Commissioner Diaz
Commissioner McGaffigan
EDO
CIO
CFO
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR
DCS

A-119

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

JUN 19 1980

MEMORANDUM FOR: Chairman Ahearne

FROM: Howard K. Shapar

SUBJECT: PRIOR NOTICE REQUIREMENT FOR RULE CHANGE

By memorandum of June 16, 1980, you requested my views on the OGC analysis (SECY-80-271) of the applicability of the exceptions to the general requirement of section 4 of the Administrative Procedure Act (APA) that issuance of rules be preceded by notice and an opportunity for comment. You also posed two specific questions.

SECY-80-271

The OGC paper discusses, in summary fashion, the APA section 4 requirement that agency rules (statements of general applicability and future effect) be issued only after notice and an opportunity for public comment except for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." As in some of the pertinent court decisions, the OGC memorandum lumps what are really three different exceptions into one; there are, however, several cases which focus upon the immediately pertinent "agency organization, procedure, or practice" exception and which, therefore, deserve more extended consideration. These are discussed in the next portion of this memorandum.

I have several specific areas of disagreement, at least as to the degree of certainty expressed, with the conclusions set forth in SECY-80-271. First, as to rules which are truly procedural, the chances of an agency's being sustained in having dispensed with notice and comment are considerably greater than in the case of an interpretative rule; i.e., the substantial impact test is less likely to be applied. See discussion of specific cases below.

Second, the case law in this general area is often inconsistent and the predictability of the outcome in any given situation is much less certain than the OGC memo would indicate. For example, there is a growing body of case law reaching a result diametrically opposite to that in U.S. Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979) and Sharon Steel Corp. v. EPA, 597 F.2d 377 (3rd Cir. 1979), both cited at p. 1 of SECY-80-271. See, U.S. Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), cert. denied, 48 U.S.L.W. 3450 (U.S. Jan. 14, 1980) (No. 79-486). (All three cases deal with a separate exception

Contact: G. H. Cunningham
492-7203

A-120

to the notice and comment requirement--the "good cause" exception.[1]) The unpredictability of judicial acceptance or rejection of rules labeled by the agency as "interpretative" is highlighted by the conflicting decisions of various panels of Temporary Emergency Court of Appeals in their review of DOE regulations implementing the Emergency Petroleum Allocation Act.[2]

Third, the OGC analysis fails to point out that even those courts which have found the need for notice and comment to be based on the substantiality of a regulation's impact have focused upon the impact on the regulated industry. Though the interests of intervenors in NRC proceedings are clearly substantial and have received protection in both NRC and judicial decisions, it is not at all clear that a court would find that a prospective intervenor's right to notice and opportunity for comment on a procedural or interpretative rule change (even a substantial one) would be coextensive with that of a regulated party.

To the extent, therefore, that the Commission might wish to change its procedural rules (i.e., the rules of practice) without notice and comment, I believe that the APA and the pertinent reported cases would permit such a change, notwithstanding a substantial impact on the rights of participants in agency proceedings.[3] This is discussed in response to the first specific question which you have posed.

1/ This exception applies "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." A good discussion of the sharp difference in opinion among the circuits concerning the reach of the good cause exception is found in the note, "The 'Good Cause' Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," 68 Geo. L.J. 765 (February, 1980).

2/ A thoughtful analysis of recent rulemaking cases in this area is found in Baller, "Need Grows for Defining APA Role in DOE Rules," Legal Times of Washington, p. 17 (June 16, 1980).

3/ Two important caveats must be noted: First, any such change must be truly procedural, that is a mechanistic prescription of the form of agency practice rather than substantively controlling the outcome of the proceeding, and second, new procedural rules cannot be applied to pending proceedings if a party will be injured or prejudiced thereby. Pacific Molasses Co. v. F.T.C., 356 F.2d 386 (5th Cir. 1966), See also, American Farm Lines v. Black Ball, 397 U.S. 532 (1970).

Question Number 1

"Assuming there were statutory authority to conduct a legislative hearing in an NRC adjudication, do you agree with the OGC analysis that changing the rules so as to make use of this authority would serve to deprive the parties of rights to an adjudicatory hearing, including rights to cross-examination and therefore that prior public comment would be required before changing the rules?"

Since the premise of this question--that there were statutory authority to conduct a legislative hearing in an NRC adjudication--does not reflect the usual situation,[4/] I do not think the OGC analysis in SECY-80-271 can fairly

4/ Section 189(a) of the Atomic Energy Act does not specifically state that a hearing shall be "on the record" and in conformity with the Administrative Procedure Act provisions governing adjudications (sections 5, 7, and 8). However, the legislative history of section 189 indicates that such a hearing was intended and the Commission has consistently interpreted the provision to require a trial-type hearing. The rationale for this interpretation was discussed at length in my note to Joseph Hennessey, AEC General Counsel, dated April 3, 1967. In brief, the Commission took the position that the 1957 amendment to section 189 of the Atomic Energy Act which added a mandatory hearing requirement for the issuance of facility licenses, required the hearing and decision to comply with the provisions of sections 5, 7 and 8 of the APA. This position was articulated, among other times, when Congress was considering some liberalization of the mandatory hearing requirement in 1961. A panel discussion among Professor Kenneth C. Davis, Professor David E. Cavers, Mr. Lee Hydeman and Dr. Theos J. Thompson was held at the conclusion of the hearings which preceded the enactment of the amendments (Radiation Safety and Regulation, Hearings before the Joint Committee on Atomic Energy, 87th. Cong., 1st Sess., pp. 372-389). Professor Davis disagreed with the Commission's view that section 189 required a trial-type hearing and the exchange between Professor Davis and the Commission continued after the close of the hearings. AEC General Counsel Naiden, in a letter dated September 6, 1961 to Mr. Ramey, Executive Director of the Joint Committee on Atomic Energy, stated that "Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA. For the Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirement." The Commission's interpretation of the mandatory hearing requirement was, in effect, ratified when Congress passed the amendments in 1962. One of these amendments added Section 191 to the Act which authorized the Commission to establish one or more Atomic Safety and Licensing Boards..."notwithstanding the provisions of sections 7(a) and 8(a)" of the APA. Sections 7 and 8 of the APA apply only to adjudications required to be determined on the record after opportunity for agency hearing which are subject to the provisions of section 5.

(CONTINUED)

be regarded as applying to the posited situation. Assuming the situation posed in the question, however, I conclude that the better legal view is that the necessary rule changes could be effected (for application to future proceedings)[5/] without prior notice and opportunity for public comment.[6/] This conclusion is equally applicable to promulgation of rule changes to be applicable to adjudications as it is to the presumed case.

The majority of cases construing the "procedural rule" exception of the APA have held that it means what it says--promulgation of such rules is not subject to the notice and comment requirement of section four. The following cases are illustrative: Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th

4/ (CONTINUED)
Therefore, the exception to permit the use of Licensing Boards in lieu of hearing examiners would not have been necessary unless the trial-type procedures of section 5 were considered to apply to such hearings.

Thus, since the adjudicatory provisions of the APA apply to NRC adjudications, the "statutory authority to conduct a legislative hearing in an NRC adjudication" would have to be found in the APA itself. Section 5 of the APA provides that its provisions apply to every adjudication "except to the extent that there is involved

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

5/ See footnote 3, supra.

6/ This conclusion and the discussion which follows applies equally to rule changes intended to cover adjudicatory proceedings.

Cir. 1977), cert. denied, 435 U.S. 995 (1978) (action which provides that complaints erroneously filed with Department of Labor's compliance office shall be deemed properly filed with the EEOC and appropriately forwarded held to be procedural and not subject to section 4); Pickus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir 1974) ("a matter 'relating to practice or procedure' means technical regulation of the form of agency action and proceedings. This category too should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercises authority. Certainly, it does not include formalized criteria adopted by an agency to determine whether claims for relief are meritorious;" applying this test the court sustained promulgation, without notice and comment, of a regulation which "merely prescribes order and formality in the transaction of Board business, but affirmed the setting aside of "regulations regarding parole hearings [which] are likely to produce parole decisions different from those which alternatives would be likely to produce");[7] DeRieux v. Five Smiths, Inc., 499 F.2d 1321 (Em. App. 1974) (Cost of Living Council order delegating certain of its authority to Office of Emergency Preparedness was exempt, as being concerned with rules of agency organization, procedure, or practice, from notice requirements of section 4); Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963) (rule imposing a "freeze" on the acceptance of license applications pending the adoption of new rules was procedural and exempt from notice and comment); Ranger v. F.C.C., 294 F.2d (D.C. Cir. 1961) (change in method of computing filing deadline was procedural even though effect was to preclude some competing applicants from participation in comparative hearings); Pennsylvania v. U.S., 361 F. Supp. 208 (M.D. Pa. 1973), aff'd 414 U.S. 1017 (rule changes were not substantive, but merely changes in procedure and practice and therefore not subject to section 4).[8]

Though I believe that the foregoing cases set forth the better legal view-that truly procedural rules will not be held subject to section 4 requirements-there is contrary authority. Akron, Canton & Youngstown R. Co. v. U.S., 370 F.Supp. 1231 (D. Md. 1974) (a rule requiring transmission of a proposed tariff to "subscribers" prior to filing with the ICC, found to impose a substantive burden and therefore beyond the section 4 exemption for procedural rules); National Motor Freight Traffic Assn. v. U.S., 268 F.Supp 90 (D.D.C. 1967), aff'd 393 U.S. 15 (rule establishing voluntary informal settlement procedures to supplement statutory judicial reparations scheme "scarcely the same as fixing the time within which pleadings must be filed." This "significant step" held subject to notice and comment requirements). There are also cases which hold that apparently procedural rules are really

7/ The voided regulations were substantive parole selection criteria.

8/ Notwithstanding this express holding, the court "nonetheless, consider[ed] whether the new I.C.C. rules will have the type of 'substantial impact' on parties, such as plaintiffs in this case, as to require §4 notice and hearings." It found they did not.

not procedural and thus not within the exception. See, e.g., Brown Express, Inc. v. U.S., 607 F.2d 695 (5th Cir. 1979) (Elimination of Commission practice of notifying competitors of filing of "Emergency Temporary Authority" request held not "procedural"). See also, Pharmaceutical Manufacturers Ass'n. v. Finch, 307 F.Supp. 858 (D. Del. 1970). These cases suggest that a radical change in the Commission's rules of practice involving, for example, elimination of the right[9/] to cross examination might, despite its obvious procedural nature, be held subject to the section 4 notice and comment requirements.

Question Number 2

"Would the requirement of public comment with respect to such changes in 10 CFR Part 2 be consistent with past practice"?

Approximately half (21 of 41) amendments to 10 CFR Part 2 made effective since January 1, 1971 have been promulgated without prior notice and opportunity for public comment on the basis of their relation to agency organization, procedure, or practice. In the remaining cases, comment has been sought though usually with the disclaimer that this action was not required. Tabulations of those charges to Part 2 in which comments were and were not sought are set forth in Attachment 1 and 2, respectively. It seems fair to conclude that even major procedural changes have been effected without public comment when rapid implementation was deemed essential.

6/19/80

Howard K. Shapar
Executive Legal Director

cc: Commissioner Gilinsky
Commissioner Kennedy
Commissioner Hendrie
Commissioner Bradford
William J. Dircks
OGC
OPE

9/ Even assuming the "statutory authority to conduct a legislative hearing in [a particular] NRC adjudication" a rule change would still be necessary to implement that authority since the "rights" provided by the Commission's rules of practice currently apply in "all proceedings, other than export and import licensing proceedings described in Part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for (a) granting, suspending, revolving, amending, or taking other action with respect to any license, construction permit, or application to transfer a license; ..." 10 CFR 2.1.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

May 11, 2004 Rec'd 5/21/2004
mailed by NRC 5/18/2004

Jonathan M. Block, Esq.
94 Main Street
P.O. Box 566
Putney, VT 0534_6-0566

IN RESPONSE REFER TO
2004-004A

Dear Mr. Block:

I am responding to your letter of April 27, 2004, to the Freedom of Information Act/Privacy Act Officer, in which you appealed the agency's April 15, 2004, response to your Freedom of Information Act (FOIA) initial request 2004-0160, dated March 15, 2004. You requested a copy of a note from Howard Shapar to Joseph Hennessey dated April 3, 1967. This record was denied on the basis of exemption 5, as attorney-client privileged information.

Without conceding that the NRC is bound by law to grant your appeal, I have decided to make a discretionary release of a portion of this document–the portion dealing with section 189a.

This is a final agency decision. As set forth in the FOIA (5 U.S.C. 552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business, or in which the agency records are situated, or in the District of Columbia.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

A-126

Ex 5

<date> 19670403 </date>
<to> Hennessey </to>
<from> Shapar, Howard </from>
<subject> MANDATORY HEARING REQUIREMENTS OF SECTION 189 OF THE ATOMIC ENERGY ACT; SUBJECTION OF SUCH HEARINGS TO SECTION 5 OF THE APA AND SECTION 5(a) OF S. 518 </subject>

DOC-NO: OGC-198

DATE: 04/03/67

TYPE: Internal OGC

TO: Mr. Hennessey

FROM: Howard K. Shapar

SUBJECT: MANDATORY HEARING REQUIREMENTS OF SECTION 189 OF THE ATOMIC ENERGY ACT; SUBJECTION OF SUCH HEARINGS TO SECTION 5 OF THE APA AND SECTION 5(a) OF S. 518

PAGES: 005

During the testimony of Arthur Gehr before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 518, a bill to amend the Administrative Procedure Act, there was some discussion between him and Bernard Fernsterwald, the counsel of the subcommittee, as to whether our section 189 hearings on reactor license applications might not fall within the scope of section 5(b) of the APA, as it would read after the passage of S. 518.

Provisions of the APA and S. 518 relating to adjudications

Section 5 of the Administrative Procedure Act contains provisions (relating to, among other things, separation of functions) which are applicable 'in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,' with certain exceptions not pertinent here. Sections 7 and 8 contain provisions applicable to hearings and decisions in cases subject to section 5. The Administrative Procedure Act does not now contain any provisions specifically applicable to adjudications other than those 'required by statute to be determined on the record after opportunity for an agency hearing,' i.e., formal adjudications.

S. 518 includes, with some important changes not relevant to the immediate discussion, the provisions applicable to formal adjudications in section 5 of the present APA in section 5(a) of the bill. In addition, a new section 5(b) would be added, applicable to 'all other adjudications' which, in general, would direct the agency to provide procedures which shall promptly, adequately and fairly inform the agency and the parties of the issues, facts and arguments involved. Section 5(b) contains no provisions relating to separation of functions. Under S. 518, sections 7 and 8 would be applicable to cases subject to section 5(a) but not to cases subject to section 5(b).

Subjection of AEC hearings under section 189 of the Atomic Energy Act to section 5 of the present APA and section 5(a) of the APA as revised by S. 518

A-1

Section 189 a. of the Atomic Energy Act provides, in pertinent part:

'The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104 b. for a construction permit for a facility, and on any application under section 104 c. for a construction permit for a testing facility.'

A mandatory hearing requirement for the issuance of facility licenses was first added to the Act in 1957 (P.L. 85-256, sec. 7). A hearing was required on each application for a license under section 103 and 104 b. and on each application for a license for a testing facility under section 104 c. While the language of section 189 a. did not then, and does not now, specifically state that the hearing and adjudication shall be 'on the record' and in conformity with sections 5, 7 and 8 of the APA, the legislative history of section 189 indicates that such a hearing and adjudication were intended, and the Commission has so interpreted the provision.

In introducing S. 1684, which contained the mandatory hearing requirement enacted in P.L. 87-256, Senator Anderson stated:

'When the Atomic Energy Act was amended 3 years ago, I made the following statement on the floor of the Senate on July 14, 1954, expressing my opinion as to the advisability of public hearings on reactor license applications:

'. . . But because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everyone can see it .

'Although I have no doubt about the ability and integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take; and if they are to grant a license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.'

'Almost 3 years have now passed and I believe my words of 1954 are still applicable.' (emphasis added) (Cong. Record, March 21, 1957, p. 3616)

In carrying out the requirement of the 1957 amendment to hold hearings in cases involving power and test reactor licenses, the Commission took the view that the hearing and decision had to be in compliance with the provisions of sections 5, 7 and 8 of the APA. The Commission's position was articulated, among other times, when amendments to the Act, which resulted, in 1962, in some liberalizing of the mandatory hearing requirement, were under consideration.

At the conclusion of the hearings which preceded the enactment of the amendments, a panel discussion among Commissioner Olson, Professor Kenneth C. Davis, Professor David F. Cavers, Mr. Lee Hydeman and Dr. Theos J. Thompson was conducted (Radiation Safety and Regulation, Hearings before the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., pp. 372-389). Professor Davis took issue with the Commission's view that section 189 required a trial-type hearing. Commissioner Olson reiterated the Commission position that a formal hearing of record is required, submitting for the record an AEC memorandum in support (Id., pp. 382-5).

After the close of the hearings, the exchange between Professor Davis and the Commission continued, through letters to the JCAE staff, publication by Professor Davis of an article in the American Bar Association Journal, and replies thereto. In the course of this exchange, General Counsel naiden, in a letter dated September 6, 1961 to Mr. Ramey as executive director of the JCAE, stated that 'Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA. For the Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirement.'

The Congress, in effect, ratified the Commission's interpretation of the mandatory hearing requirement when it passed the 1962 amendments to the Act. One of these amendments was the addition of section 191 to the Act. That section provides, in part:

'a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each composed of three members, two of whom shall be technically qualified and one of whom shall be qualified in the conduct of administrative proceedings, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder.' (Emphasis supplied)

Since sections 7 and 8 of the APA are applicable only to adjudications required to be determined on the record after opportunity for agency hearing which are subject to provisions of section 5 of the APA, an exception from the requirements of subsections 7(a) and 8(a) to permit the use of atomic safety and licensing boards in lieu of hearing examiners would not have been necessary unless the hearings to be conducted and adjudications to be made by the boards were considered to be subject to section 5. The report which accompanied the amendments as enacted so stated the understanding of Congress in explaining the exceptions:

'This language ('notwithstanding the provisions of sections 7(a) and 8 of the Administrative Procedure Act') is intended only to provide the Commission with specific authority to use a three-man Board to preside at hearings in lieu of a hearing examiner, and to permit final, as well as intermediate decisions to be made by the Board . . .

'The great bulk of the provisions of the Administrative Procedure Act will remain applicable, pursuant to section 181 of this act, and the only exceptions authorized by these amendments are to permit the Board to preside at hearings in lieu of a hearing examiner, and to permit the Board to render final as well as intermediate decisions.' (U.S. Code, Congressional and Administrative News, 87th Cong., 2nd Sess., 1962, p. 2213)

Ex 5

A-129

4

Ex 5

DISSENTBY: BRADFORD; GILINSKY

DISSENT:

COMMISSIONER [*86] GILINSKY'S SEPARATE VIEWS

It would have been more efficient, and legally more prudent, for the Commission to have granted the City's hearing request and appointed an Administrative Law Judge to hear this case using informal procedures. It would be reasonable to expect the Administrative Law Judge to issue a decision within, at most, two months.

DISSENTING VIEWS OF COMMISSIONER BRADFORD

The issue in this case is not whether to approve of the petitioner's motives or past approach to the matter. Nor is it whether or not this particular amendment seems on its face to pose a significant threat to the public health or safety. It is whether to treat all materials licenses differently from power reactors. This question should be approached with the realization that a materials license could as easily be for a major reprocessing plant with large quantities of radioactivity, a fuel fabrication facility handling material that could be diverted for use in a nuclear bomb, or a facility for the storage or disposal of nuclear wastes.

This is the first nonmilitary materials license case in the 25 year history of section 189(a) in which the Commission has insisted on a nonadjudicatory [*87] hearing. Whenever an interested person sought a hearing on a materials license amendment, that person was directed to file a petition for intervention nuder 10 CFR 2.714 and was granted an opportunity for an adjudicatory hearing.[1] Except for the Erwin case to which the Commission has had to apply the APA's military function exemption in order to avoid an adjudicatory hearing, the Commission has found no case offering anything other than an adjudicatory hearing when a request for a hearing on a materials license was made.[2] In its brief filed in *Seigel v. AEC, 400 F.2d 778 (D.C. Cir. 1978)* the Commission states at page 15 that section 189(a) contemplates adjudicatory hearings on licensing cases.

The consistency of the Commission's interpretation of Section 189(a) reflects the position it took originally before Congress. In brief, the Commission stated that the 1957 amendment to section 189 of the Atomic Energy Act, which added a mandatory hearing requirement, required the hearing and decision to comply with the provisions of sections 5, 7 and 8 of the APA. This position was articulated, among other times, when Congress was considering some liberalization of the

[1] *See, e.g., In the Matter of Walker Trucking Company*, 1 AEC 55 (1958); *Hamlin Testing Laboratories, Ind. v. U.S. Atomic Energy Commission, 357 F2d 632, 638 (6th Cir. 1966).* Kerr-McGee in its pleadings to the Commission assumed that if a hearing were held, to which it expressed no objection, the hearing would be an adjudicatory one before a Licensing Board.

[2] For a discussion of the agency's consistent position that section 189(a) requires an adjudicatory hearing in materials license cases, see In the *Matter of Nuclear Fuel Services, Inc. CLI-80-27, 11 NRC 799, 809 (1980),* particularly notes 2 and 3. The documents cited there are available in the docket of that case. [*88]

mandatory hearing requirement in 1961. A panel discussion among Professor Kenneth C. Davis, Professor David E. Cavers, Mr. Lee Hydeman and Dr. Theos J. Thompson was held at the conclusion of the hearings which preceded the enactment of the amendments (Radiation Safety and Regulation, Hearings before the Joint Committee on Atomic Energy, 87th Cong., 1st Sess., pp. 372-389). Professor Davis disagreed with the Commission's view that section 189 required a trial-type hearing and the exchange between Professor Davis and the Commission continued after the close of the hearings. AEC General Counsel Naiden, in a letter dated September 6, 1961 to Mr. Ramey, Executive Director of the Joint Committee on Atomic Energy, stated [*89] that "Section 189(a) of the Atomic Energy Act explicitly requires a hearing on the record conducted in accordance with the APA. For the Commission to have made any other interpretation would have been inconsistent with what we believe to have been the intent of Congress in adopting the mandatory hearing requirements." The Commission's interpretation of the mandatory hearing requirement was, in effect, ratified when Congress passed amendments in 1962. One of these amendments added Section 191 to the Act which authorized the Commission to establish one or more Atomic Safety and Licensing Boards... "notwithstanding the provisions of sections 7(a) and 8(a)" of the APA. Section 7 and 8 of the APA apply only to adjudications required to be determined on the record after opportunity for an agency hearing subject to the provisions of section 5. Therefore, the exception to permit the use of Licensing Boards in lieu of hearing examiners would not have been necessary unless the trial-type procedures of section 5 were considered to apply. Since the adjudicatory provisions of the APA apply to NRC adjudications, the statutory authority to conduct a legislative hearing in an NRC adjudication [*90] would have to be found in the APA itself. The 1962 hearings were also significant because Congress, knowing the Commission's interpretation of its own statute, did not pass the legislation recommended by its consultants to relax the adjudicatory hearing requirement.

The Commission seeks to make a distinction, not found in the Statute, between materials licenses and all other NRC licenses. That Section 189(a) requires an adjudicatory hearing for reactor licenses is not in dispute. One hopes that the Commission would require adjudicatory hearings for materials licenses such as reprocessing plants like Barnwell, UF[6] conversion facilities, fuel fabrication facilities and milling operations. Otherwise, the Commission would be ascribing to Congress an intent, not expressed, of applying lesser procedural safeguards to major nuclear facilities, some of which posed the same "novel technological questions with wide-ranging safety concerns," which the majority find applicable to reactors. Commission Opinion, p.32. However, if the Commission's reading of Section 189(a) is accepted, the NRC will have the discretion to deny full hearings for types of facilities at least as potentially [*91] dangerous in some circumstances as power reactors, a result that Congress cannot have intended.

The precise words "on the record" need not appear in order to trigger the formal adjudicatory procedures of the APA.[3] The general presumption is that unless a statute specifies otherwise, hearings involving disputed facts subject to judicial review on the basis of the hearing record must be on the record. *572 F.2d at 877; 564 F.2d at 1263,* citing Attorney General's Manual on the APA at 41. Furthermore, NRC license amendment adjudications often involve disputed factual issues and subsection b. of Section 189 of the AEA provides for judicial review of final orders entered in the proceedings specified in subsectio a. on the basis of the hearing record.

[3] Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978). U.S. Steel Corp v. Train, 556 F.2d 822, 833 (7th Cir. 1977). Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253, 1262-3 (9th Cir. 1977).

The plain language of Section 189(a), its legislative history, case law and the agency's consistent historic interpretation conclusively demonstrate that the agency must, when [*92] requested, hold an adjudicatory hearing in materials licensing cases. If the petitioners lack legitimate contentions, the hearing will be a short one, lasting at most until the summary judgment stage. In this case, if West Chicago does not have litigable contentions, a hearing offered at the time of the first request might have been over by now.