



April 1, 1987

**RULEMAKING ISSUE**  
(Notation Vote)

SECY-87-88

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(3 page out of 48 pp)* 5

For: The Commission  
From: William C. Parler  
General Counsel  
Subject: REVISED PROPOSED RULE ON INFORMAL HEARING  
PROCEDURES FOR MATERIALS LICENSING ADJUDICATIONS  
Prior History: SECY-85-227

Summary: In response to the Commission's comments on SECY-85-227, we have revised the previous proposed procedures for informal hearings in materials licensing cases to incorporate various requested changes. (Attachment 1) Among these are revisions to the proposed rule's provisions on "contentions" to be litigated, coverage of materials licensing enforcement proceedings, and ex parte/separation of functions. Our revised draft proposal reflects comments provided by the Chairman and members of the Atomic Safety and Licensing Appeal Panel ("ASLAP"), the Atomic Safety and Licensing Board Panel ("ASLBP"), the Office of Nuclear Materials Safety and Safeguards, and the Division of Rules and Records, Office of Administration.

Discussion: In disapproving publication of the draft proposed rule on procedures for informal materials licensing adjudicatory hearings attached to SECY-85-227, the Commission provided a number of comments requesting revisions to the proposal or further explanation about some of its provisions. We have redrafted various provisions of the proposed rule to reflect those comments and

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questions.<sup>1</sup> In addition, drafts of the revised proposed rule were provided to the ASLAP, the ASLBP, and NMSS and changes were made in response to their comments. A description of the major changes follows.

I. Revisions in Response to Comments by a Majority of the Commission

A. Contentions Threshold

Former Chairman Palladino, Chairman Zech, and Commissioners Roberts and Bernthal expressed concern about proposed paragraphs (e) and (i) to section 2.1205, which provided that a petition for a hearing or a petition to intervene only need set forth a "statement of the issues" to be determined. Comments by these four Commission members requested that additional specificity should be required.

We suggested the "issues" standard to conform with a proposal for initial contentions in one of the two then-outstanding hearing options for hybrid hearings on spent fuel storage. 48 Fed. Reg. 54499, 54503 (Dec. 5, 1983) (Option 1, § 2.1104(a)). As was noted in the Commission's explanation regarding the final rule on hybrid hearing procedures, the "statement of issues" standard for contentions was seen initially as

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<sup>1</sup>Former Chairman Palladino, Chairman Zech, and Commissioners Roberts and Bernthal indicated they would consider approving a redraft that addressed their specific concerns. Commissioner Asselstine declared that he had a fundamental problem with the notice provision of the proposed rule, which does not require public notice of all materials licensing actions (§ 2.1205(c)), that would preclude him from voting for any proposal that did not require notice. Because the issue of appropriate notice of materials licensing actions previously was aired with the Commission and a majority seemingly has endorsed the approach set forth in the earlier proposed rule, we have not revised the notice provision.

providing a simpler, less formal alternative to the existing requirement for formal hearing proceedings. 50 Fed. Reg. 41662, 41665 (Oct. 15, 1985). Rather than spending time arguing about admissibility of contentions, interested persons could turn their attention to discovery in an effort to gain the information necessary to show the existence of a factual dispute that required a formal hearing. Id. However, because of the concern that this would result in extensive "discovery on loosely-stated issues," the proposal was abandoned in the final rule in favor of the existing standard for the admission of contentions in formal, Subpart G proceedings. Id. at 41669.

As indicated, the contention requirement was adopted in order to focus discovery narrowly in the time between grant of the hearing request and framing of the final issues just before conduct of the actual hearing. Yet, this rationale used for adoption of the contentions standard is not applicable to informal hearings conducted under the proposed rule because there is no discovery in such proceedings. Nonetheless, to conduct the informal hearing itself on the basis of loosely stated issues hardly seems desirable.<sup>2</sup> We therefore have revised the proposed regulations to require that in making its written presentation to the presiding officer, which could be the only presentation made to the presiding officer,

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<sup>2</sup>The initial hearing request, which is scrutinized in order to make a determination about standing, need not include a detailed statement of issues to be litigated. Nonetheless, it is important that in its initial hearing request the petitioner make some minimal showing about the matters the petitioner wishes to discuss so that the presiding officer, in making a standing determination, can be sure that the petitioner's interest in the proceeding is more than academic. To this end, we have used the requirement in the existing section 2.714 that those filing initial hearing requests or petitions to intervene must indicate the "aspects" of the subject matter of the proceeding about which they wish to be heard.

a petitioner must provide a detailed description of the deficiencies or omissions in the application or agency licensing action at issue and submit all documentary data, informational material, or other written evidence (or a citation to such data or material if it is in a generally available publication) that the petitioner relies upon to support or illustrate each omission or deficiency complained of. Proposed § 2.1233(d). Further, to help ensure that this requirement is taken seriously, the petitioner would be precluded thereafter from introducing or referencing any new documentary material in support of its arguments without the permission of the presiding officer. Id.

B. Informal Hearings for Enforcement Proceedings

Former Chairman Palladino, Chairman Zech, and Commissioners Roberts and Bernthal also questioned whether hearings on proposed enforcement actions against materials licensees should be conducted as informal adjudications. As we indicated in SECY-85-227, at 4 n.3, we believe a legal basis exists for affording only an informal hearing in enforcement proceedings. This being the case, a determination to afford materials licensees greater hearing rights than the general public raises issues of fairness and equity that merit Commission consideration. Nonetheless, we are not aware of anything that clearly precludes the Commission from providing licensees more process than they may be due as a matter of law. Accordingly, we have revised section 2.1201 of the proposed rule to indicate that licensee hearings on enforcement matters, including civil penalty proceedings, will be conducted in accordance with the formal hearing procedures of 10 C.F.R. Part 2, Subpart G.

C. Ex Parte and Separation of Functions Restrictions

These four Commissioners also raised concerns about the extent to which proposed section 2.1215

on ex parte communications and separation of functions went beyond what is required for an informal proceeding. As we indicated in SECY-85-227, at 16, case law suggests judicial concern that even in the context of an informal adjudication, in order to conduct a fair proceeding there must be some control over the introduction of nonpublic information into the decisional process. Chairman Zech suggested that this problem be addressed by providing that the informal adjudication must be based upon information in the public record with respect to which all parties have been given reasonable prior notice. To implement this suggestion, we have deleted section 2.1215 and included language in proposed section 2.1251(c) that states that an initial decision must be based upon the record, which is to include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice.

## II. Response to Individual Commissioner Comments and Questions

### A. Former Chairman Palladino

Former Chairman Palladino also suggested that consideration be given to a waiver provision for the one-year limitation on the filing of hearing requests on completed materials licensing actions. We have added language to section 2.1205(c) that would allow such a waiver upon a showing of "exceptional circumstances."

### B. Chairman Zech

Chairman Zech suggested that a "safety valve" provision exist to allow the presiding officer to seek authority from the Commission to utilize additional "formal" procedures, such as discovery or cross-examination, in conducting a materials licensing hearing. Such a provision has been included in the various individual orders that the Commission has issued to convene informal adjudications. See Sequoyah Fuels Corp.

(Sequoyah UF<sub>2</sub> to UF<sub>4</sub> Facility), CLI-86-17, 24 NRC \_\_\_\_\_ (Oct. 3, 1986).<sup>4</sup> We have incorporated this suggestion in proposed section 2.1209(j).

Chairman Zech also questioned whether the rule should include some indication that any limitation on the time within which a hearing can be requested did not affect the rights of any person to file a petition under 10 C.F.R. § 2.206 at any time. However, in light of recent Commission case law in formal adjudications indicating that the agency need not afford full consideration to a section 2.206 petition that raises issues that are or could be the subject of an ongoing adjudication, see, e.g., General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Units 1 and 2), CLI-85-4, 21 NRC 561, 563 (1985), we would not propose to include a specific provision relating to this matter. Rather we believe, as has occurred in formal adjudications, that this is a matter that can be developed appropriately through the case law, for which the existing precedent in formal proceedings certainly would provide guidance.

We also have revised section 2.1211(a) to respond to Chairman Zech's comment regarding limited appearance statements not being "evidence" in the informal hearing. We have tried to clarify this provision by stating explicitly that such statements are not to be considered part of the "decisional record under section 2.1251(c)." That provision indicates the presiding officer's initial decision "must be based only upon information in the record" of the proceeding. Such limited appearance statements would be included in the public docket for the proceeding but would not be considered material upon which the initial decision can be based, absent the presiding officer taking official notice of the material and offering the parties an opportunity to comment.

In response to Chairman Zech's comments, we also have revised section 2.1239 relating to the

settlement of materials licensing proceedings to delete the reference to "contested" proceedings.

Finally, Chairman Zech suggested that language be added to the proposed rule that would allow the presiding officer in "special circumstances" to compel the NRC staff to participate as a party even if the staff has indicated it does not wish to have that status. We have added such a provision to section 2.1213(a), that would allow the presiding officer to order staff participation as a party with respect to a particular issue upon a showing of that staff's participation as a party would "aid materially" in the resolution of that issue.

This additional provision would not, however, appear to satisfy a request by Commissioner Bernthal that the rule provide that the NRC staff be required to participate as a party in all informal proceedings. This question of the role of the staff is a policy issue for Commission resolution. We would note that in the informal proceedings that have been convened within the past eighteen months in which staff could choose party status, the staff has not participated as a party in any of them.<sup>3</sup> On numerous occasions, however, presiding officers in these proceedings have requested that the staff provide information or status reports regarding the licensing actions at issue and the staff has always complied. In discussions with the Licensing Board about this proposed rule, we were not made aware of any instance in which staff's nonparty status seriously has hampered a presiding officer in conducting a proceeding.

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<sup>3</sup>As we recognized in several recent cases, see SECY-86-280, when the staff has acted to deny or proposes to deny a license application prior to the start of the hearing, it should be a party to any hearing requested by the applicant. We have incorporated this as a requirement in section 2.1213 of the proposed rule.

C. Commissioner Roberts

One of Commissioner Roberts' concerns is that any rule on informal proceedings should not invite intervention. These rules do contemplate that if a petition for hearing is granted a notice of hearing will be published setting a deadline for any additional intervention petitions. While this might be considered as "inviting" intervention, we believe that it is preferable to ensure that when a hearing will be held, only one proceeding with respect to a particular licensing action need be convened by the publication of a notice that effectively extinguishes the hearing rights of those who do not comply with its requirements for timely intervention filings and who cannot meet the additional standard for late intervention.

Commissioner Roberts also asserts that, unlike formal proceedings, there should be no limited appearance statements by persons not able or willing to assume party status and that state and local governments should not be allowed to participate in proceedings as "interested governments" so that they need not take a position with respect to any issue. This also presents policy issues for Commission resolution. Deletion of proposed section 2.1211 would accomplish both of these purposes. With respect to the participation of interested states, however, such deletion may raise questions about whether section 2741 of the Atomic Energy Act, 42 U.S.C. § 2021(1), as it relates to certain disposal activities such as those under 10 C.F.R. § 20.302, requires that "interested state" participation be retained for informal proceedings relating to such licensing activities. In the event the Commission desires that states not be afforded "interested state" status, as defined in section 2741, for informal proceedings, we would need an opportunity to analyze this issue further before issuing a proposed rule.

An additional suggestion from Commissioner Roberts is that, unlike the proposed rule that

has all initial appeals going to an Appeal Board, only appeals from a presiding officer's initial decision with respect to a Part 70 license to store irradiated fuel at a reactor facility prior to operation go automatically to an Appeal Board. For other proceedings, the Commission would make a case-by-case determination on whether it or an Appeal Board should conduct a review of the initial decision.

This suggestion also raises a policy question for Commission determination. If, however, the Commission does decide to involve itself in a case-by-case determination about whether it or the ASLAP should consider any appeal initially, it should allow for a period of at least sixty days after the initial decision before the presiding judge's decision becomes final agency action. This would allow the Commission the time both to consider the issue of whether the matter should be referred to an Appeal Board and, if not, to conduct its own sua sponte review of the initial decision.

Commissioner Roberts also questions the extent to which environmental issues regarding a particular materials licensing action should be litigated in informal hearings. Supporting the exclusion of such issues from adjudications, he suggests, is 10 C.F.R. § 51.22(c)(14), which categorically excludes many materials licensing actions from the requirement to prepare an environmental impact statement ("EIS") or an environmental assessment absent a Commission finding of special circumstances, and the fact that the National Environmental Policy Act ("NEPA") creates no independent hearing right with respect to the EIS process.

We believe the proposed rule deals appropriately with the litigation of environmental issues. If someone sought to challenge a categorical exclusion, this would be considered a challenge to the Commission's regulations and under proposed section 2.1237 would require a showing of special circumstances as under existing section 2.758.

On the other hand, under existing guidelines of the Council on Environmental Quality, 40 C.F.R. § 1505.1(c)-(d), and NRC regulations implementing those guidelines, 10 C.F.R. § 51.104(b), a challenge to a staff determination not to issue an EIS when there is no categorical exclusion or a challenge to the content of an EIS or EA generally would be an appropriate issue for litigation in an adjudicatory proceeding, whether formal or informal.

#### D. Commissioner Bernthal

In addition to his comments regarding the role of the NRC staff, see § II., B., Commissioner Bernthal also suggested that proposed section 2.1211 relating to interested states, which called for such participants to indicate in advance of the hearing the issues about which they wished to participate, was incompatible with the rule's provision that the informal proceeding could consist solely of a single written presentation. We have revised this section to drop that provision.

### III. Other Revisions

In addition to the revisions to the proposed rule arising from the Commissioners' suggestions, other changes have been made in response to comments from members of the ASLAP, the ASLBP, and NMSS.

#### A. Conduct of Part 70 Proceedings

In response to comments from the Licensing Board, we have revised section 2.1207(b), which relates to the conduct of hearing on an application under 10 C.F.R. Part 70 to receive and store unirradiated fuel at the site of a reactor facility that also is the subject of an ongoing formal adjudication. The concern expressed was that holding a separate informal proceeding while a formal proceeding was ongoing was unnecessarily duplicatous, particularly because past practice

has shown that the issues raised with respect to the Part 70 application generally are substantially similar to those already being litigated in the formal hearing on the operating license. We have added an additional caveat to section 2.1207(b) that allows for the Part 70 application to be adjudicated in the existing formal proceeding upon certification to the Commission by the Licensing Board designated to conduct the hearing on the Part 70 application that the matters presented for adjudication are substantially the same as those involved in the operating license proceeding.

#### B. Hearing File

The effect of the revised initial written presentation provisions of section 2.1233 of the proposed rule would be to require petitioners early on to prepare a focused, detailed exposition of their concerns about the application or licensing action. However, the lack of discovery that makes such a detailed initial filing requirement theoretically possible also may have the practical effect of sharply curtailing meaningful participation in the licensing process.

In contrast to the applicants and intervenors in many reactor licensing cases, materials license applicants and intervenors generally are more likely to have a limited knowledge of the Commission's licensing process and little access to pertinent information, thus making it more difficult for the participants clearly to frame and discuss the issues. This, in turn, adds to the difficulty of the presiding officer in fully and fairly resolving pertinent health and safety issues. Indeed, in our discussions with the Licensing Board members who have been conducting the informal proceedings convened by Commission orders over the past eighteen months, this was identified as a particular problem.

In an effort to resolve this concern, a new section 2.1231 has been added to the proposed

rule to require that after a hearing request is granted, the staff will prepare, and thereafter keep updated, a hearing file consisting of the application, any amendments thereto, any environmental impact statement or assessment relating to the application, and any NRC report or any correspondence between the applicant and the NRC that is relevant to the application.<sup>4</sup> This hearing file is to be provided to the presiding officer, the applicant, and any other parties to the proceeding. The hearing file also is to be placed in the Washington, D.C. PDR and any existing local PDR. In the event that a local PDR does not exist, which will be the case in almost all instances for materials license applications, the applicant is given the responsibility for ensuring that a copy of the hearing file compiled by the staff is available publically in the vicinity of the principal location where the nuclear material that is the subject of the application will be possessed.

#### C. Oral Questioning of Witnesses

Under the earlier proposed rule, in the event the presiding officer found it appropriate to go beyond written presentations, he or she could "entertain proposed questions from any party." Proposed § 2.1233(b). In commenting on our revision of the proposed rule, members of the Licensing Board who have presided over the informal adjudications conducted over the past eighteen months suggested this was too limited

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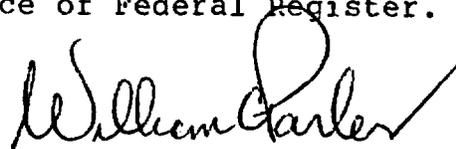
<sup>4</sup>Of course, the Freedom of Information Act is always available to applicants and other hearing petitioners to use in obtaining documentation relating to a license application. However, because of the time it often takes to respond to requests, this arguably is not a useful alternative if the Commission desires informed participation while ensuring that hearing proceedings will be concluded with a minimum of delay. The hearing file proposal arguably fulfills the same purpose in a more timely manner and may avoid further clogging the agency's already-overcrowded FOIA docket.

a grant of authority that, as a practical matter, could slow considerably the conduct of the proceedings. Assuming that oral questioning of witnesses in a particular instance is appropriate, such as in complex proceedings like those occurring with regard to large fuel cycle facilities, if the parties are afforded a reasonable opportunity to suggest oral questions the presiding officer also must make a substantial expenditure of time to screen and then ask those questions. To afford some more flexibility, we have included in proposed section 2.1235 the additional discretionary authority for the presiding officer to screen and then allow the parties themselves to pose any particular question or line of questions.

Recommendations:

1. Approve publication in the Federal Register of a notice of proposed rulemaking amending 10 C.F.R. Part 2. (Attachment 1)
2. Note that:
  - a. The notice of proposed rulemaking in Attachment 1 will be published in the Federal Register allowing sixty days for public comment.
  - b. The proposed rule contains the requisite Regulatory Flexibility Act certification.
  - c. There are no information collection requirements contained in the proposed rule and it therefore is not subject to the requirements of the Paperwork Reduction Act.
  - d. The proposed rule comes within the categorical exclusion in 10 C.F.R. § 51.22(c)(1) and no environmental assessment has been prepared.
  - e. A regulatory analysis regarding this rulemaking is included in the Statement of Considerations.

- f. The proposed rule does not require a backfit analysis pursuant to 10 C.F.R. § 50.109(c).
- g. The Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Subcommittee on Energy and the Environment of the House Interior and Insular Affairs Committee, and the Subcommittee on Energy and Power of the House Energy and Commerce Committee will be informed of the proposed rulemaking by letter.
- h. A public announcement will be issued when the proposed rule is filed with the Office of Federal Register.



William C. Parler  
General Counsel

Attachment:  
Notice of proposed rulemaking

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, April 16, 1987.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, April 8, 1987, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Attachment 1

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Informal Hearing Procedures for  
Materials Licensing Adjudications

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations to provide rules of procedure for the conduct of informal adjudicatory hearings in materials licensing proceedings. The Atomic Energy Act of 1954 requires that the NRC, in any proceeding for the granting, suspending, revoking, or amending of an NRC license, including a license involving source, byproduct, and special nuclear materials, afford an interested person, upon request, a "hearing." The Commission previously has determined that the "hearing" provided for a materials licensing proceeding need not encompass all the procedures in NRC regulations that govern formal adjudications for the licensing of production and utilization facilities. Rather, the Commission has determined that, in most instances, an informal hearing with an opportunity to present written views is sufficient to fulfill this requirement. This proposed rule prescribes the procedures that would govern these informal proceedings.

DATES: Comment period expires [insert date sixty days from date of Federal Register publication]. Comments received after this date will be considered if it is practicable to do so, but assurance of

consideration can be given only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, ATTN: Docketing and Service Branch. Hand deliver comments to: Room 1121, 1717 H Street, NW., Washington, D.C., between 8:15 a.m. and 5:00 p.m.

Examine comments received at: The NRC Public Document Room, 1717 H Street, NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: (202) 634-3224.

SUPPLEMENTARY INFORMATION: Section 189a of the Atomic Energy Act of 1954 (AEA) (42 U.S.C. 2239(a)) provides that in any proceeding for the granting, suspending, revoking, or amending of any license, the agency shall grant a hearing upon the request of any person whose interest may be affected by the proceeding. Among the licenses issued by the agency are those for byproduct material (AEA sections 81-84, 42 U.S.C. 2111-2114, 10 CFR Parts 30-35), source material (AEA sections 61-69, 42 U.S.C. 2091-2099, 10 CFR Part 40), and special nuclear material (AEA sections 51-58, 42 U.S.C. 2071-2078, 10 CFR Part 70). In a February 1982 decision, the Commission declared that, with regard to materials licenses, the agency was not required to afford a formal, trial-type adjudicatory hearing under the Administrative Procedure Act (5 U.S.C. 554, 556, 557). Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982). Rather, the Commission found that it was

sufficient to afford an informal hearing in which the parties are given an opportunity to present to the hearing officer their written views and whatever documentary evidence they wish. The Commission's interpretation of the type of hearing it need provide in connection with materials licensing actions was upheld by the United States Court of Appeals for the Seventh Circuit. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

In order to specify the particular procedures that will be applicable in such informal proceedings, the Commission now proposes to add a new Subpart L to Part 2 of its rules in Title 10 of the Code of Federal Regulations. The chief differences from the Subpart G "Rules of General Applicability" for formal adjudications are discussed below.

#### TIME FOR FILING A HEARING PETITION

Under proposed § 2.1205(c), "interested persons" (other than an applicant or licensee) wishing to request a hearing on a materials licensing action would be required to file a petition for a hearing within thirty days of the agency's publication in the Federal Register of a notice of the receipt of an application or a notice of agency action relative to an application for a materials license. Thus, the publication of an initial Federal Register notice regarding a materials license application generally will trigger the time for filing a hearing petition.

Under current Commission practice, however, a Federal Register notice is not published with respect to each proposed or completed materials licensing action that may be subject to a hearing request.

While the AEA specifically requires that "interested persons" be afforded a hearing upon request, it does not impose any requirement that the Commission publish a Federal Register notice with respect to each of the thousands of material licensing applications it receives annually. Because of the large number of materials licensing actions involved, the administrative and resource burden of a self-imposed requirement to provide notice in all instances, and the relative insignificance of many of the licensing actions involved, it has been the Commission's practice to provide a published notice only in significant cases. The Commission will retain this practice. If no notice is published, however, a petition is timely if it is filed within thirty days after the petitioner receives actual notice of the action or proposed action complained of, or within one year after completion of the agency action, whichever first occurs. Further, the proposed rule indicates that a hearing petition filed more than one year after completion of the agency's action will be granted upon a showing of "exceptional circumstances" that precluded the petitioner from discovering the agency action and petitioning for a hearing earlier.

The requirements in § 2.1205 for the filing of hearing petitions would not change the requirements in § 2.103(b) for the time for filing applicant hearing petitions following a notice of denial or a notice of proposed denial.

PROVISION FOR HEARINGS SUBSEQUENT  
TO GRANT OF A LICENSE

While section 189a of the Atomic Energy Act (42 U.S.C. 2239(a)) has provisions that govern whether a hearing must be provided upon request prior to staff action with regard to reactor construction permits and operating licenses, the Act says nothing specific about whether such a hearing requested by an interested person must be completed prior to agency action granting or denying a materials license. The proposed rule therefore does not preclude, and in fact contemplates, the grant of a license by the NRC staff prior to any initial decision in any proceeding convened as a result of a hearing request.

Of course, the lack of any statutory directive will not relieve the agency of any obligation constitutional due process may impose. Due process generally requires that if a constitutionally protected right to a hearing exists,<sup>1</sup> opportunity for that hearing must be afforded before agency action becomes effective. E.g., Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941). It also has been recognized, however, that in particular circumstances a balancing of the private and governmental interest involved may allow government action to precede any hearing. See, e.g., Cleveland Board of Education v.

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<sup>1</sup>The due process right of a license applicant or a licensee to a hearing with regard to its request for licensing action has been recognized, e.g., Buttrey v. United States, 690 F.2d 1170, 1177-78 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983); Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1077 & n.12 (7th Cir. 1982); whether other "interested persons" have such a due process right is less apparent, City of West Chicago v. NRC, 701 F.2d 632, 645 (7th Cir. 1983).

Loudermill, 470 U.S. 532, 542 n.7 (1985); Hewitt v. Helms, 459 U.S. 460, 476 n.8 (1983); Parratt v. Taylor, 451 U.S. 527, 540-41 (1981); Barry v. Barchi, 443 U.S. 55, 64 (1979). A weighing of those interests here has led the agency to conclude that a prelicensing hearing is not necessarily required.

The private rights involved in this instance are two-fold: the right of the applicant to a reasonably prompt administrative assessment of and determination about its application so it can go forth with its planned activities and the right of other "interested persons" to challenge the requested licensing action on the basis of their specific concerns about anticipated harm to radiological health and safety or the environment. Into this balance also must be weighed the governmental interest in avoiding delay in the administrative process that will be caused by halting all action on the application pending notice of opportunity for hearing and any hearing. The importance of this factor is heightened by the fact that the agency reviews and processes literally thousands of materials license applications each year. Kerr McGee Corp., 15 NRC at 261. Finally, it is significant that the materials involved in the vast majority of cases, when compared to power reactors, involve substantially less hazard. Id. at 262.

Taking these factors into account, the Commission believes that an appropriate balance is struck by its present practice of not requiring that completion of any requested hearing be a prerequisite to every licensing action by the agency while providing that any "interested person" who believes the effectiveness of the licensing action will be harmful to his or her interests can request a stay from the presiding

officer. Section 2.1263 of the proposed rule outlines the procedure for making such requests.

#### DESIGNATION OF A SINGLE HEARING OFFICER

Unlike reactor licensing proceedings in which a three-member board is established to conduct any hearing, for most materials licensing proceedings only a single hearing officer would be appointed by the Chairman of the Atomic Safety and Licensing Board Panel (ASLBP) from the panel's membership to rule on a petition for hearing and, if a hearing is granted, preside over the adjudication. The exception to this rule is for proceedings on Part 70 licenses to receive new fuel at reactor facilities that are subject to an ongoing proceeding for an operating license under Part 50. In such instances, the three-member licensing board conducting the Part 50 proceeding also will consider the Part 70 application in accordance with the informal procedures in proposed Subpart L unless the board certifies to the Commission that the matters presented for adjudication are substantially the same as those being litigated in the operating license proceeding. Upon certification, the Part 70 issues can be adjudicated using the formal hearing procedures in 10 CFR Part 2, Subpart G.

#### REQUIREMENTS FOR STANDING

Under the proposed § 2.1205, the focus of an initial request for hearing or a petition to intervene is to be the issue of standing. In turn, the presiding officer's determination about whether the petitioner

for a hearing has standing would be in accordance with the Commission's existing practice and would include a consideration of the factors set forth at 10 CFR 2.714(d). Nonetheless, the "distance standard" established by NRC case law for standing in nuclear reactor licensing proceedings, whereby persons residing within fifty miles of a facility generally are considered to have standing, see, e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.7 (1977), is not applicable in materials licensing proceedings. Instead, the interest of the petitioner must be assessed in terms of the particular licensed facility or activity at issue in the materials licensing proceeding.

#### HEARING FILE

Following a presiding officer's determination to grant a hearing request because the requestor has standing, § 2.1231 requires that the NRC staff assemble and make available to the presiding officer and the parties a hearing file of materials relevant to the licensing proceeding. The file would include the application and any amendment thereto, as well as any environmental assessment or impact statement and any NRC report or any correspondence between the NRC and the applicant relating to the application. The hearing file also would be placed by the staff in the NRC's public document room (PDR) and in any appropriate local PDR. If a local PDR did not exist, as it does not for the overwhelming majority of materials licenses, then the applicant would be responsible for making the hearing file provided by the NRC staff

publicly available during regular business hours in the vicinity of the principal location where the nuclear material that is the subject of the application will be possessed. This could be done by the applicant in a number of different ways, including making the file available at a local public library.

Although the proposed rule provides that no discovery by the parties is allowed in informal proceedings, creation of the hearing file is intended to give all parties in such proceedings access to the central documentation relating to the application for use in preparing written and oral presentations. Moreover, as proposed § 2.1231(c) indicates, the NRC staff is given the continuing duty of keeping the hearing file for a proceeding current by supplementing it with appropriate documents that are generated after the file is established initially. Further, any issue that arises over the appropriate documents to be included in the file is to be resolved by the presiding officer.

WRITTEN PRESENTATIONS AND DISCRETION  
TO HOLD ORAL PRESENTATIONS

Under the proposed rule, after a hearing file is established the parties would be given an opportunity to make written presentations. These presentations are to be made under oath or affirmation. Those filed by an applicant challenging a proposed denial or a denial of its licensing request must describe with particularity any deficiency or omission in the staff's action. Similarly, the written presentation of intervenors challenging an application for licensing action must

describe in detail any deficiency or omission in the application. Each written presentation also must be supported by all documentation or information that supports or illustrates each deficiency or omission complained of. Subsequent attempts to present or to rely upon other documentation or information would require the permission of the presiding officer. In addition to receiving the parties' filings, the presiding officer could require that the parties answer his or her written questions.

If it appears to the presiding officer, in his or her discretion, that it is necessary for the creation of an adequate record for decision, oral presentations to the presiding officer by the parties or oral questioning of witnesses concerning the factual and legal issues presented by the licensing action are allowed. An oral presentation by the parties would be appropriate in instances when the presiding officer is convinced that such a presentation is the most expeditious way to clarify or resolve specific ambiguities or controversies arising from the written presentations. Although such presentations generally would be similar to the nontestimonial oral arguments held with respect to motions in formal adjudicatory proceedings, in the event a party wished to make any additional factual presentations for the record, under § 2.1233(b) the presenter would be required to be under oath. Oral questioning of affiants or of principals or employees of the applicant or licensee, also under oath, might be allowed in addition to or in lieu of an oral presentation in instances when the veracity or demeanor of such individuals is at issue and is critical to resolving an important matter in controversy. Normally such questioning would be done by the

presiding officer on the basis of his or her concerns and any questions of the parties the presiding officer finds appropriate. The proposed rule also contemplates that oral questioning could be done by the parties themselves, but only after the specific questions or the line of questions for the witness has been approved by the presiding officer. Free-ranging cross-examination would not be allowed. The Commission contemplates that oral presentations or oral questioning would not be necessary in the vast majority of cases.

Thereafter, on the basis of the hearing file, any information presented under oath in written or oral presentations, and any facts that might be officially noticed, the presiding officer would make an initial decision. This decision would be subject to review by an Atomic Safety and Licensing Appeal Board under the same procedures as exist for the appeal of initial decisions in formal adjudications under Subpart G of 10 CFR Part 2.

In the event that the presiding officer, on his own or at the request of any party, reaches the conclusion that a full and fair airing of the issues in the proceeding requires that additional procedures should be used, such as discovery or allowing the parties to cross-examine witnesses, or that the proceeding should be conducted entirely in accordance with Subpart G in formal procedures, § 2.1209(j) authorizes the presiding officer to request authority to use the additional procedures or to have the Commission convene a formal adjudication. The Commission contemplates that this will not be appropriate in the vast majority of cases. See generally Sequoyah Fuels Corporation (Sequoyah UF<sub>6</sub> to UF<sub>4</sub> Facility), CLI-86-17, 24 NRC \_\_\_\_\_ (Oct. 3, 1986).

### ROLE OF THE NRC STAFF

Another important change in procedure proposed in these rules of procedure is the role provided for the NRC staff. In formal hearings under Subpart G of 10 CFR Part 2, the staff is a party to the proceeding. Under the proposed rule, in instances other than an applicant- or licensee-initiated hearing following a denial or proposed denial of an application, the staff need not assume such a role. Instead, it may decline to participate as a party in the proceeding. However, if the staff subsequently determined it wished to assume party status or the presiding officer decided it should participate as a party, under proposed § 2.1213 the presiding officer could afford or impose party status.

### RESTRICTIONS ON PRIVATE COMMUNICATIONS WITH ADJUDICATORS

Despite the lack of any statutory requirement that the Commission apply the ex parte and separation of functions prohibitions of the Administrative Procedure Act (5 U.S.C. 554(d), 557(d)) to informal adjudications, these prohibitions can in some circumstances have due process implications. See Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1008-10 (7th Cir.), cert. denied, 447 U.S. 921 (1980); United States Lines v. FMC, 584 F.2d 519, 536-42 (D.C. Cir. 1978). The crux of judicial concern in this regard is that the decision resulting from the adjudication should not be based upon information about which the parties have not had notice and a chance to provide their views. Bethlehem Steel Corp., 638 F.2d at 1009-10; United States Lines,

584 F.2d at 540-41. Proposed § 2.1215(c) addresses this concern by providing that an initial decision can only be based upon information with respect to which all parties have had notice and an opportunity to comment.

#### ENVIRONMENTAL IMPACT: CATEGORICAL EXCLUSION

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

#### PAPERWORK REDUCTION REVIEW

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

#### REGULATORY ANALYSIS

The Atomic Energy Act affords interested persons the right to a hearing regarding a materials licensing proceeding. As the Commission previously indicated in its decision in Kerr McGee Corp., 15 NRC at 241, the use of informal procedures involves less cost and delay for the parties and the Commission than the use of formal, trial-type procedures, the only other procedural alternative. Also, procedures must be in place to allow for the orderly conduct of those

adjudications. Codifying the informal hearing procedures for materials licensing proceedings is preferable to the only other alternative, which is the present practice of setting forth the procedures to be followed on a case-by-case basis. By codifying the procedures, the Commission will avoid the expenditure of time and resources necessary to prepare the individual orders that previously have been used to designate those procedures. It thus is apparent that this proposed rule is the preferred alternative and the cost entailed in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

#### BACKFIT ANALYSIS

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

#### REGULATORY FLEXIBILITY CERTIFICATION

The proposed rule will not have a significant economic impact upon a substantial number of small entities. Many materials licensees or intervenors fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or the NRC's size standards

published December 9, 1985 (50 FR 50241). While the proposed rules, if adopted, would reduce the burden on licensees or intervenors because of the informal nature of the hearing, the requirement that they submit filings and documentary information detailing contested legal and factual issues is still required. Some cost reduction in comparison to the cost of participating in a formal adjudicatory hearing can be anticipated, although that reduction as a whole may not be significant. Further, the use of informal procedures will not increase significantly the burden upon licensees to respond to hearing requests. Since the Commission's determination in 1982 that use of such procedures was appropriate, it has received, on average, fewer than five hearing requests per year regarding materials licensing applications. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities.

#### LIST OF SUBJECTS IN 10 CFR PART 2

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

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

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

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

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

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub.L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub.L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.300-2.309 also issued under Pub.L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). Sections 2.600-2.606 also issued under sec. 102, Pub.L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. 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). Appendix A also issued under sec. 6, Pub.L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

2. Subpart L of Part 2 is added to read as follows:

Subpart L - Informal Hearing Procedures for Adjudications  
in Materials Licensing Proceedings

Sec.

- 2.1201 Scope of subpart.
- 2.1203 Docket; filing; service.
- 2.1205 Request for a hearing; petition  
for leave to intervene.
- 2.1207 Designation of presiding officer.
- 2.1209 Power of presiding officer.
- 2.1211 Participation by a person not a party.
- 2.1213 Role of the NRC staff.
- 2.1215 Appearance and practice.

HEARINGS

- 2.1231 Hearing file; prohibition on discovery.
- 2.1233 Written presentations; written questions.
- 2.1235 Oral presentations; oral questions.
- 2.1237 Consideration of Commission rules and regulations in  
informal adjudications.
- 2.1239 Settlement of materials licensing proceedings.

INITIAL DECISION, COMMISSION REVIEW,  
AND FINAL DECISION

- 2.1251 Initial decision and its effect.
- 2.1253 Appeals from initial decisions.
- 2.1255 Review by the Atomic Safety and Licensing Appeal Board.
- 2.1257 Review of decisions and actions of an Atomic Safety and  
Licensing Appeal Board.
- 2.1259 Final decision; petition for reconsideration.
- 2.1261 Authority of the Secretary to rule on procedural matters.
- 2.1263 Stays of NRC staff licensing actions or of decisions of a  
presiding officer, an Atomic Safety and Licensing Appeal  
Board, or the Commission, pending hearing or review.

§ 2.1201 Scope of subpart.

The general rules in this subpart govern procedure in any adjudication initiated by a request for a hearing in a proceeding for the grant, transfer, renewal, or licensee-initiated amendment of a materials license subject to Parts 30, 32 through 35, 40, or 70 of this chapter. Any adjudication regarding a materials license subject to Parts 30, 32 through 35, 40, or 70 that is initiated by a notice of hearing issued under § 2.104, a notice of proposed action under § 2.105, or a request for hearing regarding an enforcement proceeding under Subpart B of 10 CFR Part 2, including an order to show cause, an order for modification of license, or a civil penalty, is to be conducted in accordance with the procedures set forth in Subpart G of 10 CFR Part 2.

§ 2.1203 Docket; filing; service.

(a) The Secretary shall maintain a docket for each adjudication subject to this subpart, commencing with the filing of a request for a hearing. All papers, including any request for a hearing, petition for leave to intervene, correspondence, exhibits, decisions, and orders, submitted or issued in the proceeding; the hearing file compiled in accordance with § 2.1231; and the transcripts of any oral presentations or oral questioning made in accordance with § 2.1235 must be filed with the Office of the Secretary and must be included in the docket.

(b) Documents will be considered filed with the Office of the Secretary in adjudications subject to this subpart either --

(1) By delivery to the Docketing and Service Branch of the Office of the Secretary at Room 1121, 1717 H Street, NW., Washington, D.C. or

(2) By mail or telegram addressed to the Secretary,  
U.S. Nuclear Regulatory Commission, Washington, D.C. 20555,  
Attention: Docketing and Service Branch.

Filing by mail or telegram will be complete as of the time of deposit in the mail or with the telegraph company.

(c) Computation of time shall be done in accordance with § 2.710.

(d) A request for a hearing or a petition for leave to intervene must be served in accordance with § 2.1205(e), (j). All other documents offered for filing are to be served as the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission shall direct.

§ 2.1205 Request for a hearing; petition for leave to intervene.

(a) Any person whose interest may be affected by a proceeding for the grant, transfer, renewal, or licensee-initiated amendment of a materials license subject to this subpart may file a request for a hearing.

(b) An applicant for a license, a license amendment, a license transfer, or a license renewal who is issued a notice of proposed denial or a notice of denial must in all cases file a request for a hearing within the time specified in § 2.103.

(c) The request for a hearing of a person other than an applicant must be filed (1) within thirty (30) days of the agency's publication in the Federal Register of a notice of the receipt of, or action relative to, an application, or (2) if no such notice is published, within thirty (30) days after the requestor receives actual notice of a pending

application or agency action granting an application or within one (1) year after agency action granting an application, whichever first occurs. A request for a hearing filed more than one (1) year after effective completion of the agency action will be granted only upon a showing of exceptional circumstances for the late filing.

(d) The request for a hearing filed by a person other than an applicant must describe in detail --

- (1) The interest of the requestor in the proceeding;
- (2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors of paragraph (g) of this section; and
- (3) The specific aspect or aspects of the subject matter of the proceeding about which the requestor wishes to be heard.

(e) Each request for a hearing must be served, by delivering it personally or by mail to --

- (1) The applicant (unless the requestor is the applicant);  
and
- (2) The NRC staff, by delivery to the Executive Director for Operations, U.S. Nuclear Regulatory Commission,  
Washington, D.C. 20555.

(f) Within ten (10) days of service of a request for a hearing filed under paragraph (c) of this section, the applicant may file an answer. The NRC staff may file an answer to such a request for a

hearing within ten (10) days of the designation of the presiding officer.

(g) In ruling on a request for a hearing filed under paragraph (c) of this section, the presiding officer shall determine that the requestor meets the judicial standard for standing and shall consider, among other factors --

- (1) The nature of the requestor's right under the Act to be made a party to the proceeding;
- (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

(h) If a hearing request filed under paragraph (b) of this section is granted, the applicant and the NRC staff shall be parties to the proceeding. If a hearing request filed under paragraph (c) of this section is granted, the requestor shall be a party to the proceeding along with the applicant and the NRC staff, if the staff chooses to participate as a party in accordance with § 2.1213.

(i) If a request for a hearing is granted and no notice of opportunity for a hearing previously has been published in the Federal Register, a notice of hearing must be published in the Federal Register that must state --

- (1) The time, place, and nature of the hearing;
- (2) The authority under which the hearing is to be held;
- (3) The matters of fact and law to be considered; and

(4) The time within which any other person whose interest may be affected by the proceeding may petition for leave to intervene, as specified in paragraph (j) of this section.

(j) Any petition for leave to intervene, which must be filed within thirty (30) days of the date of publication of the notice of hearing, must set forth the information required under paragraph (d) of this section. A petition for leave to intervene must be served upon the applicant and upon the NRC staff, by delivering it personally or by mail to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Within ten (10) days of service of a petition for leave to intervene, the NRC staff and the applicant may file an answer. Thereafter, the petition for leave to intervene must be ruled upon by the presiding officer, taking into account the factors set forth in paragraph (g) of this section. If the petition is granted, the petitioner shall be considered a party to the proceeding.

(k) A nontimely petition for leave to intervene will not be entertained absent a finding by the Commission or the presiding officer that the petition should be granted based upon a balancing of the factors set forth in § 2.714(a)(1)(i)-(v), in addition to those set forth in paragraph (g) of this section.

(l) The filing or granting of a request for a hearing or a petition for leave to intervene need not delay NRC staff action regarding an application for a materials licensing action covered by this subpart.

(m) An order granting a request for a hearing or a petition for leave to intervene may condition or limit participation in the interest of avoiding repetitive factual presentations and argument.

(n) In the event the presiding officer wholly denies a request for a hearing or a petition for leave to intervene, that action is appealable within ten (10) days of service of the order on the question whether the request for a hearing or the petition for leave to intervene should have been granted in whole or in part. If a request for a hearing or a petition for leave to intervene is granted, parties other than the requestor or petitioner may appeal that action within ten (10) days of service of the order on the question whether the request for a hearing or the petition for leave to intervene should have been wholly denied. An appeal may be taken by filing and serving upon all parties a statement that succinctly sets out, with supporting argument, the errors alleged. The appeal may be supported or opposed by any party by filing a counter statement within fifteen (15) days of the service of the appeal brief.

§ 2.1207 Designation of presiding officer.

(a) Unless otherwise ordered by the Commission or as provided in paragraph (b) of this section, within ten (10) days of filing of a request for a hearing relating to a materials license proceeding covered by this subpart, the Chairman of the Atomic Safety and Licensing Board Panel shall issue an order designating a single member of the panel to rule on the request for a hearing and, if necessary, to serve as the presiding officer to conduct the hearing.

(b) For any request for hearing relating to an application under 10 CFR Part 70 to receive and store unirradiated fuel at the site of a production or utilization facility that also is the subject of a

proceeding under Subpart G of this Part for the issuance of an operating license, the Chairman of the Atomic Safety and Licensing Board Panel shall issue an order designating a Licensing Board conducting the operating license proceeding to rule on the request for a hearing and, if necessary, to conduct the hearing in accordance with this Subpart. Upon certification to the Commission by the Licensing Board designated to conduct the hearing that the matters presented for adjudication by the parties with respect to the Part 70 application are substantially the same as those being heard in the pending proceeding under 10 CFR Part 50, the Licensing Board may conduct the hearing in accordance with the procedures in Subpart G.

§ 2.1209 Power of presiding officer.

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. The presiding officer has all powers necessary to those ends, including the power to --

- (a) Regulate the course of the hearing and the conduct of the participants;
- (b) Dispose of procedural requests or similar matters;
- (c) Hold conferences before or during the hearing for settlement, simplification of the issues, or any other proper purpose;
- (d) Certify questions to the Atomic Safety and Licensing Appeal Board for determination, either in the presiding officer's discretion or on direction of the Commission or the Atomic Safety and Licensing Appeal Board;

- (e) Reopen a proceeding for the reception of further information at any time prior to initial decision;
- (f) Administer oaths and affirmations;
- (g) Issue initial decisions;
- (h) Issue subpoenas requiring the attendance and testimony of witnesses at the hearing or the production of documents for the hearing;
- (i) Receive written or oral evidence and take official notice of any fact in accordance with § 2.743(i);
- (j) Recommend to the Commission that procedures other than those authorized under this subpart be used in a particular proceeding; and
- (k) Take any other action consistent with the Act and this chapter.

§ 2.1211 Participation by a person not a party.

(a) The presiding officer may permit a person who is not a party to make a limited appearance in order to state his or her views on the issues. Limited appearances may be in writing or oral, at the discretion of the presiding officer, and are governed by rules adopted by the presiding officer. A limited appearance statement is not to be considered part of the decisional record under § 2.1251(c).

(b) Upon request, the presiding officer shall afford the representative of an interested State, county, municipality, or an agency thereof, a reasonable opportunity to participate in a proceeding conducted under this Subpart, including an opportunity to make written and oral presentations in accordance with §§ 2.1233, 2.1235, without requiring the representative to take a position with respect to the

issues. Participants under this subsection may notice an appeal of an initial decision in accordance with § 2.1253 with respect to any issue on which they participate.

§ 2.1213 Role of the NRC staff.

If a hearing request is filed under § 2.1205(b), the NRC staff shall be a party to the proceeding. If a hearing request is filed under § 2.1205(c), within ten (10) days of the designation of a presiding officer pursuant to § 2.1207 the NRC staff shall notify the presiding officer whether or not the staff desires to participate as a party to the adjudication. Thereafter, upon a determination by the presiding officer that the resolution of any issue in the proceeding would be aided materially by staff's participation in the proceeding as a party, the presiding officer may order or permit the NRC staff to participate as a party with respect to that particular issue.

§ 2.1215 Appearance and practice.

(a) Representation by an attorney-at-law is not necessary in order for an individual, an organization, or a § 2.1211(b) participant to appear in an adjudication conducted under this subpart. If the representative of an organization is not an attorney-at-law, he or she must be a member or officer of the organization represented. Upon request of the presiding officer, an individual acting as a representative shall provide appropriate information establishing the basis of his or her authority to act in a representational capacity.

(b) Any action to reprimand, censure, or suspend a party, a § 2.1211(b) participant, or the representative of a party or a § 2.1211(b) participant must be in accordance with the procedures in § 2.713(c).

#### HEARINGS

§ 2.1231 Hearing file; prohibition on discovery.

(a) Within thirty (30) days of the presiding officer's entry of an order granting a request for a hearing, the NRC staff shall file and make available to the presiding officer, the applicant, and any other party to the proceeding a hearing file. Thereafter, within ten (10) days of the date a petition for leave to intervene or a request to participate under § 2.1211(b) is granted, the NRC staff shall make the hearing file available to the petitioner or the participant. The hearing file also shall be made available for public inspection and copying during regular business hours at the NRC Public Document Room in Washington, D.C., and at any appropriate local public document room. In the event no appropriate local public document room exists, the applicant must make the hearing file available for public inspection and copying during regular business hours at a location in the vicinity of the principal location where the nuclear material that is the subject of the application will be possessed.

(b) The hearing file will consist of the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report or any correspondence between the applicant and the NRC that is relevant to the application.

The presiding officer will 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.

(d) A party may not seek discovery from any other party, § 2.1211(b) participant, or the NRC or its personnel, whether by document production, deposition, interrogatories, or otherwise.

§ 2.1233 Written presentations; written questions.

(a) At such time or times and in such sequence as the presiding officer may establish after publication of a notice of hearing in accordance with § 2.1205(i) and after the NRC staff has made the hearing file available in accordance with § 2.1231, the parties shall submit, under oath or affirmation, written presentations of their arguments and documentary data, informational material, and other supporting written evidence. The presiding officer also may, on his or her initiative, submit written questions to the parties to be answered in writing, under oath or affirmation, and supported by appropriate documentary data, informational material, or other written evidence.

(b) In a hearing initiated under § 2.1205(b), the initial written presentation of the applicant that is issued a notice of proposed denial or a notice of denial must describe in detail any deficiency or omission in the agency's denial or proposed denial of its application and what relief is sought with respect to each deficiency or omission.

(c) In a hearing initiated under § 2.1205(c), the initial written presentation of a party that requested a hearing or petitioned for leave

to intervene must describe in detail any deficiency or omission in the license application, with references to any particular section or portion of the application considered deficient, give a detailed statement of reasons why any particular section or portion is deficient or why an omission is material, and describe in detail what relief is sought with respect to each deficiency or omission.

(d) A party making an initial written presentation under this section must submit with its presentation or identify by reference to a generally available publication or source, such as the hearing file, all documentary data, informational material, or other written evidence upon which it relies to support or illustrate each omission or deficiency complained of. Thereafter, additional documentary data, informational material, or other written evidence can be submitted or referenced by any party, other than the NRC staff, or any § 2.1211(b) participant in a written presentation or in response to a written question only as the presiding officer, in his or her discretion, permits.

(e) Strict rules of evidence will not apply to written submission under this section, but 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 cumulative, irrelevant, immaterial, or unreliable.

§ 2.1235 Oral presentations; oral questions.

(a) Upon a determination that it is necessary for the creation of an adequate record for decision, in his or her discretion the presiding officer may allow or require oral presentations by the parties or pose questions orally to witnesses. The presiding officer may impose

appropriate time limits on oral presentations and may entertain and pose questions to witnesses proposed by any party or allow a sponsoring party to pose any particular question or line of questions the presiding officer finds are appropriate.

(b) Oral presentations and responses to oral questioning to be relied upon as oral evidence must be given under oath or affirmation. All oral presentations or oral questioning must be stenographically reported and, unless the presiding officer orders otherwise, must be public.

(c) Strict rules of evidence will not apply to oral submissions under this section, but the presiding officer may, on motion or on the presiding officer's own initiative, strike any portion of an oral presentation or a response to oral questioning that is cumulative, irrelevant, immaterial, or unreliable.

§ 2.1237 Consideration of Commission rules and regulations in informal adjudications.

(a) Except as provided in paragraph (b) of this section, any regulation of the Commission issued in its program for the licensing and regulation of production and utilization facilities, source material, special nuclear material, or byproduct material may not be challenged in any adjudication subject to this subpart.

(b) A party to an adjudication subject to this subpart may petition that the application of a Commission regulation specified in paragraph (a) of this section be waived or an exception made for the particular proceeding. The sole ground for such a request for waiver or

exception must be that special circumstances exist such that application of the regulation to the subject matter of the proceeding would not serve the purposes for which the regulation was adopted. In the absence of a prima facie showing of special circumstances, the presiding officer may not further consider the matter. If the presiding officer determines that a prima facie showing has been made, he or she shall certify directly to the Commission itself for determination the matter of whether special circumstances support a waiver or an exception. The Commission's determination shall be made after such further proceedings as the Commission deems appropriate.

§ 2.1239 Settlement of materials licensing proceedings.

The fair and reasonable settlement of proceedings subject to this subpart is encouraged. A settlement must be approved by the presiding officer or Atomic Safety and Licensing Appeal Board, as appropriate, in order to be binding in the proceeding.

INITIAL DECISION, COMMISSION REVIEW,  
AND FINAL DECISION

§ 2.1251 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 forty-five (45) days after the date of issuance, unless an appeal is taken in accordance with § 2.1253.

(b) The Commission may direct that the presiding officer certify the record to it without an initial decision and may omit an initial decision and prepare a final decision upon a finding that due and timely execution of its functions so requires.

(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. 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) The appropriate ruling, order, or denial of relief with its effective date; and

(3) The time within which appeals to the decision and a brief in support of those appeals may be filed, the time within which briefs in support of or in opposition to appeals filed by another party may be filed, and the date when the decision becomes final in the absence of an appeal.

(d) Matters not put into controversy by the parties may not be examined and decided by the presiding officer or the Atomic Safety and Licensing Appeal Board. If the presiding officer or the Appeal Board believes that a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy, the presiding officer or the Appeal Board promptly shall advise the Commission of the basis for that view, and the Commission may take appropriate action.

§ 2.1253 Appeals from initial decisions.

Parties and § 2.1211(b) participants may appeal from an initial decision under this subpart in accordance with the procedures set out in §§ 2.762 and 2.763.

§ 2.1255 Review by the Atomic Safety and Licensing Appeal Board.

The Commission authorizes the Atomic Safety and Licensing Appeal Board to exercise the authority and carry out the review functions to be performed under §§ 2.1205(n), 2.1209(d), and 2.1253.

§ 2.1257 Review of decisions and actions of an Atomic Safety and Licensing Appeal Board.

The Commission will not entertain any petition for review of a decision or action of an Atomic Safety and Licensing Appeal Board under this subpart. Commission review is available only on the Commission's own motion issued within forty (40) days after the date of a decision or action by the Appeal Board under § 2.1255. Commission review will be conducted in accordance with such procedures as the Commission deems appropriate. Absent Commission review, the decision of the Appeal Board constitutes the final action of the Commission.

§ 2.1259 Final decision; petition for reconsideration.

(a) Commission or Atomic Safety and Licensing Appeal Board action to render a final decision must be in accordance with § 2.770.

(b) The provisions of § 2.771 govern the filing of petitions for reconsideration.

§ 2.1261 Authority of the Secretary to rule on procedural matters.

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

§ 2.1263 Stays of NRC staff licensing actions and decisions of a presiding officer, an Atomic Safety and Licensing Appeal Board or the Commission, pending hearing or review.

Applications for a stay of any decision or action of the Commission, a presiding officer, or an Atomic Safety and Licensing Appeal Board or any action by the NRC staff in issuing a license in accordance with § 2.1205(1) are governed by § 2.788, except that any request for a stay of staff licensing action pending completion of an adjudication under this subpart must be filed at the time a request for a hearing or petition to intervene is filed or within ten (10) days of the staff's action, whichever is later.

Dated at Washington, DC, this            day of            , 1987.

For The Nuclear Regulatory Commission.

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SAMUEL J. CHILK,  
Secretary of the Commission.

For: The Commission

From: William C. Parler  
General Counsel

Subject: REVISED PROPOSED RULE ON INFORMAL HEARING  
PROCEDURES FOR MATERIALS LICENSING ADJUDICATIONS

Prior History: SECY-85-227

Summary: In response to the Commission's comments on  
SECY-85-227, we have revised the previous  
proposed procedures for informal hearings in  
materials licensing cases to incorporate various  
requested changes....

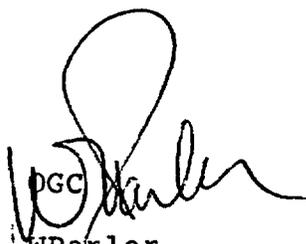
Attachment: FR notice

Disk: PAUL7  
SECY-85-227 (SECY paper)  
Fed Reg Notice (attachment)

Contact: Bollwerk

OGC  
  
PBollwerk  
3/31/87

OGC  
  
MMalsch  
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3/31/87