RULEMAKING ISSUE
(Notation Vote)

August 13, 2010 SECY-10-0106

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: PROPOSED RULE—10 CFR PARTS 2, 51, AND 54 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS" (RIN 3150-AI43)

PURPOSE:

To obtain Commission approval to publish a proposed rule to amend portions of 10 CFR Part 2, to make conforming changes to other provisions of the regulations, and to solicit public comment on possible changes to the mandatory disclosure requirements that are intended to avoid duplication of effort or unnecessary administrative burden to the parties. Major revisions to the Part 2 regulations were issued in January 2004. Since that time provisions requiring correction and clarification have been discovered by the Office of the General Counsel (OGC), and several areas in need of additional improvement have been identified. This enclosed draft *Federal Register* notice (FRN) contains OGC's recommended amendments to the NRC's adjudicatory rules.

SUMMARY:

The proposed rule (Enclosure 1) contains a number of improvements to the NRC's hearing process, as well as many minor corrective and clarifying amendments. The most significant changes include amendments to the 10 CFR § 2.309 standards for review of hearing requests, intervention petitions, and new or amended contentions filed after the deadlines in paragraph (b) of that section and to the discovery provisions related to enforcement proceedings. The amendments would also provide for more time for appellate filings and would request public comment on whether there should be changes to the mandatory disclosure requirements for non-enforcement proceedings. OGC believes that the changes in this proposed rule will promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

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OGC recommends making this rule, should it become final, immediately effective for all ongoing and future NRC adjudicatory proceedings. In an ongoing adjudicatory proceeding, the new or amended requirements would be effective and govern all obligations and disputes that arise after the effective date of the final rule. The requirements would not, however, be applied retroactively to decisions or determinations of a presiding officer, and disputes over an adjudicatory obligation or situation arising before the effective date of the new rule would be governed by the former rule provisions.

OGC recommends that this rule be issued as a proposed rule for notice and comment. Although the Administrative Procedure Act does not require the use of notice and comment rulemaking for rules of agency procedure and practice, OGC believes that the benefits of issuing this rule as a proposed rule for public comment outweigh the benefits that could be gained by issuing the rule as a final rule.

BACKGROUND:

In a final rulemaking published in the Federal Register on January 14, 2004 ("major 2004 Part 2 revisions"), the NRC substantially modified its rules of practice governing agency adjudications, 10 CFR Part 2. Portions of 10 CFR Parts 1, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76 and 110 were also amended at that time. 69 FR 2182.

Since the new rules of practice became effective, provisions needing correction or clarification have been discovered, and several areas have been identified where further improvements to the rules governing the hearing process can be achieved. Prior rulemakings have addressed some of these issues, but OGC believes that this comprehensive rulemaking is necessary to correct remaining errors and to implement improvements that were not adopted in the rulemakings that have occurred since 2004.

SUMMARY OF SIGNIFICANT PROPOSED RULE CHANGES:

Changes to 10 CFR § 2.309

The proposed rule would significantly change the requirements in § 2.309(c) and (f)(2) for hearing requests, intervention petitions, and new or amended contentions filed after the initial filing deadline. The language in the current § 2.309 is confusing because two different filing tests are stated in two separate paragraphs of § 2.309, without any indication in the regulatory text as to how they interrelate. Section 2.309(c) applies the traditional eight factor balancing test to "nontimely" hearing requests, intervention petitions, and contentions; the most important of these factors is "good cause." Section 2.309(f)(2) applies a three-factor test to new or amended contentions after the initial filing; the Commission has also applied these three factors to a intervention petition filed after the deadlines in § 2.309(b). *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 33 (2006). The § 2.309(f) three-factor test appears to be a specific application of the case law definition of "good cause." The proposed rule would simplify the requirements governing hearing requests, intervention petitions, or new or amended contentions filed after the deadlines in § 2.309(b) by: (1) making good cause the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention, petition, or hearing request; (2) defining good cause as those factors currently in § 2.309(f)(2)(i)–(iii) (which require information used as the basis for new or amended contentions to be new and materially different, and for the

contentions to be timely filed after discovery of the new information); (3) adding clarifying information regarding the need to address interest and standing; and (4) removing references to nontimely filings. Any contention that is filed after the initial filing deadline would be called "new or amended," rather than "late-filed," the term currently used. The term "late-filed" can be misleading because these contentions are normally timely filed after new information becomes available.

The proposed amendments to § 2.309 would apply the good cause factor to all filings after the deadlines in paragraph (b) and would adopt the current § 2.309(f)(2)(i) through (iii) factors as the standards to be applied when evaluating whether good cause exists. This change will significantly simplify the review of filings after initial filing deadline. These changes would allow both the parties and the presiding officer to focus their resources on the most relevant questions related to the admissibility of these filings (i.e., whether good cause exists and whether the contentions meet the admissibility requirements of 2.309(f)).

The proposed rule would also change the requirements in § 2.309(i), which currently requires the presiding officer to seek Commission approval if the presiding officer cannot issue a decision within 45 days after the filing of all answers and replies in § 2.309(h). Section 2.309(i) would be redesignated as § 2.309(j), and would require that the presiding officer notify (instead of seek approval from) the Commission and the parties if the 45-day deadline will not be met. This notification must include the expected date of when the decision will issue.

Request for Public Comment on Interlocutory Appeals

Section 2.311 establishes a scheme for interlocutory appeals from orders admitting or denying a request for hearing or petition to intervene. Currently, if a petitioner is held to not have standing or all of the petitioner's contentions are denied, then the petitioner can immediately appeal the Licensing Board order to the Commission. If at least one contention is admitted, but one or more are denied, then the petitioner must wait until the Licensing Board has issued its final order in the proceeding before it can appeal the denial of contentions. Parties, such as the license applicant and the NRC staff, however, can appeal the admission of all of the contentions admitted immediately after issuance of the initial Board order on the grounds that *none* of them are admissible, and therefore there should be no hearing.

The Atomic Safety and Licensing Board Panel (ASLBP) is suggesting that the rule be amended to preclude parties from appealing rulings on the admissibility of contentions (including new or amended contentions) prior to the issuance of the final Board order. Rather than having such appeals as a matter of right, the ASLBP believes that the Commission should only entertain interlocutory appeals challenging the admission of contentions when the standards that the Commission uses in accepting interlocutory appeals (as set forth in 10 CFR § 2.341(f)(2)) have been satisfied. The ASLBP argues that under the current rule applicants in particular are encouraged to oppose every proffered contention regardless of merit in order to preserve their appeal right, which it suggests encourages applicants in particular to opposes contentions regardless of merit in order to preserve the "automatic" right of appeal. This in turn, the ASLBP suggests, significantly contributes to the workload of the Boards, Commission, OCAA, and OGC. The main disadvantage would be removing the means by which an early determination can be made as to the proper admission of some contentions.

Another approach would be to require all appeals of decisions on contention admissibility (including rulings on new or amended contentions) to be filed immediately after the issuance of the Board order. The arguable advantage of this approach is that it allows early resolution of contention admissibility issues, avoiding the potentially needless expenditure of resources by all hearing participants. Further, it eliminates the possibility that, after a Board has issued its final order in the proceeding, the Commission on appeal will remand the proceeding to the Board for consideration of a contention that the Commission has determined should have been admitted and thereby prolong the proceeding. The argument against this approach is that the perceived advantages of allowing all appeals at the early stage may be largely illusory. It will likely substantially increase the adjudicatory workload for all of the participants in the adjudication, OCAA, and the Commission itself, and present the Boards with case management challenges. This approach could theoretically result in the admissibility of every contention in every proceeding being appealed to the Commission on an interlocutory basis. In any event, this option would require the Commission to devote its attention to matters that under the current rules the Commission would not have been asked to address because, in many cases, parties at the end of a proceeding choose not to appeal decisions denying the admissibility of contentions or a settlement agreement may have obviated the need to address the admissibility question. Currently, the Commission receives periodic appeals of the denial of contentions following issuance of Licensing Boards' final orders in the proceeding.

Overall, OGC believes that the current approach has served the agency well and has achieved the proper balance and does not recommend that the Commission modify the regulation. But, OGC has prepared for the Commission's consideration rule text and explanatory material to be included in the *Federal Register* notice, should the Commission decide to seek public comment on either or both of the alternative approaches. These alternative approaches are set forth in Enclosure 2.

Changes to the Discovery Provisions in 10 CFR 2.336, 2.704, 2.709

Narrowing the scope of NRC staff disclosures in enforcement proceedings.

Section 2.336, which governs NRC staff disclosures in enforcement proceedings, could be interpreted as requiring the disclosure of documents that are well outside of the scope of the enforcement proceeding, which could result in the inclusion of many unnecessary and unrelated documents. Subpart G should be amended to specify the staff's disclosure obligations in Subpart G enforcement proceedings; a conforming amendment would be made to remove Subpart G enforcement proceedings from the scope of § 2.336 mandatory disclosures. The new Subpart G mandatory disclosure provisions would limit the scope of the staff's disclosures to documents relevant to disputed issues alleged with particularity in the pleadings. OGC believes that these amended disclosure requirements would benefit the NRC staff (by reducing the resources necessary to review, prepare, and provide the required documents), and the other parties to the proceeding (by reducing the number of documents they need to review to only documents that are relevant to the issues in the proceeding). Further, this disclosure requirement would parallel the initial document disclosure requirement in § 2.704(a)(2) for parties other than the NRC staff. Although parties other than the NRC staff are also required by § 2.704(a)(1) to identify individuals likely to have discoverable information relevant to disputed issues, OGC believes that a similar disclosure requirement for the NRC staff is unnecessary

because the enforcement order and the discoverable portions of any pertinent Office of Investigations report should identify many of the individuals likely to have discoverable information relevant to disputed issues.

An additional amendment to § 2.709 would add paragraph (a)(6)(i) to require that if a claim of privilege or protected status is made by the NRC staff for any documents, a list of these documents must be provided, together with sufficient information for assessing the claim of privilege or protected status. Finally, proposed § 2.709(a)(6)(ii) would require the NRC staff to provide disclosure updates every 30 days. Currently, the regulations provide for disclosure every 14 days. Each update would include documents subject to disclosure under this section that have not been disclosed in a prior update and that are developed, obtained, or discovered during the period that runs from 5 business days before the last disclosure update to 5 business days before the filing of the update, as required of other parties by proposed § 2.704(a)(3). An amendment to § 2.709(a)(7) would specify the manner in which the NRC staff may disclose information in Subpart G proceedings. For publicly available documents, data compilations, or other tangible things, the NRC staff's duty to disclose this information to the other parties and the presiding officer would be met by identifying the location, the title, and a page reference to the subject information. If the publicly available documents, data compilations, or other tangible things can be accessed at either the NRC Web site, http://www.nrc.gov, or at the NRC Public Document Room, the staff would provide the parties and the presiding officer with any citations necessary to access this information. This addition parallels § 2.704(a)(2) for disclosures by parties other than the NRC Staff.

Revised mandatory disclosure schedule

Currently, all parties are required by § 2.336(d) to update their disclosures within 14 days of obtaining or discovering new information, which is unnecessarily burdensome; in the proposed rule disclosure updates would be made every 30 days. These updates would include all documents obtained or discovered during the period that runs from five days before the last disclosure update to five business days before the filing of the update. Documents discovered during the period between the five business day cutoff and the 30-day deadline would be included in the next update. OGC is also proposing that the Commission request comments on a variation of this proposed disclosure updates timeline that would require updates every 30 days, but would, as specified in the hearing milestones approach, mirror the 14-day disclosure requirements of the current version of § 2.336(d). A similar change is also being proposed to the timing of, and the supplementation requirements for, the initial disclosures under Subpart G for parties other than the NRC staff. These disclosures would have to be made 30 days after the grant of a hearing request, and the document disclosures would have to be supplemented within 30 days of the discovery of new documents.

Request for public comment on the scope of mandatory disclosures

Under the mandatory disclosure provisions of § 2.336(b)(3), the NRC staff must disclose NRC correspondence with the applicant or licensee “associated with the application or proposed action,” and documents “supporting the staff’s review, including documents that provide support for, or opposition to, the application or proposed action.” Because the disclosure obligation is not limited to the *issues in the proceeding* but instead extends to documents “*associated with*” the application or proposed NRC action, the staff has been required to review, produce, and, in some cases, redact a large number of documents that are irrelevant to the issues actually in

dispute. Thus, the current mandatory disclosure provisions have proven to be highly burdensome on the NRC staff and OGC hearing staff with little compensating benefit to other parties. Further, most of the documents that are now provided through mandatory disclosures are available to the public through ADAMS, with the exception of documents that are properly withheld under existing law (e.g., FOIA). These withheld documents are not made available on ADAMS or through mandatory disclosures.

OGC is therefore proposing that the Commission request public comment on a proposal to limit the documents disclosed by the staff under § 2.336(b)(3) to documents related to the admitted contentions. OGC believes that this change could reduce the burden on all the parties by focusing the staff's disclosures on documents that are directly related to the admitted contentions. This would reduce the number of unrelated documents that parties receive throughout the course of a proceeding and would allow all of the parties to focus on the issues in dispute.

Extension of time to appeal presiding officer orders to the Commission

Experience has demonstrated that the time the NRC's rules allow for petitions for review and appeals from an order of a presiding officer (10-15 days) is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. OGC does not expect the proposed change in appeal deadlines to result in any unnecessary delays in licensing. For one thing, higher-quality briefs should expedite appellate decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC Staff finishes its safety and environmental reviews and does not affect the timing of those reviews. OGC is therefore proposing to extend the time to file an appeal, petition for review, or answer to appeal or petition to the Commission to 25 days; the time to file a reply to an answer to a petition for review would be extended from five to ten days. Sections 2.311, 2.314, 2.341, and 2.1407 would adopt this new timeline.

Petitions for Commission review not acted on deemed denied in § 2.341

Section 2.341 contains requirements pertaining to the review of decisions and actions of a presiding officer by the Commission. As stated in the 2004 Part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786. 69 FR at 2225. But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. OGC is therefore proposing that the Commission adopt the provisions of former § 2.786(c) with an extended period of time for Commission review—120 days instead of 30. The 30-day review period in former Section 2.786 provided insufficient time for Commission review following the completion of briefing, routinely resulting in multiple extensions of time. In contrast, the automatic denial of a petition for review after 120 days, absent an extension from the Commission, would allow the Commission to concentrate its resources on the merits of the petitions, which would improve the overall efficiency of the adjudicatory process.[1]

[1] The Commission originally adopted a discretionary review system, of which the deemed denied provision was a part, to ensure that "its review procedures not impose an expensive and time-consuming (continued. . .)

Clarification of the Authority of the Secretary in § 2.346

Section 2.346(j), as currently written, authorizes the Secretary to "[t]ake action on minor procedural matters." Since 2004, experience with the Subpart C hearing procedures has shown that greater efficiencies would be achieved if the Secretary were authorized to take action on more than minor procedural matters. OGC believes that the Secretary should be authorized to take action on "procedural and other minor matters," such as motions raising matters that do not explicitly fit within the Secretary's existing authority (e.g., a motion to suspend a hearing notice, or a trivial motion to reconsider a Commission order). This change would allow the Secretary to take action on a variety of non-substantive matters, whether or not procedural. Time is of the essence on many minor matters—requiring Commission orders and affirmation sessions can sometimes result in undesirable delay in issuing needed decisions. Giving the Secretary authority to act for the Commission on minor matters will not result in orders contrary to Commission policy; the Secretary's current practice is to notify and informally consult with the Commission Offices before issuing orders invoking her authority.

Authority and role of the NRC staff in certain adjudications in § 2.1202

Section 2.1202 of Subpart L pertains to the authority and role of the NRC staff in less formal hearings. The introductory text of § 2.1202(a) could be erroneously interpreted as suggesting that the staff is required to advise the presiding officer on the merits of contested matters. Proposed § 2.1202(a) would require that, in Subpart L proceedings, the staff's notice to parties regarding relevant staff licensing actions must include an explanation of why both the public health and safety is protected and the action is in accord with the common defense and security**,** despite the "pendency of the contested matter before the presiding officer."

A conforming change to the introductory text of paragraph (a) of § 2.1403 is also proposed to require the NRC Staff to provide this explanation when the same situation arises in Subpart N proceedings.

Other Less Substantial Changes made in the Proposed Rule

The following less substantial changes are also in the proposed rule:

- Section 2.1209 of Subpart L (to be renamed "Simplified Hearing Procedures for NRC Adjudications") would be amended to provide format requirements for findings of fact and conclusions of law that mirror the requirements for Subpart G proceedings.
- Section 2.1213(f) of Subpart L would be amended to exclude from the stay provisions those matters limited to whether a no significant hazards consideration determination for a power reactor license amendment was proper.
- Section 2.1300 of Subpart M ("Procedures for Hearings on License Transfer Applications") would be amended to clarify that proceedings under Subpart M are governed by the provisions in both Subpart C and Subpart M. Section 2.1304 is duplicative of § 2.1300 and would be deleted.

(. . .continued)
burden on parties to licensing proceedings and ultimately on the public. . . .[Such a system] would allow the Commission to exercise an informed review function restricted to major matters." 41 FR 54206.

- Section 2.1316(c) of Subpart M, on the participation of the NRC staff as a party, would be amended to conform to the more detailed § 2.1202(b)(2) and (3), governing the participation of the NRC staff as a party in Subpart L proceedings.
- Other citation and typographical errors and omissions that have been noticed since the major revisions to the NRC's Rules of practice in early 2004 would also be corrected.
- Many other minor changes that do not raise policy issues are also being proposed throughout this draft *Federal Register* notice.

COORDINATION:

The FRN attached to this SECY paper has been reviewed by the Rules and Directives Branch of the Office of Administration. OGC incorporated comments from OCAA and the ASLBP. The EDO and relevant staff offices has been briefed on this SECY paper.

RESOURCES:

0.2 FTE will be required to complete this rulemaking in FY2011. These resources have been budgeted for.

RECOMMENDATIONS:

That the Commission:

Approve the enclosed proposed rule (Enclosure 1) for publication in the Federal Register.

Certify, under the Regulatory Flexibility Act, 5 U.S.C. § 605(b), that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed Federal Register notice.

Note:

- The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. § 605(b);
- The enclosed FRN contains the Regulatory Analysis for this rulemaking;
- No Environmental Impact Statement or Environmental Assessment has been prepared for this rulemaking because of the categorical exclusion in 10 CFR § 51.22(c)(1);
- Copies of the FRN of this proposed rulemaking will be distributed to all affected Commission licensees, Agreement States, and other States. The notice will be sent to other interested persons upon request;
- The staff has determined that this action is not a "major rule," as defined by the Congressional Review Act, 5 U.S.C. § 804(2), and has confirmed this determination with the OMB. The appropriate Congressional and Government Accountability Office contacts will be informed;

- The appropriate Congressional committees will be informed;
- A press release will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register; and
- The rule does not contain changes in information collection requirements.

/RA/

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General Counsel

Enclosures:
(1) Draft proposed rule *Federal Register* notice
(2) Alternatives Approaches on Interlocutory Appeals

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*See Previous Concurrence Page.

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