May 18, 1981

SECY-81-310

RULEMAKING ISSUE
(Affirmation)

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: Final Rule Amending Part 2

Discussion: Attached for your consideration is a draft Federal Register Notice on the proposed final rule amending 10 CFR Part 2. OGC, the Chairman of the ASLAP, the ASLBP and OELD concur in the proposed draft.

Leonard Bickwit, Jr.
General Counsel

Attachment:
Draft Final Rule Amending
Part 2

SECY NOTE: This paper may be discussed during the ongoing series of Commission meetings on Licensing Procedures. It is identical to the advanced copy distributed to Commissioner offices on May 18, 1981.

CONTACT:
Trip Rothschild, OGC
4-1465

This paper is tentatively scheduled for consideration at an open meeting during the week of June 1, 1981. Please refer to the appropriate weekly Commission schedule, when published, for a specific date and time.

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, June 2, 1981.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT May 26, 1981, 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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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

Expediting the NRC Hearing Process

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission has adopted several amendments to its Rules of Practice to facilitate expedited conduct of its adjudicatory proceedings on applications to construct or operate nuclear power plants. These amendments authorize the licensing boards to make oral rulings on written motions during the course of a prehearing conference or a hearing, preclude parties from filing responses to objections to a prehearing order unless the licensing board so directs, revise the schedule for filing proposed findings of fact and conclusions of law, and permit summary disposition motions to be filed at any time during the course of the proceeding.

EFFECTIVE DATE: Date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Esq., Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (202-634-1465).

SUPPLEMENTAL INFORMATION: On March 17, 1981 the Commission published in the Federal Register (46 Fed. Reg. 17216) a Notice of Proposed Rulemaking soliciting public comments on six proposed changes to the Commission's Rules of Practice, 10 CFR Part 2. The purpose of the proposed amendments was to shorten the hearing process on applications to construct or operate a nuclear power plant, without reducing the overall quality or fairness of NRC adjudicatory proceedings. In response the Commission received more than 600 comments. The comments are set forth and analyzed in SECY 81-252, a publicly available memorandum from the Commission's General Counsel to the Commission and, therefore, only a brief summary of the more significant comments is contained in this Notice.

The Commission also sought comment on a proposed model hearing schedule which would serve as a guideline for NRC's administrative judges. The Commission is still deliberating on the proposed schedule and, therefore, a model schedule is not set forth in this notice.

1. Eliminate Discovery Against the NRC Staff

Currently, parties to NRC licensing proceedings may engage in formal discovery against the NRC staff. The Commission sought comment on a proposed rule which would eliminate formal discovery against the staff. Most of the commenters opposed the proposal, arguing that their participation in a proceeding would be severely impeded if they could not obtain relevant information from the NRC

staff through formal discovery prior to the commencement of the hearing or that elimination of discovery against the staff might lengthen the licensing process. A majority of the Commission does not support the proposed rule and it has not been adopted. However, the Commission has under consideration a different proposal which would limit the number of interrogatories that a party may file against another party in an NRC adjudicatory proceeding. Public comment would be sought in a future rule-making proceeding on any such proposal.

2. Permit the Licensing Boards to Rule Orally on Written Motions

Under 10 CFR 2.730(e), licensing boards are required to issue written orders on those motions submitted to them in writing. The Commission sought comment on a proposed rule which would permit the boards, where appropriate, to issue oral rulings addressing such motions during the course of a prehearing conference or hearing.

Many of the nuclear industry commenters supported the proposed rule change noting that it could expedite the hearing process by enhancing the ability of the licensing boards to rule promptly on motions pertaining to procedural matters. Several emphasized, however, that if oral rulings are permitted, a board must take care to fully spell out its reasoning.

Intervenors, on the other hand, opposed the rule change because of a concern that they would not promptly learn of oral rulings. Intervenors frequently limit their attendance at the hearings to the days when their contentions are being litigated,

and do not have the resources to purchase transcripts. Intervenors asserted that without prompt notification they could miss filing deadlines imposed by the boards in oral rulings and the period for seeking reconsideration of a board's ruling could expire before they learned of the ruling.

After evaluating these comments, the Commission has adopted a rule which amends 10 CFR 2.730(e) to permit the boards to make oral rulings on written motions, but will require the board to ensure that the parties are promptly notified of the ruling. This will permit oral rulings where this could expedite the proceedings, or is otherwise appropriate, without prejudicing any party. Several mechanisms are available to notify absent parties of the ruling. The Board may notify the party by phone; it may direct one of the parties present to contact the absent party; or it may serve the transcript pages containing the order on all parties. The Commission encourages the boards at a minimum to serve the transcript pages. When the boards rule orally they are also directed to take special care to fully set forth the reasoning behind the decision.

3. Prohibit Motions to Reconsider Prehearing Orders

Under 10 CFR 2.751(d) and 2.752(c) parties other than the NRC staff may file, within five days after service of a board prehearing order, an objection to the order. Such an objection constitutes, in effect, a motion requesting the board to reconsider

its ruling. The NRC staff has ten days after service of the order to request reconsideration. The Commission sought comment on a proposed rule which would preclude parties from filing requests for reconsideration of prehearing orders.

Virtually all commenters opposed the proposed rule change arguing that mistakes which could significantly affect the proceeding might be prevented if motions for reconsideration are permitted. Moreover many commenters argued that the proposed rule would not result in significant time savings because such motions which are without merit can be promptly answered and denied, and the proceeding may continue while the motions for reconsideration are pending. It was further argued that it is unclear how the proposed change would save time, particularly in comparison with the time which would be required should the licensing board be reversed for an error which a party wished to but could not bring to the board's attention.

The Commission agrees with the commenters and therefore has not adopted the proposed rule. However, the Commission has adopted other changes to its regulations pertaining to objections to or motions for reconsideration of prehearing orders. The Commission has observed that objections or motions for reconsideration are not frequently granted. The Commission therefore is amending its regulations to take away the right of a party to file an answer to an objection or motion for reconsideration. Responses will only be permitted, if the licensing board so directs. This means that

motions which on their face have little merit will be summarily dismissed by the board. Parties will be asked to respond only to those motions that a board believes may have some merit.

In addition, although the Commission's present rules do not so dictate, it is possible under the present practice for an objection or motion for reconsideration to have the effect of staying the effectiveness of the board's order until the board rules on the matter. The Commission has adopted an amendment to its regulations which provides that filing of an objection to or a motion for reconsideration does not stay the effectiveness of the prehearing order, unless the board for good cause shown determines that the decision should be stayed pending board action. Thus parties are to proceed with prehearing matters on admitted contentions, even though objections to or motions for reconsideration of the ruling admitting the contentions are pending before the board. This approach would be consistent with existing regulations pertaining to petitions for reconsideration of final board decisions, 10 CFR 2.771(c).

4. Permit Licensing Board Chairman to Rule on Prehearing Matters Without Consulting Other Board Members

Under 10 CFR 2.721(d) and 2.718, when a licensing board is not in session, the chairman of the board (who is always qualified in the conduct of administrative proceedings) is vested with the power to rule on procedural requests. This includes ruling on intervention petitions, contentions, motions for summary disposition

requests to compel a party to respond to interrogatories, and requests for extension of time. However, in practice the board chairman does not rule alone on petitions for leave to intervene, contentions, or motions for summary disposition because the technical expertise of the administrative judges serving on the board who have scientific backgrounds is frequently essential in ruling on such motions. The Commission sought comment on a proposed rule which would permit the licensing board chairman to act alone on all prehearing matters. It would be within the discretion of the chairman to consult with the other administrative judges before taking action.

Few commenters supported this proposal. The commenters argued that it would be a serious error to allow the chairman to act alone in issuing substantive orders on prehearing matters, such as ruling on contentions and motions for summary disposition. On this point the commenters emphasized that prehearing orders set the framework for the hearing and therefore the technical administrative judges should contribute to the decision. Others commented that centralized decisionmaking may be appropriate in times of crisis, but is not necessary in licensing proceedings. Others argued that the proposal was inconsistent with Congress' intent in establishing three member panels to preside over NRC hearings.

Based upon the review of these comments, the Commission has decided not to amend 10 CFR 2.721 as proposed. The Commission believes that the present practice whereby all three board members participate in acting upon substantive prehearing orders should continue.

5. Eliminate the Right of the Applicant to File a Reply to Other Parties' Proposed Findings of Fact and Conclusions of Law

Under 10 CFR 2.754(c) unless otherwise directed by the board, the applicant must file its proposed findings of fact and conclusions of law within 20 days after the record is closed. The filings from the other parties, except for the NRC staff are due 30 days after the close of the record. Staff's filing must be filed by day forty. The applicant must file its reply to the other parties' submissions within ten days after service of the other parties' filings. The Commission sought comment on a proposed rule which would eliminate the right of the applicant to file a reply submittal.

A few commenters supported the proposed rule change arguing that the applicant should be given only one opportunity to set forth its views and that the licensing board is capable of making its findings without having a reply finding from the applicant. However, most commenters opposed the rule change. Because the applicant has the burden of proof in NRC initial licensing proceedings, many argued that fairness dictates that it should have the last word. It was also argued that the applicant's reply filing served a useful function because it focused on the disputes between the parties and permitted prompt resolution of issues by the board. Finally, many commenters noted that if the applicant wished to expedite the proceeding, it could waive the opportunity to file a reply pleading.

After reviewing these comments, the Commission has decided not to eliminate the right of the applicant to file a reply pleading. However, it has adopted amendments to 10 CFR 2.754 which alter the time limits for filing proposed findings of fact. Experience indicates that because of the complexity of NRC proceedings the applicant frequently is unable to file its proposed findings within the prescribed 20-day period and the Board must establish another filing schedule. The Commission therefore is modifying the schedule to make it more realistic. Under the new regulations the applicant's submission will be due thirty days after the record closes, the filing of other parties (except for the NRC staff) will be due 40 days after the record closes. The staff's pleading will be due 50 days after the record closes. The applicant's response will be due 5 days after the staff files its proposed findings, five days earlier than the ten days allowed under prior regulations. The Commission contemplates that staff would hand-deliver or air express its filing to the applicant to provide applicant a reasonable time to respond. Although boards are authorized to deviate from this suggested schedule, it is expected that absent unusual circumstances the board will not authorize use of a more extended filing schedule. In cases with few parties, and few contentions, the boards should not hesitate to order use of a more compressed filing schedule.

6. Eliminate Requirement That Motions for Summary Disposition be Submitted no Later Than 45 Days Before the Commencement of the Hearing

Under 10 CFR 2.749(a) parties to proceedings must file any motions requesting summary disposition at least 45 days prior to the start of the hearing. The Commission sought comment on a proposed rule which would permit motions for summary disposition to be filed at any time. However, the board would be authorized to set appropriate time limits for the filing of such motions which would be tailored to fit the circumstances.

Although a few commenters favored the proposed change because it would provide greater flexibility in the use of these motions, most commenters opposed the proposed change. The major arguments advanced against the proposal are that if there is no genuine factual dispute which exists on a particular issue, a competent attorney should recognize that well before the hearing, and that late filed motions actually disrupt and delay the hearing. Commenters frequently noted that most motions for summary disposition are filed against intervenors, who generally have limited resources. Because responding to summary disposition motions requires a substantial effort, if motions are filed just before the hearing or during the hearing itself, intervenors will be required to divert resources from ongoing efforts to prepare testimony or to prepare for cross-examination. Late filed motions similarly distract the other parties to the proceeding as well as

the board which must rule on the motion. Several commenters suggested that if the boards are given the discretion to permit motions for summary disposition to be filed less than 45 days prior to the commencement of the hearing, they should be directed to reject summarily motions which would unduly divert parties' resources away from the hearing.

After evaluating these comments, the Commission has adopted a rule which provides that motions for summary disposition may be filed at any time, but that the boards are to reject motions filed right before the hearing or during the hearing itself where response to such motions would require the other parties or the board to divert substantial resources from the hearing. Boards are directed in each case at an early date to set forth an appropriate schedule for filing motions for summary disposition. This approach should provide the board maximum flexibility in setting a schedule for the filing of such motions, but will discourage filing of motions right before the hearing or during the hearing itself.

The Commission has also adopted one other minor amendment to the regulations. In 1980 the Commission adopted an amendment to 10 CFR 2.749a which provides that a party may file an answer in support of a motion for summary disposition, as well as in opposition to such a motion. The Commission also revised the regulations to permit the party opposing the motion for summary disposition to file a supplemental response which addresses any new

matters raised in answers supporting the motion. The Commission directed its boards to establish expeditious time limits on a case-by-case basis for the filing of any response to supporting statements consistent with the requirements of fairness.

The Commission has amended the regulations to provide for a ten-day response period rather than having the boards establish the time for response on a case-by-case basis. Establishing time limits for response on a case-by-case basis is not a profitable use of the board's time. Unlike the other amendments addressed in this Notice, the Commission did not seek public comment on this minor change. The Commission has determined that public comment is not required because the amendment is procedural in nature.

Because the amendments are related only to matters of procedure, the Commission is making the amendments effective upon publication in the Federal Register. Accordingly, pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10, Chapter 1, Code of Federal Regulations, Part 2, are published as a document subject to codification to be effective upon publication in the Federal Register:

Part 2 -- RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. In § 2.730, paragraph (e) is revised to read:

§ 2.730 Motions

* * * *

(e) The Board may dispose of written motions either by written order or by ruling orally during the course of a prehearing conference or hearing. The Board should ensure that parties not present for the oral ruling are notified promptly of the order.

* * * *

2. In § 2.749, paragraph (a) is revised to read as follows:

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

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

motion. No further supporting statements or responses thereto shall be entertained. The board may dismiss summarily motions filed shortly before the hearing commences or during the hearing if the other parties or the board would be required to divert substantial resources from the hearing in order to respond adequately to the motion.

3. In § 2.751a, paragraph (d) is revised to read as follows:

(d) The presiding officer shall enter an order which recites the action taken at the conference, the schedule for further actions in the proceeding, any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties in the proceeding, and provides for the submission of status reports on discovery. The order shall be served upon all parties to the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order, except that the staff may file objections to such order within ten (10) days after service. Parties may not file replies to the objections unless the Board so directs. The board may revise the order in consideration of the objections presented and, as permitted by § 2.718(i), may certify for determination to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

4. In § 2.752, paragraph (c) is revised to read as follows:

(c) The presiding officer shall enter an order which recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and which limits the issues or defines the matters in controversy to be determined in the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order, except that the regulatory staff may file objections to such order within ten

(10) days after service. Parties may not file replies to the objections unless the board so directs. The board may revise the order in the light of the objections presented and, as permitted by § 2.718(i) may certify for determination to the Commission or the appeal board, as appropriate, such matters raised in the objections as it deems appropriate. The order shall control the subsequent course of the proceeding unless modified for good cause.

5. In § 2.754, paragraph (a) is revised to read as follows:

§ 2.754 Proposed findings and conclusions.

(a) Any party to a proceeding may, or if directed by the presiding officer shall, file proposed findings of fact and conclusions of law, briefs and a proposed form or order of decision within the time provided by the following subparagraphs, except as otherwise ordered by the presiding officer:

(1) The party who has the burden of proof shall, within thirty (30) days after the record is closed, file proposed findings of fact and conclusions of law and briefs, and a proposed form of order or decision.

(2) Other parties may file proposed findings, conclusions of law and briefs within forty (40) days after the record is closed. However, the staff may file such proposed findings, conclusions of law and briefs within fifty (50) days after the record is closed.

(3) A party who has the burden of proof may reply within five (5) days after filing of proposed findings and conclusions of law and briefs by other parties.

* * * *

(Sec. 161p., Pub. L. No. 83-703, 68 Stat. 948 (42 U.S.C. 2201); Sec. 201, as amended, Pub. L. No. 93-438, 88 Stat. 1243 (42 U.S.C. 5841).)

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.

this ____ day of _____, 1981.