UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Helen F. Hoyt, Chairperson
Emmeth A Luebke
Jerry Harbour

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY	)	(ASLBP No. 82-471-02-OL)
OF NEW HAMPSHIRE, et al.	)	
	)	
(Seabrook Station, Units 1 and 2)	)	September 12, 1983

ORDER
(Granting an Extension of Time
and Amending the Service List)

On September 9, 1983, this Board was contacted by Charles Cross, Esquire, a newly-appointed representative of the Town of Hampton, N.H. He requested a ten-day extension of time to file contentions on the local radiological emergency response plans. In order to encourage the obtainment of legal representation by interested municipalities, the Board granted the request. The Town of Hampton has until September 19, 1983 to file its contentions. The Board hereby reaffirms that decision. A copy of the Commission's Rules of Practice is attached for the convenience of Hampton's new representative.

The Board also directs the parties to amend their service lists by deleting:

John B. Tanzer
Town of Hampton
5 Morningside Drive
Hampton, NH 03842

and adding:

Charles Cross, Esq.
Shaines, Madrigan, & McEachern
25 Maplewood Ave.
P.O. Box 366
Portsmouth, NH 03801

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Helen F. Hoyt, Chairperson
ADMINISTRATIVE JUDGE

September 12, 1983
Bethesda, Maryland

PART 2 RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS*

Sec.

2.1 Scope.
2.2 Subparts.
2.3 Resolution of conflict.
2.4 Definitions.

Subpart A—Procedure for Issuance, Amendment, Transfer, or Renewal of a License

2.100 Scope of subpart.
2.101 Filing of application.
2.102 Administrative review of application.
2.103 Action on applications for byproduct, source, special nuclear material, and operator licenses.

HEARING ON APPLICATION—HOW INITIATED

2.104 Notice of hearing.
2.105 Notice of proposed action.
2.106 Notice of issuance.
2.107 Withdrawal of application.
2.108 Denial of application for failure to supply information.
2.109 Effect of timely renewal application.
2.110 Filing and administrative action on submittals for design review or early review of site suitability issues.
2.111 Prohibition of sex discrimination.

Subpart B—Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License, or for Imposing Civil Penalties

2.200 Scope of subpart.
2.201 Notice of violation.
2.202 Order to show cause.
2.203 Settlement and compromise.
2.204 Order for modification of license.
2.205 Civil penalties.
2.206 Requests for action under this subpart.

Subpart C—[Reserved]

Subpart D—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Construct or Operate Nuclear Power Plants of Duplicate Design at Multiple Sites

2.400 Scope of subpart.
2.401 Notice of hearing on applications pursuant to Appendix N of Part 50 for construction permits.
2.402 Separate hearings on separate issues; consolidation of proceedings.
2.403 Notice of proposed action on applications for operating licenses pursuant to Appendix N of Part 50.
2.404 Hearings on applications for operating licenses pursuant to Appendix N of Part 50.
2.405 Initial decisions in consolidated hearings.
2.406 Finality of decisions on separate issues.
2.407 Applicability of other sections.

Subpart E—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Manufacture Nuclear Power Reactors To Be Operated at Sites Not Identified in the License Application and Related Licensing Proceedings

2.500 Scope of subpart.
2.501 Notice of hearing on application pursuant to Appendix M of Part 50 for a license to manufacture nuclear power reactors.
2.502 Notice of hearing on application for a permit to construct a nuclear power reactor manufactured pursuant to a Commission license issued pursuant to Appendix M of Part 50 of this chapter at the site at which the reactor is to be operated.
2.503 Finality of decision on separate issues.
2.504 Applicability of other sections.

Subpart F—Additional Procedures Applicable to Early Partial Decisions on Site Suitability Issues in Connection With an Application for a Permit To Construct Certain Utilization Facilities

2.600 Scope of subpart.
2.601 Applicability of other sections.
2.602 Filing fees.
2.603 Acceptance and docketing of application for early review of site suitability issues.
2.604 Notice of hearing on application for early review of site suitability issues.
2.605 Additional considerations.
2.606 Partial decisions on site suitability issues.

Subpart G—Rules of General Applicability

2.700 Scope of subpart.
2.700a Exceptions.
2.701 Filing of documents.
2.702 Docket.
2.703 Notice of hearing.
2.704 Designation of presiding officer, disqualification, unavailability.
2.705 Answer.
2.706 Reply.
2.707 Default.
2.708 Formal requirements for documents.
2.709 Acceptance for filing.
2.710 Computation of time.
2.711 Extension and reduction of time limits.
2.712 Service of papers, methods, proof.
2.713 Appearance and practice before the Commission in adjudicatory proceedings.
2.714 Intervention.
2.714a Appeals from certain rulings on petitions for leave to intervene and/or requests for hearing.
2.715 Participation by a person not a party.
2.715a Consolidation of parties in construction permit or operating license proceedings.
2.716 Consolidation of proceedings.
2.717 Commencement and termination of jurisdiction of presiding officer.
2.718 Power of presiding officer.
2.719 Separation of functions.
2.720 Subpoenas.
2.721 Atomic safety and licensing boards.
2.722 Special assistants to the presiding officer.

MOTIONS

2.730 Motions.
2.731 Order of procedure.
2.732 Burden of proof.
2.733 Examination by experts.

DEPOSITIONS AND WRITTEN INTERROGATORIES; DISCOVERY; ADMISSION; EVIDENCE

2.740 General provisions governing discovery.
2.740a Depositions upon oral examination and upon written interrogatories.
2.740b Interrogatories to parties.
2.741 Production of documents and things and entry upon land for inspection and other purposes.
2.742 Admissions.
2.743 Evidence.
2.744 Production of NRC records and documents.

SUMMARY DISPOSITION ON PLEADINGS

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

HEARINGS

2.750 Official reporter; transcript.
2.751 Hearings to be public.
2.751a Special prehearing conference in construction permit and operating license proceedings.
2.752 Prehearing conference.
2.753 Stipulations.
2.754 Proposed findings and conclusions.
2.755 Oral argument before presiding officer.
2.756 Informal procedures.
2.757 Authority of presiding officer to regulate procedure in a hearing.
2.758 Consideration of Commission rules and regulations in adjudicatory proceedings.
2.759 Settlement in initial licensing proceedings.

INITIAL DECISION AND COMMISSION REVIEW

2.760 Initial decision and its effect.
2.760a Initial decision in contested proceedings on applications for facility operating licenses.
2.761 Expedited decisional procedure.
2.761a Separate hearings and decisions.
2.762 Appeals to the Commission from initial decisions.
2.763 Oral argument.
2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.
2.765 Immediate effectiveness of initial decision directing issuance or amendment of licenses under Part 61 of this chapter.

*Amended 43 FR 6915

FINAL DECISION

2.770 Final decision.
2.771 Petition for reconsideration.
2.772 Authority of the Secretary to rule on procedural matters.

EX PARTE COMMUNICATIONS

2.780 Ex parte communications.

ATOMIC SAFETY AND LICENSING APPEAL BOARD

2.785 Functions of Atomic Safety and Licensing Appeal Board.
2.786 Review of decisions and actions of an Atomic Safety and Licensing Appeal Board.
2.787 Composition of Atomic Safety and Licensing Appeal Boards.
2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

AVAILABILITY OF OFFICIAL RECORDS

2.790 Public inspections, exemptions, requests for withholding.

Subpart H—Rule Making

2.800 Scope of rule making.
2.801 Initiation of rule making.
2.802 Petition for rule making.
2.803 Determination of petition.
2.804 Notice of proposed rule making.
2.805 Participation by interested persons.
2.806 Commission action.
2.807 Effective date.
2.808 Authority of the Secretary to rule on procedural matters.
2.809 Participation by the Advisory Committee on Reactor Safeguards

Subpart I—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

2.900 Purpose.
2.901 Scope.
2.902 Definitions.
2.903 Protection of restricted data and national security information.
2.904 Classification assistance.
2.905 Access to restricted data and national security information for parties; security clearances.
2.906 Obligation of parties to avoid introduction of restricted data or national security information.
2.907 Notice of intent to introduce restricted data or national security information.
2.908 Contents of notice of intent to introduce restricted data or other national security information.
2.909 Rearrangement or suspension of proceedings.
2.910 Unclassified statements required.
2.911 Admissibility of restricted data or other national security information.
2.912 Weight to be attached to classified evidence.
2.913 Review of Restricted Data or other National Security Information received in evidence.

APPENDIX A—Statement of general policy and procedure: Conduct of proceedings for the issuance of construction permits and operating licenses for production and utilization facilities for which a hearing is required under section 189a of the Atomic Energy Act of 1954, as amended

APPENDIX B—[RESERVED]

APPENDIX C—GENERAL POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

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

(Sec. 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Sections 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. 91-560, 84 Stat. 1473 (42 U.S.C. 2135).

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in Part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for (a) granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license; (b) imposing civil penalties under section 234 of the Act; and (c) public rulemaking. [43 FR 6915]

§ 2.2 Subparts.

Each subpart other than Subpart G sets forth special rules applicable to the type of proceeding described in the first section of that subpart. Subpart G sets forth general rules applicable to all types of proceedings except rule making, and should be read in conjunction with the subpart governing a particular proceeding. Subpart I sets forth special procedures to be followed in proceedings in order to safeguard and prevent disclosure of Restricted Data. [27 FR 377]

§ 2.3 Resolution of conflict.

In any conflict between a general rule in Subpart G of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs. [28 FR 10151]

§ 2.4 Definitions.

As used in this part,

(a) "ACRS" means the Advisory Committee on Reactor Safeguards established by the Act.

(b) "Act" means the Atomic Energy Act of 1954, as amended (68 Stat. 919).

(c) "Adjudication" means the process for the formulation of an order for the final disposition of the whole or any part of any proceeding subject to this part, other than rule making. [27 FR 377]

(d) "Department" means the Department of Energy established by the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565 42 U.S.C. 7101 *et seq.*) to the extent that the Department, or its duly authorized representatives, exercises functions formerly vested in the U.S. Atomic Energy Commission, its Chairman, members, officers and components and transferred to the U.S. Energy Research and Development Administration and to the Administrator thereof pursuant to sections 104 (b), (c) and (d) of the Energy Reorganization Act of 1974 (Pub. L. 93-438, 88 Stat. 1233 at 1237, 42 U.S.C. 5814) and retransferred to the Secretary of Energy pursuant to section 301(a) of the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565 at 577-578, 42 U.S.C. 7151). [45 FR 14199]

(e) "Commission" means the Commission of five members or a quorum thereof sitting as a body, as provided by section 201 of the Energy Reorganization Act of 1974 (88 Stat. 1242), or any officer to whom has been delegated authority pursuant to section 161r of the Act. [27 FR 377]

(f) [Reserved] [40 FR 8774]

(g) "Facility" means a production facility or a utilization facility as defined in § 50.2 of this chapter. [28 FR 10151]

(h) "Administrative Law Judge" means an individual appointed pursuant to section 11 of the Administrative Procedure Act to conduct proceedings subject to this part. [38 FR 2330]

(i) "License" means a license or construction permit issued by the Commission. 40 FR 8774

(j) "Licensee" means a person who is authorized to conduct activities under a license or construction permit issued by the Commission.

(k) "Public Document Room" means the place at 1717 H Street NW., Washington, D.C., at which public records of the Commission will ordinarily be made available for inspection. 28 FR 10151

(l) [Reserved] 40 FR 8774

(m) "Secretary" means the Secretary to the Commission. 29 FR 12189

(n) "Contested proceeding" means (1) a proceeding in which there is a controversy between the staff of the Commission and the applicant for a license concerning the issuance of the license or any of the terms or conditions thereof or (2) a proceeding in which a petition for leave to intervene in opposition to an application for a license has been granted or is pending before the Commission. 31 FR 12774

(o) "Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the Department, except that the Department shall be considered a person with respect to those facilities of the Department specified in section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244),* any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing. 45 FR 14199

(p) "NRC personnel" means (1) NRC employees; (2) for the purpose of §§ 2.720 and 2.740 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and (3) members of advisory boards, committees, and panels of the NRC; members of boards designated by the Commission to preside at adjudicatory proceedings and officers or employees of Government agencies, including military personnel, assigned to duty at the NRC. 38 FR 1500

(q) "NRC records and documents" means any book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities. "NRC records and documents" do not include objects or articles such as structures, furniture, tangible exhibits or models, or vehicles and equipment. 35 FR 19500

(r) Except as redefined in this section, words and phrases which are defined in the Act and in this chapter have the same meaning when used in this part. 40 FR 8774

(s) "Electric utility" means any entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and state and federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility." 47 FR 13750

*The Department facilities specified in section 202 are:

(1) Demonstration Liquid Metal Fast Breeder reactors when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.

(2) Other demonstration nuclear reactors, except those in existence on January 19, 1975, when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.

(3) Facilities used primarily for the receipt and storage of high-level radioactive wastes resulting from licensed activities.

(4) Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration, which are not used for, or are part of, research and development activities.

Subpart A—Procedure for Issuance, Amendment, Transfer, or Renewal of a License

27 FR 377

§ 2.100 Scope of subpart.

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

§ 2.101 Filing of application.

41 FR 15832

(a)(1) An application for a license or an amendment to a license shall be filed with the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as prescribed by the applicable provisions of this chapter. A prospective applicant may confer informally with the staff prior to the filing of an application.

47 FR 57446

(2) Each application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee will be assigned a docket number. However, to allow a determination as to whether an application for a construction permit or operating license for a production or utilization facility is complete and acceptable for docketing, it will be initially treated as a tendered application after it is received and a copy of the tendered application will be available for public inspection in the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. Generally, that determination will be made within a period of thirty (30) days. However, in selected construction permit applications, the Commission may decide to determine acceptability on the basis of the technical adequacy of the application as well as its completeness. In such cases, the Commission, pursuant to § 2.104(a), will direct that the notice of hearing be issued as soon as practicable after the application has been tendered, and the determination of acceptability will generally be made within a period of sixty (60) days. For docketing and other requirements for applications pursuant to Part 61 of this chapter, see paragraph (g) of this section.

42 FR 22882

(3) If the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, determines that a tendered application for a construction permit or operating license for a production or utilization facility, and/or any environmental report required pursuant to Part 51 of this chapter, or part thereof as provided in paragraphs (a)(5) or (a-1) of this section, are complete and acceptable for docketing, a docket

number will be assigned to the application or part thereof, and the applicant will be notified of the determination. With respect to the tendered application and/or environmental report or part thereof that is acceptable for docketing, the applicant will be requested to:

(i) Submit to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, such additional copies as the regulations in Parts 50 and 51 require;

(ii) Serve a copy on the chief executive of the municipality in which the facility is to be located or, if the facility is not to be located within a municipality, on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application, a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, and telephone number of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph (a)(3)(ii) the applicant should not make public distribution of those parts of the application subject to § 2.790(d). The applicant shall submit to the Director of Nuclear Reactor Regulation an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served; and

(iii) Make direct distribution of additional copies to Federal, State, and local officials in accordance with the requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Such written instructions will be furnished as soon as practicable after all or any part of the application, or environmental report, is tendered. The copies submitted to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and distributed by the applicant shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to applications, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(4) The tendered application for a construction permit or operating license for a production or utilization facility will be formally docketed upon receipt by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, of the required additional copies. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addressees. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Within ten (10) days after docketing the applicant shall submit to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, an affidavit that distribution of the additional copies to Federal, State, and local officials has been completed in accordance with requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate. Amendments to the application and environmental report shall be filed and distributed and an affidavit shall be furnished to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, in the same manner as for the initial application and environmental report. If it is determined that all or any part of the tendered application and/or environmental report is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination, and the respects in which the document is deficient.

(5) An applicant for a construction permit for a production or utilization facility which is subject to § 51.5(a) of this chapter, and is of the type specified in §§ 50.21(b)(2) or (3) or 50.22 of this chapter or is a testing facility may submit the information required of applicants by Part 50 of this chapter in three parts. One part shall be accompanied by the information required by § 50.30(f) of this chapter, another part shall include any informati... by §§ 50.34(a) and, if ... § 50.34a of this chapter and part shall include any informat... quired by § 50.33a. One part may cede or follow other parts by no lon... than six (6) months except that th... part including information required by § 50.33a shall be submitted in accordance with time periods specified in § 50.33a. If an applicant for a construction permit for a nuclear power reactor is exempted pursuant to § 50.33a of this chapter from filing the information described by § 50.33a of this chapter, such applicant shall file with the first part of its application an affidavit setting forth facts as to the electrical generating capacity of its system. If it is determined that any one of the parts as described above is incomplete and not acceptable for processing, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will inform the applicant of this determination and the respects in which the document is deficient. Such a determination of completeness will generally be made within a period of thirty (30) days. Except for the part including information required by § 50.33a, whichever part is filed first shall also include the fee required by § 50.30(e) and 170.21 of this chapter and the information required by §§ 50.33, 50.34(a)(1), and 50.37 of this chapter. The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will accept for docketing an application for a construction permit for a production or utilization facility which is subject to § 51.5(a) of this chapter, and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility where one part of the application as described above is complete and conforms to the requirements of Part 50 of this chapter. Additional parts will be docketed upon a determination by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, that they are complete.

(a-1) *Early consideration of site suitability issues.* An applicant for a construction permit for a utilization facility which is subject to § 51.5(a) of this chapter and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility, may request that the Commission conduct an early review and hearing and render an early partial decision in accordance with Subpart F on issues of site suitability within the purview of the applicable provisions of Parts 50, 51 and 100 of this chapter. In such cases, the applicant for the construction permit may submit the information required

of applicants by the provisions of this chapter in three or (in the case of nuclear power reactors) four parts:

(1) Part one shall include or be accompanied by any information required by §§ 50.34(a)(1) and 50.30(f) of this chapter which relates to the issue(s) of site suitability for which an early review, hearing and partial decision are sought, except that information with respect to operation of the facility at the projected initial power level need not be supplied, and shall include the information required by §§ 50.33(a) through (e) and 50.37 of this chapter. The information submitted shall also include: (i) Proposed findings on the issues of site suitability on which the applicant has requested review and a statement of the bases or the reasons for those findings, (ii) a range of postulated facility design and operation parameters that is sufficient to enable the Commission to perform the requested review of site suitability issues under the applicable provisions of Parts 50, 51 and 100, and (iii) information concerning the applicant's site selection process and long-range plans for ultimate development of the site required by § 2.603(b)(1).

(2) Part two shall include or be accompanied by the remaining information required by §§ 50.30(f), 50.33 and 50.34(a)(1) of this chapter.

(3) Part three shall include the remaining information required by §§ 50.34(a) and (in the case of a nuclear power reactor) 50.34a of this chapter.

(4) The information required for part two or part three shall be submitted during the period the partial decision on part one is effective. Submittal of the information required for part three may precede by no more than six months or follow by no more than six months the submittal of the information required for part two.

(5) Part four,[1] which is only required when the application is for a construction permit for a nuclear power reactor, shall include any information required by § 50.33a of this chapter and shall be filed in accordance with the time periods specified in § 50.33a.

42 FR 22882

(b) After the application has been docketed each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee except applicants under Part 61 of this chapter, who must comply with paragraph (g) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the following information: Docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, and telephone number of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph (b) the applicant should not make public distribution of those parts of the application subject to § 2.790(d). The applicant shall submit to the Director of Nuclear Material Safety and Safeguards an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

47 FR 57446

(c) The notice published in the **Federal Register** announcing docketing of the antitrust information portion of an application for a facility construction permit under section 103 of the Act, except for those applications described in § 2.101(e) and § 2.102(d)(2), shall state that:

47 FR 9983

(1) The portion of the application filed contains the information requested by the Attorney General for the purpose of an antitrust review of the application as set forth in Appendix L to Part 50 of this chapter;

(2) Upon receipt and acceptance for docketing of the remaining portions of the application dealing with radiological health and safety and environmental matters, notice of receipt will be published in the FEDERAL REGISTER including an appropriate notice of hearing; and

41 FR 15832

(3) Any person who wishes to have his views on the antitrust matters of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within sixty (60) days after publication of the notice announcing receipt and docketing of the antitrust information to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Antitrust and Economic Analysis Branch.

47 FR 9983

(d) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will give notice of the docketing of the public health and safety, common defense and security, and environmental parts of an application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except that for applications pursuant to Part 61 of this chapter paragraph (g) of this section applies, to the Governor or other appropriate official of the State in which the facility is to be located or the activity is to be conducted and will cause to be published in the **Federal Register** a notice of docketing of the application which states the purpose of the application and specifies the location at which the proposed activity would be conducted.

47 FR 57446

(e)(1) Upon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility operating license under section 103 of the Act, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall publish in the **Federal Register** and in appropriate trade journals a "Notice of Receipt of Operating License Antitrust Information." The notice shall invite persons to submit, within thirty (30) days after publication of the notice, comments or information concerning the antitrust aspects of the application to assist the Director in determining, pursuant to section 105c of the Act, whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review in connection with the construction permit. The notice shall also state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within thirty (30) days after publication of the notice to: U.S. Nuclear

[1] For a construction permit application in four parts, part four shall be filed second in time since it must precede both parts two and three by a period of from 9 months to 3 years.

Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Antitrust and Economic Analysis Branch.

(2) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, after reviewing any comments or information received in response to the published notice and any comments or information regarding the applicant received from the Attorney General, concludes that there have been no significant changes since the completion of the previous antitrust review in connection with the construction permit, a finding of no significant changes shall be published in the Federal Register, together with a notice stating that any request for reevaluation of such finding should be submitted within thirty (30) days of publication of the notice. If no requests for reevaluation are received within that time, the finding shall become the NRC's final determination. Requests for a reevaluation of the no significant changes determination may be accepted after the date when the Director's finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

(3) If, as a result of a reevaluation of the finding described in paragraph (e)(2) of this section, it is determined that there have been no significant changes, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall deny the request and shall publish a notice of finding of no significant changes in the Federal Register. The notice and finding become the final NRC decision thirty (30) days after being made and only in the event that the Commission has not exercised sua sponte review.

(4) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, concludes that significant changes have occurred since the completion of the antitrust review in connection with the construction permit, then the provisions of § 2.102(d) apply.

47 FR 9983

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental report required in connection therewith pursuant to Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application or environmental report is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

(3) If the Director of Nuclear Material Safety and Safeguards determines that the tendered document is complete and acceptable for docketing, a docket number will be assigned and the applicant will be notified of the determination. If it is determined that all or any part of the tendered document is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination and the respects in which the document is deficient.

46 FR 13971

(4) The Director may determine the environmental report to be not complete and therefore not acceptable for processing if it fails to include the required site characterization data, including the results of appropriate in situ testing at depth for each site characterized, with respect to the number of sites and media specified in § 51.40 of this chapter. If such a determination is made, the Director shall request the DOE to submit, within a specified time, such characterization data as the Director determines to be necessary. If the DOE fails to provide the requested data within the time specified, the application shall be subject to denial under § 2.108.

(5) With respect to any tendered document that is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies as the regulations in Parts 60 and 51 require, (ii) serve a copy on the chief executive of the municipality in which the geologic repository operations area is to be located or, if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(6) The tendered document will be formally docketed upon receipt by the Director of Nuclear Material Safety and Safeguards of the required additional copies. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Material Safety and Safeguards. Within ten (10) days after docketing, the applicant shall submit to the Director of Nuclear Material Safety and Safeguards a written statement that distribution of the additional copies to Federal, State, Indian Tribe, and local officials has been completed in accordance with requirements of this chapter and written instructions furnished to the applicant by the Director of Nuclear Material Safety and Safeguards. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addressees.

46 FR 13971

(7) Amendments to the application and environmental report shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental report.

(8) The Director of Nuclear Material Safety and Safeguards will cause to be published in the Federal Register a notice of docketing which identifies the State and location at which the proposed geologic repository operations area would be located and will give notice of docketing to the governor of that State. The notice of docketing will state that the Commission finds that a hearing is required in the public interest, prior to issuance of a construction authorization, and will recite the matters specified in § 2.104(a) of this part.

(g) Each application for a license to receive radioactive waste from other persons for disposal under Part 61 of this chapter and the accompanying environmental report shall be processed in accordance with the provisions of this paragraph.

(1) To allow a determination as to whether the application or environmental report is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room 1717 H Street NW., Washington, D.C. One original and two copies shall be filed to enable this determination to be made.

(i) Upon receipt of a tendered application, the Commission will publish in the **Federal Register** notice of the filed application and will notify the governors, legislatures and other appropriate State, county, and municipal officials and tribal governing bodies of the States and areas containing or potentially affected by the activities at the proposed site and the alternative sites. The Commission will inform these officials that the Commission staff will be available for consultation pursuant to § 61.71 of this chapter. The **Federal Register** notice will note the opportunity for interested persons to submit views and comments on the tendered application for consideration by the Commission and applicant. The Commission will also notify the U.S. Bureau of Indian Affairs when tribal governing bodies are notified.

(ii) The Commission will also post a public notice in a newspaper or newspapers of general circulation in the affected States and areas summarizing information contained in the applicant's tendered application and noting the opportunity to submit views and comments.

(iii) When the Director of Nuclear Material Safety and Safeguards determines that the tendered document is complete and acceptable for docketing, a docket number will be assigned and the applicant will be notified of the determination. If it is determined that all or any part of the tendered document is incomplete and therefore not acceptable for processing, the applicant will be informed of this determination and the aspects in which the document is deficient.

(2) With respect to any tendered document that is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies as the regulations in Parts 61 and 51 of this chapter require, (ii) serve a copy of the chief executive of the municipality in which the waste is to be disposed of or, if the waste is not be be disposed of within a municipality, serve a copy on the chief executive of the county in which the waste is to be disposed of, (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards, and (iv) serve a notice of availability of the application and environmental report on the chief executives or governing bodies of the municipalities or counties which have been identified in the application and environmental report as the location of all or part of the alternative sites if copies are not distributed under paragraph (g)(2)(iii) of this section to the executives or bodies. All distributed copies shall be completely assembled documents identified by docket number. Subsequently distributed amendments, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages. In complying with the requirements of paragraph (g) of this section the applicant shall not make public distribution of those parts of the application subject to § 2.790(d).

(3) The tendered document will be formally docketed upon receipt by the Director of Nuclear Material Safety and Safeguards of the required additional copies. Distribution of the additional copies shall be deemed to be complete as of the time the copies are deposited in the mail or with a carrier prepaid for delivery to the designated addressees. The date of docketing shall be the date when the required copies are received by the Director of Nuclear Material Safety and Safeguards. Within ten (10) days after docketing, the applicant shall submit to the Director of Nuclear Material Safety and Safeguards a written statement that distribution of the additional copies to Federal, State, Indian Tribe, and local officials has been completed in accordance with requirements of this section and written instructions furnished to the applicant by the Director of Nuclear Material Safety and Safeguards.

(4) Amendments to the application and environmental report shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental report.

(5) The Director of Nuclear Material Safety and Safeguards will cause to be published in the **Federal Register** a notice of docketing which identifies the State and location of the proposed waste disposal facility and will give notice of docketing to the governor of that State and other officials listed in paragraph (g)(3) of this section and, in a reasonable period thereafter, publish in the **Federal Register** a notice pursuant to § 2.105 offering opportunity to request a hearing to the applicant and other affected persons.

47 FR 57446

47 FR 57446

47 FR 57446

§ 2.102 Administrative review of application.

(a) During review of an application by the staff, an applicant may be required to supply additional information. The staff may request any one party to the proceeding to confer with the staff informally. In the case of a docketed application for a construction permit or an operating license for a facility, the staff shall establish a schedule for its review of the application, specifying the key intermediate steps from the time of docketing until the completion of its review.

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will refer the docketed application to the ACRS as required by law and in such additional cases as he or the Commission may determine to be appropriate. The ACRS will render to the Commission one or more reports as required by law or as requested by the Commission.

(c) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will make each report of the ACRS a part of the record of the docketed application, and transmit copies to the appropriate State and local officials.

37 FR 15127

(d)(1) Except as provided in paragraph (d)(2) of this section, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will refer and transmit a copy of each docketed application for a construction permit or an operating license for a utilization or production facility under section 103 of the Act to the Attorney General as required by section 105c of the Act.

(2) The requirements of paragraph (d)(1) of this section do not apply to an application for an operating license for a production or utilization facility under section 103 of the Act for which the construction permit was also issued under section 103, unless the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, determines, after consultation with the Attorney General and in accordance with § 2.101(e), that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review of the Attorney General and the Commission under section 105c of the Act in connection with the construction permit.

47 FR 9983

(3) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause the Attorney General's advice received pursuant to paragraph (d)(1) to be published in the FEDERAL REGISTER promptly upon receipt, and will make such advice a part of the record in any proceeding on antitrust matters conducted in accordance with subsection 105c(5) and section 189a of the Act. The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will also cause to be published in the FEDERAL REGISTER a notice that the Attorney General has not rendered any such advice. Any notice published in the FEDERAL REGISTER pursuant to this subparagraph will also include a notice of hearing, if appropriate, or will state that any person whose interest may be affected by the proceeding may, pursuant to and in accordance with § 2.714, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. The notice will state that petitions for leave to intervene and requests for hearing shall be filed within 30 days after publication of the notice.

36 FR 13270

§ 2.103 Action on applications for byproduct, source, special nuclear material, and operator licenses.

(a) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, finds that an application for a byproduct, source, special nuclear material, or operator license complies with the requirements of the Act, the Energy Reorganization Act, and this chapter, he will issue a license. If the license is for a facility, or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, or if it is to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, will inform the State, tribal and local officials specified in § 2.104(e) of the issuance of the license. For notice of issuance requirements for licenses issued pursuant to Part 61 of this chapter, see § 2.106(d) of this part.

47 FR 57446

(b) If the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, finds that an application does not comply with the requirements of the Act and this chapter he may issue a notice of proposed denial or a notice of denial of the application and inform the applicant in writing of:

(1) The nature of any deficiencies or the reason for the proposed denial or the denial, and

(2) The right of the applicant to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.

28 FR 10151

HEARING ON APPLICATION—HOW INITIATED

§ 2.104 Notice of hearing.

(a) In the case of an application on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest, the Secretary will issue a notice of hearing to be published in the FEDERAL REGISTER as required by law at least fifteen (15) days, and in the case of an application concerning a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility, at least thirty (30) days, prior to the date set for hearing in the notice.[1]

37 FR 15127

In addition, in the case of an application for a construction permit for a facility of the type described in § 50.22 of this chapter, or a testing facility, the notice (other than a notice pursuant to paragraph (d) of this section) shall be issued as soon as practicable after the application has been docketed: *Provided*, That if the Commission, pursuant to § 2.101(a)(2), decides to determine the acceptability of the application on the basis of its technical adequacy as well as completeness, the notice shall be issued as soon as practicable after the application has been tendered.

44 FR 47758

[1] If the notice of hearing concerning an application for a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility does not specify the time and place of initial hearing, a subsequent notice will be published in the FEDERAL REGISTER which will provide at least thirty (30) days notice of the time and place of that hearing. After this notice is given the presiding officer may reschedule the commencement of the initial hearing for a later date or reconvene a recessed hearing without again providing thirty (30) days notice.

43 FR 30793

The notice will state:

(1) The time, place, and nature of the hearing and/or prehearing conference, if any;

(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 answers to the notice shall be filed.

(b) In the case of an application for a construction permit for a facility on which the Act requires a hearing, the notice of hearing will, except as provided in paragraph (d) of this section and unless the Commission determines otherwise, state, in implementation of paragraph (a)(3) of this section:

(1) That, if the proceeding is a contested proceeding, the presiding officer will consider the following issues:[1]

(i) Whether in accordance with the provisions of § 50.35(a) of this chapter:

(*a*) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(*b*) Such further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration will be supplied in the final safety analysis report;

(*c*) Safety features or components, if any, which require research and development, have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components; and

(*d*) On the basis of the foregoing, there is reasonable assurance that (*1*) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of the proposed facility; and (*2*) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;

(ii) Whether the applicant is technically qualified to design and construct the proposed facility;

(iii) Whether the applicant is financially qualified to design and construct the proposed facility, except that this subject shall not be an issue if the applicant is an electric utility seeking a license to construct a production or utilization facility of the type described in § 50.21(b) or § 50.22;

(iv) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;

(v) If the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance with the requirements of Part 51 of this chapter, the construction permit should be issued as proposed.

(2) That, if the proceeding is not a contested proceeding, the presiding officer will determine (i) without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on (b)(1) (i) through (iii) specified in this section and a negative finding on (b)(1)(iv) specified in this section proposed to be made and the issuance of the construction permit proposed by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety or Safeguards, as appropriate, and (ii) if the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate.

(3) That regardless of whether the proceeding is contested or uncontested, the presiding officer will, in accordance with Part 51 of this chapter,

(i) Determine whether the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act and Part 51 of this chapter have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

(c) In the case of an application for an operating license in which a hearing will be held, the notice of hearing will, except as provided in paragraph (d) of this section and unless the Commission determines otherwise, state in implementation of paragraph (a)(3) of this section, that the presiding officer will consider any matters in controversy among the parties and may, where he or she determines that a serious safety, environmental, or common defense and security matter has not been raised by the parties, consider such other matter within the purview of:

(1) Whether there is reasonable assurance that construction of the facility will be substantially completed on a timely basis, in conformity with the construction permit and the application as amended, the provisions of the Act, and the regulations in this chapter;

(2) Whether the facility will operate in conformity with the application as amended, the provisions of the Act, and the regulations in this chapter;

(3) Whether there is reasonable assurance: (i) That the activities to be authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter;

[1] Issues (i) to (iv) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (v) is the issue pursuant to the National Environmental Policy Act of 1969.

47 FR 13750

(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the regulations in this chapter, except that the issue of financial qualifications shall not be considered by the presiding officer in an operating license hearing if the applicant is an electric utility seeking a license to operate a production or utilization facility of the type described in § 50.21(b) or § 50.22;

37 FR 15127

(5) Whether the applicable provisions of Part 140 of this chapter have been satisfied;

(6) Whether issuance of the license will be inimical to the common defense and security or to the health and safety of the public; and

(7) If the application is for an operating license for a nuclear power reactor, a testing facility, or a fuel reprocessing plant, or other facility whose operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance with the requirements of Part 51 of this chapter, the operating license should be issued as proposed.[3]

46 FR 35083

(d) In an application for a construction permit or an operating license for a facility on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest to consider the antitrust aspects of the application, the notice of hearing will, unless the Commission determines otherwise, state:

(1) A time of the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with sections 105 and 189a of the Act and this part;[4]

(2) The presiding officer for the hearing who shall be either an administrative law judge or an atomic safety and licensing board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel;

(3) That the presiding officer will consider and decide whether the activities under the proposed license would create or maintain a situation inconsistent with the antitrust laws described in section 105a of the Act; and

47 FR 17797

(4) That matters of radiological health and safety and common defense and security, and matters raised under the National Environmental Policy Act of 1969, will be considered at another hearing if otherwise required or ordered to be held, for which a notice will be published pursuant to paragraphs (a) and (b) of this section, unless otherwise authorized by the Commission.

47 FR 57446

(e) The Secretary will give timely notice of the hearing to all parties and to other persons, if any, entitled by law to notice. The Secretary will transmit a notice of hearing on an application for a facility license or for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee and all applications for disposal under Part 61 of this chapter or for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter to the governor or other appropriate official of the State and to the chief executive of the municipality in which the facility is to be located or the activity is to be conducted or, if the facility is not to be located or the activity conducted within a municipality, to the chief executive of the county (or to the Tribal organization, if it is to be so located or conducted within an Indian reservation).

27 FR 377

§ 2.105 Notice of proposed action.

(a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action with respect to an application for:

(1) A license for a facility;

47 FR 57446 | 47 FR 9585

(2) A license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee. All licenses issued under Part 61 of this chapter shall be so noticed.

(3) An amendment of a license specified in paragraph (a) (1) or (2) of this section and which involves a significant hazards consideration;

(4) An amendment to an operating license for a facility licensed under § 50.21(b) or § 50.22 or for a testing facility, as follows:

(i) If the Commission determines under § 50.58 that the amendment involves no significant hazards consideration, though it will provide notice of opportunity for a hearing pursuant to this section, it may make the amendment immediately effective and grant a hearing thereafter; or

(ii) If the Commission determines under § 50.58 and § 50.91 that an emergency or exigent situation exists and that the amendment involves no significant hazards considerations, it will provide notice of opportunity for a hearing pursuant to § 2.106 (if a hearing is requested, it will be held after issuance of the amendment);

(5) A license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter;

48 FR 14873

(6) An amendment to a license specified in paragraph (a)(5) of this section, or an amendment to a construction authorization granted in proceedings on an application for such a license, when such amendment would authorize actions which may significantly affect the health and safety of the public; or

(7) Any other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded.

(8) In the case of an application for an operating license for a facility of a type described in § 50.21(b) or § 50.22 of this chapter or a testing facility, a notice of opportunity for hearing shall be issued as soon as practicable after the application has been docketed.

(9) In the case of an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, a notice of opportunity for hearing, as required by this paragraph, shall be published prior to Commission action authorizing receipt of such wastes; this requirement is in addition to the procedures set out in § 2.101(f)(8) and § 2.104 of this part, which provide for a hearing on the application prior to issuance of a construction authorization.

[3] Issues (1) to (6) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (7) is the issue pursuant to the National Environmental Policy Act of 1969.

[4] As permitted by subsection 105c of the Act, with respect to proceedings in which an application for a construction permit was filed prior to December 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER or notice of filing of the application for an operating license or December 19, 1970, whichever is later, the Commission may issue a construction permit or operating license which contains the conditions specified in § 50.55b of this chapter before the antitrust aspects of the application are finally resolved.

(b) The notice of proposed action will set forth: (38 FR 10151)

(1) The nature of the action proposed; (28 FR 10151)

(2) The manner in which a copy of the safety analysis and of the ACRS report, if any, may be obtained or examined. (36 FR 4686)

(c) If an application for a license is complete enough to permit all evaluations, other than completion inspection, necessary for the issuance of a construction permit and operating license, the notice of proposed issuance of a construction permit may provide that on completion of construction and inspection the operating license will be issued without further prior notice. (27 FR 377)

(d) The notice of proposed action will provide that, within thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER, or such lesser period authorized by law as the Commission may specify: (37 FR 15127)

(1) The applicant may file a request for a hearing; and

(2) Any person whose interest may be affected by the proceeding may file a petition for leave to intervene.

(e)(1) If no request for a hearing or petition for leave to intervene is filed within the time prescribed in the notice, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, may take the proposed action, inform the appropriate State and local officials, and publish in the FEDERAL REGISTER a notice of issuance of the license or other action. (46 FR 55083)

(2) If a request for a hearing or a petition for leave to intervene is filed within the time prescribed in the notice, the presiding officer who shall be an Atomic Safety and Licensing Board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the presiding officer will issue a notice of hearing or an appropriate order. The presiding officer designated to rule on a request or petition concerning the antitrust aspects of an application may be either an Administrative Law Judge or an Atomic Safety and Licensing Board. (46 FR 55083)

(f) Applications for facility licenses under section 103 of the Act and for facility operating licenses under section 104b of the Act as to which any person intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination are also subject to the provisions of §§ 2.101(b) and 2.102(d). (35 FR 19655)

§ 2.106 Notice of issuance. (38 FR 9585)

(a) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER notice of, and will inform the State and local officials specified in § 2.104(e) of the issuance of:

(1) A license or an amendment of a license for which a notice of proposed action has been previously published; and

(2) An amendment of a license for a facility of the type described in § 50.21(b) or § 50.22 of this chapter, or a testing facility, whether or not a notice of proposed action has been previously published.

(b) The notice of issuance will set forth: (37 FR 15127)

(1) The nature of the license or amendment;

(2) The manner in which copies of the safety analysis, if any, may be obtained and examined; and

(3) A finding that the application for the license or amendment complies with the requirements of the Act and this chapter.

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the FEDERAL REGISTER notice of, and will inform the State, local, and Tribal officials specified in § 2.104(e) of any action with respect to, an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, or for the amendment to such license for which a notice of proposed action has been previously published. (46 FR 13971)

(d) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the Federal Register notice of, and will inform the State and local officials or tribal governing body specified in § 2.104(e) of any licensing action with respect to a license to receive radioactive waste from other persons for disposal under Part 61 of this chapter or the amendment of such a license for which a notice of proposed action has been previously published. (47 FR 57446)

§ 2.107 Withdrawal of application. (28 FR 10151)

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

(b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.

(c) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of the withdrawal of an application if notice of receipt of the application has been previously published. (27 FR 377)

§ 2.108 Denial of application for failure to supply information.

(a) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, may deny an application if an applicant fails to respond to a request for additional information within thirty (30) days from the date of the request, or within such other time as may be specified.

27 FR 377

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of denial when notice of receipt of the application has previously been published, but no notice of hearing has yet been published. The notice of denial will provide that, within thirty (30) days after the date of publication in the FEDERAL REGISTER (1) the applicant may demand a hearing, and (2) any person whose interest may be affected by the proceeding may file a petition for leave to intervene.

(c) When both a notice of receipt of the application and a notice of hearing have been published, the presiding officer, upon a motion made by the staff pursuant to § 2.730, will rule whether an application should be denied by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, pursuant to paragraph (a).

39 FR 43195

§ 2.109 Effect of timely renewal application.

28 FR 10151

If, at least thirty (30) days prior to the expiration of an existing license authorizing any activity of a continuing nature, a licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

§ 2.110 Filing and administrative action on submittals for design review or early review of site suitability issues.

42 FR 22882

(a)(1) A submittal pursuant to Appendix O of Part 50 of this chapter shall be subject to §§ 2.101(a) and 2.790 to the same extent as if it were an application for a permit or license.

(2) Except as specifically provided otherwise by the provisions of Appendix Q to Part 50 of this chapter, a submittal pursuant to Appendix Q shall be subject to § 2.101 (a)(2)–(a)(4) to the same extent as if it were an application for a permit or license.

(b) Upon initiation of review by the staff of a submittal of a type described in paragraph (a)(1) of this section, the Director of Nuclear Reactor Regulation shall publish in the FEDERAL REGISTER a notice of receipt of the submittal, inviting comments from interested persons within 60 days of publication or such other time as may be specified, for consideration by the staff and ACRS in their review.

(c) Upon completion of review by the staff and the ACRS of a submittal of the type described in paragraph (a)(1) of this section, the Director of Nuclear Reactor Regulation shall publish in the FEDERAL REGISTER a determination as to whether or not the design is acceptable, subject to such conditions as may be appropriate, and place in the Public Document Room an analysis of the design in the form of a report.

§ 2.111 Prohibition of sex discrimination.

40 FR 8774

No person shall on the ground of sex be excluded from participation in, be denied a license under, be denied the benefits of, or be subjected to discrimination under any program or activity carried on or receiving Federal assistance under the Act or the Energy Reorganization Act of 1974.

Subpart B—Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License, or for Imposing Civil Penalties

§ 2.200 Scope of subpart.

39 FR 12353

(a) This subpart prescribes the procedures in cases initiated by the staff, or upon a request by any person, to impose requirements by order on a licensee or to modify, suspend, or revoke a license, or for such other action as may be proper.

42 FR 28867

(b) This subpart also prescribes the procedures in cases initiated by the staff to impose civil penalties pursuant to section 234 of the Act and section 206 of the Energy Reorganization Act of 1974.

§ 2.201 Notice of violation.

27 FR 10826

(a) Before instituting any proceeding to modify, suspend, or revoke a license or to take other action for alleged violation of any provision of the Act or this chapter or the conditions of the license the Director, Office of Inspection and Enforcement, will serve on the licensee a written notice of violation, except as provided in paragraph (c) of this section. The notice of violation will concisely state the alleged violation and will require that the licensee submit, within twenty (20) days of the date of the notice or other specified time, a written explanation or statement in reply including:

(1) Corrective steps which have been taken by the licensee, and the results achieved;

(2) Corrective steps which will be taken; and

(3) The date when full compliance will be achieved.

(b) The notice may require the licensee to admit or deny the violation and to state the reasons for the violation, if admitted. It may provide that, if an adequate reply is not received within the time specified in the notice, the Director, Office of Inspection and Enforcement, may issue an order to show cause why the license should not be modified, suspended or revoked or such other action be taken as may be proper.

(c) When the Director, Office of Inspection and Enforcement, finds that the public health, safety, or interest so requires, or that the violation is willful, the notice of violation may be omitted and an order to show cause issued.

§ 2.202 Order to show cause.

45 FR 3250

(a) The Executive Director for Operations during an emergency as determined by the EDO, and Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, and Director, Office of Administration, as appropriate may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause which will:

28 FR 10151

(1) Allege the violations with which the licensee is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action.

27 FR 377

(2) Provide that the licensee may file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee of his right, within twenty (20) days of that date of the order, or such other time as may be specified in the order, to demand a hearing;

(4) Specify the issues; and

(5) State the effective date of the order.

(b) A licensee may respond to an order to show cause by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order to show cause, and may set forth the matters of fact and law on which the licensee relies. The answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order to show cause.

(e) The consent of the licensee to the entry of an order shall constitute a waiver by the licensee of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission.

45 FR 3250

(f) When the Executive Director for Operations, during an emergency as determined by the EDO, or the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, finds that the public health, safety, or interest so requires or that the violation is willful, the order to show cause may provide, for stated reasons, that the prodposed action be temporarily effective pending further order.

§ 2.203 Settlement and compromise.

At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Administrative Law Judge, according due weight to the position of the staff. The presiding officer, or if none has been designated, the Chief Administrative Law Judge, may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding. If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding.

36 FR 2130

§ 2.204 Order for modification of license.

The Commission may modify a license by issuing an amendment on notice to the licensee that he may demand a hearing with respect to all or any part of the amendment within twenty (20) days from the date of the notice or such longer period as the notice may provide. The amendment will become effective on the expiration of the period during which the licensee may demand a hearing, or, in the event that he demands a hearing, on the date specified in an order made following the hearing. When the Commission finds that the public health, safety, or interest so requires, the order may be made effective immediately.

28 FR 1051

§ 2.205 Civil penalties.

(a) Before instituting any proceeding to impose a civil penalty under section 234 of the Act, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate,shall serve a written notice of violation upon the person charged. This notice may be included in a notice issued pursuant to § 2.201. The notice of violation shall specify the date or dates, facts, and the nature of the alleged act or omission with which the person is charged, and shall identify specifically the particular provision or provisions of the law, rule, regulation, license, permit, or cease and desist order involved in the alleged violation and shall state the amount of each penalty which the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate,proposes to impose. The notice of violation shall also advise the person charged that the civil penalty may be paid in the amount specified therein, or the proposed imposition of the civil penalty may be protested in its entirety or in part, by a written answer, either denying the violation, or showing extenuating circumstances. The notice of violation shall advise the person charged that upon failure to pay a civil penalty subsequently determined by the Commission, if any, the penalty may, unless compromised, remitted or mitigated, be collected by civil action pursuant to section 234c of the Act.

36 FR 16894

(b) Within twenty (20) days of the date of a notice of violation or other time specified in the notice, the person charged may either pay the penalty in the amount proposed or answer the notice of violation. The answer to the notice of violation shall state any facts, explanations, and arguments, denying the charges of violation, or demonstrating any extenuating circumstances, error in the notice of violation, or other reason why the penalty should not be imposed and may request remission or mitigation of the penalty.

(c) If the person charged with violation fails to answer within the time specified in paragraph (b) of this section, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate,will issue an order imposing the civil penalty in the amount set forth in the notice of violation described in paragraph (a) of this section.

(d) If the person charged with violation files an answer to the notice of violation, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, upon consideration of the answer, will issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty. The person charged may, within twenty (20) days of the date of the order or other time specified in the order, request a hearing.

36 FR 16894

(e) If the person charged with violation requests a hearing, the Commission will issue an order designating the time and place of hearing.

(f) If a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, mitigating, or remitting the civil penalty.

(g) The Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, may compromise any civil penalty, subject to the provisions of § 2.203.

36 FR 16894

(h) If the civil penalty is not compromised, or is not remitted by the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate,the presiding officer or the Commission, and if payment is not made within ten (10) days following either the service of the order described in paragraph (c) or (f) of this section, or the expiration of the time for requesting a hearing described in paragraph (d) of this section, no such request having been made, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate,may refer the matter to the Attorney General for collection.

(i) Except when payment is made after compromise or mitigation by the Department of Justice or as ordered by a court of the United States, following reference of the matter to the Attorney General for collection, payment of civil penalties imposed under section 234 of the Act shall be made by check, draft, or money order payable to the Treasurer of the United States, and mailed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate.

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, and shall be filed either (1) by delivery to the Public Document Room at 1717 H Street NW., Washington, D.C., or (2) by mail or telegram addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, will either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part with respect to his request, and the reasons therefor.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

[42 FR 36239] [45 FR 74693] [41 FR 12345]

Subpart C [Deleted 40 FR 8774.]

Subpart D—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Construct or Operate Nuclear Power Plants of Duplicate Design at Multiple Sites

§ 2.400 Scope of subpart.

This subpart describes procedures applicable to licensing proceedings which involve the consideration in hearings of a number of applications, filed by one or more applicants pursuant to Appendix N of Part 50 of this chapter, for licenses to construct and operate nuclear power reactors of essentially the same design to be located at different sites.

§ 2.401 Notice of hearing on applications pursuant to Appendix N of Part 50 for construction permits.

(a) In the case of applications pursuant to Appendix N of Part 50 of this chapter for construction permits for nuclear power reactors of the type described in § 50.22 of this chapter, the Secretary will issue notices of hearing pursuant to § 2.104.

(b) The notice of hearing will also state the time and place of the hearings on any separate phase of the proceeding.

[40 FR 2976]

§ 2.402 Separate hearings on separate issues; consolidation of proceedings.

(a) In the case of applications pursuant to Appendix N of Part 50 of this chapter for construction permits for nuclear power reactors of a type described in § 50.22 of this chapter, the Commission or the presiding officer may order separate hearings on particular phases of the proceeding, such as matters related to the acceptability of the design of the reactor, in the context of the site parameters postulated for the design, environmental matters, or antitrust aspects of the application.

(b) If a separate hearing is held on a particular phase of the proceeding, the Commission or presiding officers of each affected proceeding[s] may, pursuant to § 2.716, consolidate for hearing on that phase two or more proceedings to consider common issues relating to the applications involved in the proceedings, if it finds that such action will be conducive to the proper dispatch of its business and to the ends of justice. In fixing the place of any such consolidated hearing due regard will be given to the convenience and necessity of the parties, petitioners for leave to intervene or the attorneys or representatives of such persons, and the public interest.

[43 FR 17798]

§ 2.403 Notice of proposed action on applications for operating licenses pursuant to Appendix N of Part 50.

In the case of applications pursuant to Appendix N of Part 50 of this chapter for operating licenses for nuclear power reactors, if the Commission has not found that a hearing is in the public interest, the Director of Nuclear Reactor Regulation will, prior to acting thereon, cause to be published in the FEDERAL REGISTER, pursuant to § 2.105, a notice of proposed action with respect to each application as soon as practicable after the applications have been docketed.

§ 2.404 Hearings on applications for operating licenses pursuant to Appendix N of Part 50.

If a request for a hearing and/or petition for leave to intervene is filed within the time prescribed in the notice of proposed action on an application for an operating license pursuant to Appendix N of Part 50 of this chapter with respect to a specific reactor(s) at a specific site and the Commission or an atomic safety and licensing board designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel has issued a notice of hearing or other appropriate order, the Commission or the atomic safety and licensing board may order separate hearings on particular phases of the proceeding and/or consolidate for hearing two or more proceedings in the manner described in § 2.402.

[40 FR 2976]

§ 2.405 Initial decisions in consolidated hearings.

At the conclusion of any hearing held pursuant to this subpart, the presiding officer will render a partial initial decision which may be appealed pursuant to § 2.762. No construction permit or full power operating license will be issued until an initial decision has been issued on all phases of the hearing and all issues under the Act and the National Environmental Policy Act of 1969 appropriate to the proceeding have been resolved.

§ 2.406 Finality of decisions on separate issues.

Notwithstanding any other provision of this chapter, in a proceeding conducted pursuant to this subpart and Appendix N of Part 50 of this chapter, no matter which has been reserved for consideration in one phase of the hearing shall be considered at another phase of the hearing except on the basis of significant new information that substantially affects the conclusion(s) reached at the other phase or other good cause.

§ 2.407 Applicability of other sections.

The provisions of Subparts A and G relating to construction permits and operating licenses apply, respectively, to construction permits and operating licenses subject to this subpart, except as qualified by the provisions of this subpart. [40 FR 2976]

Subpart E—Additional Procedures Applicable to Proceedings for the Issuance of Licenses To Manufacture Nuclear Power Reactors To Be Operated at Sites Not Identified in the License Application and Related Licensing Proceedings

§ 2.500 Scope of subpart.

This subpart prescribes procedures applicable to licensing proceedings which involve the consideration in separate hearings of an application for a license to manufacture nuclear power reactors pursuant to Appendix M of Part 50 of this chapter, and applications for construction permits and operating licenses for nuclear power reactors which have been the subject of such an application for a license to manufacture such facilities (manufacturing license).

§ 2.501 Notice of hearing on application pursuant to Appendix M of Part 50 for a license to manufacture nuclear power reactors. [38 FR 30251]

(a) In the case of an application pursuant to Appendix M of Part 50 of this chapter for a license to manufacture nuclear power reactors of the type described in § 50.22 of this chapter to be operated at sites not identified in the license application, the Secretary will issue a notice of hearing to be published in the FEDERAL REGISTER at least thirty (30) days prior to the date set for hearing in the notice.[1] The notice shall be issued as soon as practicable after the application has been docketed. The notice will state:

(1) The time, place, and nature of the hearing and/or the prehearing conference;

(2) The authority within which the hearing is to be held;

(3) The matters of fact and law to be considered; and

(4) The time within which answers to the notice shall be filed.

(b) The issues stated in the notice of hearing pursuant to paragraph (a) of this section will not involve consideration of the particular sites at which any of the nuclear power reactors to be manufactured will be located and operated. Except as the Commission determines otherwise, the notice of hearing will state:

(1) That, if the proceeding is a contested proceeding, the presiding officer will consider the following issues:[2]

(i) Whether the applicant has described the proposed design of, and the site parameters postulated for, the reactor(s), including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(ii) Whether such further technical or design information as may be required to complete the design report and which can reasonably be left for later consideration, will be supplied in a supplement to the design report;

(iii) Whether safety features or components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted a research and development program reasonably designed to resolve any safety questions associated with such features or components;

(iv) Whether on the basis of the foregoing, there is reasonable assurance that (A) such safety questions will be satisfactorily resolved before any of the proposed nuclear power reactors are removed from the manufacturing site, and (B) taking into consideration the site criteria contained in Part 100 of this chapter, the proposed reactor(s) can be constructed and operated at sites having characteristics that fall within the site parameters postulated for the design of the reactor(s) without undue risk to the health and safety of the public;

(v) Whether the applicant is technically and financially qualified to design and manufacture the proposed reactor(s).

(vi) Whether the issuance of a license for manufacture of the reactor(s) will be inimical to the common defense and security or to the health and safety of the public; and [38 FR 30251]

(vii) Whether, in accordance with the requirements of Part 51 and Appendix M of Part 50 of this chapter, the license should be issued as proposed. [39 FR 26279]

(2) That, if the proceeding is not a contested proceeding, the presiding officer will determine (i) without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support affirmative findings on paragraphs (b)(1)(i) through (v) of this section and a negative finding on paragraph (b)(1)(vi) of this section proposed to be made and the issuance of the license to manufacture proposed by the Director of Nuclear Reactor Regulation, and (ii) whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate. [38 FR 30251]

(3) That, regardless of whether the proceeding is contested or uncontested, the presiding officer will, in accordance with Part 51 and paragraph 3 of Appendix M of Part 50 of this chapter, [39 FR 26279]

(i) Determine whether the requirements of section 102(2)(A), (C) and (D) of the National Environmental Policy Act and Part 51 of this chapter have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the manufacturing license should be issued, denied or appropriately conditioned to protect environmental values.

(c) The place of hearing on an application for a manufacturing license will be Washington, D.C., or such other location as the Commission deems appropriate.

§ 2.502 Notice of hearing on application for a permit to construct a nuclear power reactor manufactured pursuant to a Commission license issued pursuant to Appendix M of Part 50 of this chapter at the site at which the reactor is to be operated. [38 FR 30251]

The issues stated for consideration in the notice of hearing on an application for a permit to construct a nuclear power reactor(s) which is the subject of an application for a manufacturing license pursuant to Appendix M of Part 50 of this chapter, will be those stated in § 2.104(b) and, in addition, whether the site on which the facility is to be operated falls within the postulated site

[1] The thirty (30) day requirement of this paragraph is not applicable to a notice of the time and place of hearing published by the presiding officer after the notice of hearing described in this section has been published.

[2] Issues (i) and (vi) are the issues pursuant to the Atomic Energy Act of 1954, as amended. Issue (vii) is the issue pursuant to the National Environmental Policy Act of 1969.

parameters specified in the relevant application for a manufacturing license.

§ 2.503 Finality of decisions on separate issues.

Notwithstanding any other provision of this chapter, no matter which has been resolved at an earlier stage of the licensing process which involves a manufacturing license, a permit to construct a reactor for which a manufacturing license is sought, a license to operate such a reactor, and any amendment to such permit or licenses shall be determined to be at issue in any subsequent state of the licensing process except on the basis of significant new information that substantially affects the conclusion(s) reached at the earlier stage or other good cause.

§ 2.504 Applicability of other sections.

38 FR 30251

The provisions of Subparts A and G relating to construction permits apply to manufacturing licenses subject to this subpart, with respect to matters of radiological health and safety, environmental protection, and the common defense and security, except that § 2.104 (a) and (b) do not apply to manufacturing licenses. The provisions of Subparts A and G relating to construction permits and operating licenses apply, respectively, to construction permits and operating licenses subject to this subpart, except as qualified by the provisions of this subpart.

42 FR 22882

Subpart F—Additional Procedures Applicable to Early Partial Decisions on Site Suitability Issues in Connection With an Application for a Permit To Construct Certain Utilization Facilities

§ 2.600 Scope of subpart.

This subpart prescribes procedures applicable to licensing proceedings which involve an early submittal of site suitability information in accordance with § 2.101(a–1), and a hearing and early partial decision on issues of site suitability, in connection with an application for a permit to construct a utilization facility which is subject to § 51.5(a) of this chapter and is of the type specified in § 50.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility.

§ 2.601 Applicability of other sections.

The provisions of Subparts A and G relating to applications for construction permits and proceedings thereon apply, respectively, to applications and proceedings in accordance with this subpart, except as specifically provided otherwise by the provisions of this subpart.

§ 2.602 Filing fees.

Each application which contains a request for early review of site suitability issues under the procedures of this subpart shall be accompanied by any fee required by § 50.30(e) and Part 170 of this chapter.

§ 2.603 Acceptance and docketing of application for early review of site suitability issues.

(a) Each part of an application submitted in accordance with § 2.101(a–1) of this part will be initially treated as a tendered application. If it is determined that any one of the parts as described in § 2.101(a–1) is incomplete and not acceptable for processing, the Director of Nuclear Reactor Regulation will inform the applicant of this determination and the respects in which the document is deficient. Such a determination of completeness will generally be made within a period of thirty (30) days.

(b)(1) The Director of Nuclear Reactor Regulation will accept for docketing an application for a construction permit for a utilization facility which is subject to § 51.5(a) of this chapter and is of the type specified in §§ 50.21(b) (2) or (3) or 50.22 or is a testing facility where part one of the application as described in § 2.101(a–1) is complete. Part one of an application will not be considered complete unless it contains proposed findings as required by § 2.101 (a–1)(1)(i) and unless it describes the applicant's site selection process, specifies the extent to which that process involves the consideration of alternative sites, explains the relationship between that process and the application for early review of site suitability issues, and briefly describes the applicant's long-range plans for ultimate development of the site. Upon assignment of a docket number, the procedures in § 2.101(a)(3) and (a)(4) relating to formal docketing and the submission and distribution of additional copies of the application shall be followed.

42 FR 22882

(b)(2) Additional parts of the application will be docketed upon a determination by the Director of Nuclear Reactor Regulation that they are complete.

(c) If part one of the application is docketed, the Director of Nuclear Reactor Regulation will cause to be published in the FEDERAL REGISTER and send to the Governor or other appropriate official of the State in which the site is located, a notice of docketing of the application which states the purpose of the application, states the location of the proposed site, states that a notice of hearing will be published, requests comments within 120 days or such other time as may be specified on the initiation or outcome of an early site review from Federal, State, and local agencies and interested persons, and in the case of applications filed under section 103 of the Act, states that a person who wishes to have his views on the antitrust aspects of the application presented to the Attorney General for consideration shall submit such views in accordance with a subsequent notice that will be published in the FEDERAL REGISTER. In the case of a nuclear power reactor, such subsequent notice will be published following submission of the information required by § 50.33a.

§ 2.604 Notice of hearing on application for early review of site suitability issues.

(a) Where an applicant for a construction permit for a utilization facility subject to this subpart requests an early review and hearing and an early partial decision on issues of site suitability pursuant to § 2.101(a–1), the provisions in the notice of hearing setting forth the matters of fact and law to be considered, as required by § 2.104, shall be modified so as to relate only to the site suitability issue or issues under review.

(b) After docketing of part two of the application, as provided in §§ 2.101(a–1) and 2.603, a supplementary notice of hearing will be published pursuant to § 2.104 with respect to the remaining unresolved issues in the proceeding within the scope of § 2.104. Such supplementary notice of hearing will provide that any person whose interest may be affected by the proceeding and who desires to participate as a party in the resolution of the remaining issues shall file a petition for leave to intervene pursuant to § 2.714 within the time prescribed in the notice. Such supplementary notice will also provide appropriate opportunities for participation by a representative of an interested state under § 2.715(c) and for limited appearances pursuant to § 2.715 (a).

42 FR 22882

(c) Any person who was permitted to intervene as a party pursuant to the initial notice of hearing on site suitability issues and who was not dismissed or did not withdraw as a party may continue to participate as a party to the proceeding with respect to the remaining unresolved issues, provided that within the time prescribed for filing of petitions for leave to intervene in the supplementary notice of hearing, he files a notice of his intent to continue as a party, along with a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which he wishes to continue to participate as a party, and setting forth with particularity the basis for his contentions with regard to each such aspect or aspects. A party who files a nontimely notice of intent to continue as a party may be dismissed from the proceeding, absent a determination that the party has made a substantial showing of good cause for failure to file on time, and with particular reference to the factors specified in §§ 2.714(a)(1)–(4) and 2.714(d). The notice will be ruled upon by the Commission or atomic safety and licensing board designated to rule on petitions for leave to intervene.

(d) To the maximum extent practicable, the membership of the atomic safety and licensing board designated to preside in the proceeding on the remaining unresolved issues pursuant to the supplemental notice of hearing will be the same as the membership designated to preside in the initial notice of hearing on site suitability issues.

§ 2.605 Additional considerations.

(a) The Commission will not conduct more than one review of site suitability issues with regard to a particular site prior to filing and review of part two of the application described in § 2.101 (a–1) of this part.

(b) The Commission, upon its own initiative, or upon the motion of any party to the proceeding filed at least sixty (60) days prior to the date of the commencement of the evidentiary hearing on site suitability issues, may decline to initiate an early hearing or render an early partial decision on any issue or issues of site suitability:

(1) In cases where no partial decision

on the relative merits of the proposed site and alternative sites under Part 51 is requested, upon determination that there is a reasonable likelihood that further review would identify one or more preferable alternative sites and the partial decision on one or more site suitability issues would lead to an irreversible and irretrievable commitment of resources prior to the submittal of the remainder of the information required by § 50.30(f) of this chapter that would prejudice the later review and decision on such alternative sites; or

(2) In cases where it appears that an early partial decision on any issue or issues of site suitability would not be in the public interest considering (1) the degree of likelihood that any early findings on those issues would retain their validity in later reviews, (2) the objections, if any, of cognizant state or local government agencies to the conduct of an early review on those issues, and (3) the possible effect on the public interest and the parties of having an early, if not necessarily conclusive, resolution of those issues.

42 FR 22882

§ 2.606 Partial decisions on site suitability issues.

(a) The provisions of §§ 2.754, 2.755, 2.760, 2.761, 2.762, 2.763, and 2.764(a) shall apply to any partial initial decision rendered in accordance with this subpart. Paragraph 2.764(b) shall not apply to any partial initial decision rendered in accordance with this subpart. No limited work authorization may be issued pursuant to § 50.10(e) of Part 50 of this chapter and no construction permit may be issued without completion of the full review required by section 102(2) of the National Environmental Policy Act of 1969, as amended, and Part 51 of this chapter. The authority of the Commission and/or Appeal Board to review such a partial initial decision sua sponte, or to raise sua sponte an issue that has not been raised by the parties, will be exercised within the same time period as in the case of a full decision relating to the issuance of a construction permit.

(b) (1) A partial decision on one or more site suitability issues pursuant to the applicable provisions of Parts 50, 51, and 100 of this chapter issued in accordance with this subpart shall (i) clearly identify the site to which the partial decision applies and (ii) indicate to what extent addtional information may be needed and additional review may be required to enable the Commission to determine in accordance with the provisions of the Act and the applicable provisions of the regulations in this chapter whether a construction permit for a facility to be located on the site identified in the partial decision should be issued or denied.

(2) Following completion of Commission or Atomic Safety and Licensing Appeal Board review, as appropriate, of the partial initial decision of the Atomic Safety and Licensing Board, after hearing, on the site suitability issues, the partial decision shall remain in effect either for a period of five years or, where the applicant for the construction permit has made timely submittal of the information required to support the application as provided in § 2.101(a-1), until the proceeding for a permit to construct a facility on the site identified in the partial decision has been concluded,[3] unless the Commission, Atomic Safety and Licensing Appeal Board, or Atomic Safety and Licensing Board, upon its own initiative or upon motion by a party to the proceeding, finds that there exists significant new information that substantially affects the earlier conclusions and reopens the hearing record on site suitability issues. Upon good cause shown, the Commission may extend the five year period during which a partial decision shall remain in effect for a reasonable period of time not to exceed one year.

42 FR 22882

Subpart G—Rules of General Applicability

39 FR 17972

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3).

47 FR 4490

§ 2.700a Exceptions.

(a) Consistent with 5 U.S.C. 554(a)(4) of the Administrative Procedure Act, the Commission may provide alternative procedures in adjudications to the extent that there is involved the conduct of military or foreign affairs functions.

(b) This rule shall apply to proceedings in progress where hearings have already been requested or ordered as well as to future proceedings.

33 FR 6707

§ 2.701 Filing of documents.

(a) Documents shall be filed with the Commission in adjudications subject to this part either: (1) By delivery to the Public Document Room at 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: Chief, Docketing and Service Section.

29 FR 12829

(b) All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. The staff of the Commission shall be deemed to be a party.

27 FR 377

(c) Filing by mail or telegram will be deemed to be complete as of the time of deposit in the mail or with a telegraph company.

37 FR 28710

§ 2.702 Docket.

The Secretary will maintain a docket for each proceeding subject to this part, commencing with the issuance of the initial notice of hearing, notice of consideration of issuance of facility operating license or other proposed action specified in § 2.105, or order to show cause.

29 FR 12829

The Secretary will maintain all files and records, including the transcripts of testimony and exhibits and all papers, correspondence, decisions and orders filed or issued.

27 FR 377

§ 2.703 Notice of hearing.

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing, and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) The time within which an answer shall be filed.

(b) The time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding, and the public interest.

31 FR 16309

§ 2.704 Designation of presiding officer, disqualification, unavailability.

(a) The Commission may provide in the notice of hearing that one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, shall preside.

[3] The partial decision on site suitability issues shall be incorporated in the decision regarding issuance of a construction permit to the extent that it serves as a basis for the decision on a specific site issue(s).

If the Commission does not so provide, the Chairman of the Atomic Safety and Licensing Board Panel will issue an order designating an atomic safety and licensing board appointed pursuant to section 191 of the Atomic Energy Act of 1954, as amended, or, if the Commission has not provided for the hearing to be conducted by an atomic safety and licensing board, the Chief Administrative Law Judge will issue an order designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code. [35 FR 11459]

(b) If a designated presiding officer or a designated member of an atomic safety and licensing board deems himself disqualified to preside or to participate as a board member in the hearing, he shall withdraw by notice on the record and shall notify the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, of his withdrawal.

(c) If a party deems the presiding officer or a designated member of an atomic safety and licensing board to be disqualified, he may move that the presiding officer or the board member disqualify himself. The motion shall be supported by affidavits setting forth the alleged grounds for disqualification. If the presiding officer does not grant the motion or the board member does not disqualify himself, the motion shall be referred to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, which will determine the sufficiency of the grounds alleged.

(d) If a presiding officer or a designated member of an atomic safety and licensing board becomes unavailable during the course of a hearing, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, will designate another presiding officer or atomic safety and licensing board member. If he becomes unavailable after the hearing has been concluded: [40 FR 1995]

(1)(i) The Commission may designate another presiding officer to make the decision; or

(ii) The Chairman of the Atomic Safety and Licensing Board Panel or the Commission, as appropriate, may designate another atomic safety and licensing board member to participate in the decision;

(2) The Commission may direct that the record be certified to it for decision, except in adjudications in which exceptions to the initial decision may be taken to the Atomic Safety and Licensing Appeal Board; or

(3) The Commission may designate another presiding officer.

(e) In the event of substitution of a presiding officer or a designated member of an atomic safety and licensing board for the one originally designated, any motion predicated upon the substitution shall be made within five (5) days thereafter. [40 FR 51995]

§ 2.705 Answer.

(a) Within twenty (20) days after service of the notice of hearing, or such other time as may be specified in the notice of hearing, a party may file an answer which shall concisely state: (1) The nature of his defense or other position; (2) the items of the specification of issues he controverts and those he does not controvert; and (3) whether he proposes to appear and present evidence. [27 FR 377]

(b) If facts are alleged in the specification of issues, the answer shall admit or deny specifically each material allegation of fact; or, where the party has no knowledge or information sufficient to form a belief, the answer may so state and the statement shall have the effect of a denial. Material allegations of fact not denied shall be deemed to be admitted. Matters alleged as affirmative defenses or positions shall be separately stated and identified and, in the absence of a reply, shall be deemed to be controverted.

(c) If a party does not oppose an order or proposed action embodied in or accompanying the notice of hearing, or does not wish to appear and present evidence at the hearing, the answer shall so state. In lieu of appearing at the hearing, a party may request leave to file a statement under oath or affirmation of reasons why the proposed order or action should not be issued or should differ from that proposed. Such a statement, if accepted, will be accorded whatever weight is deemed proper.

§ 2.706 Reply. [43 FR 17798]

A party may file a reply to an answer within ten (10) days after it is served.

§ 2.707 Default. [37 FR 15127]

On failure of a party to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading; to appear at a hearing or prehearing conference, to comply with any prehearing order entered pursuant to § 2.751a or § 2.752, or to comply with any discovery order entered by the presiding officer pursuant to § 2.740, the Commission or the presiding officer[4] may make such orders in regard to the failure as are just, including, among others, the following: [37 FR 15127]

(a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate; or

(b) Proceed without further notice to take proof on the issues specified.

[4]When a reference is made to the Commission or the presiding officer in this subpart and a presiding officer has been designated, the specified action will be taken by the presiding officer, unless otherwise provided.

§ 2.708 Formal requirements for documents. [27 FR 377]

(a) Each document filed in an adjudication subject to this part to which a docket number has been assigned shall bear the docket number and title of the proceeding.

(b) Each document shall be bound on the left side and typewritten, printed or otherwise reproduced in permanent form on good unglazed paper of standard letterhead size. Each page shall begin not less than one and one-quarter inches from the top, with side and bottom margins of not less than one and one-quarter inches. Text shall be double-spaced, except that quotations may be single-spaced and indented. The requirements of this paragraph do not apply to original documents or admissible copies offered as exhibits, or to specially prepared exhibits.

(c) The original of each document shall be signed in ink by the party or his authorized representative, or by an attorney having authority with respect to it. The capacity of the person signing, his address, and the date shall be stated. The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information, and belief the statements made in it are true, and that it is not interposed for delay. If a document is not signed, or is signed with intent to defeat the purpose of this section, it may be stricken. [28 FR 10151]

(d) Except as otherwise provided by this part or by order, a pleading (or other document) other than correspondence shall be filed in an original and two conformed copies. [45 FR 49535]

(e) The first document filed by any person in a proceeding shall designate the name and address of a person on whom service may be made. [27 FR 377]

(f) A document filed by telegraph need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section. [39 FR 35332]

§ 2.709 Acceptance for filing. [27 FR 377]

A document which fails to conform to the requirements of § 2.708 may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any matter so tendered but not accepted for filing shall not be entered on the Commission's docket.

§ 2.710 Computation of time. [46 FR 58279]

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period. Only two (2) days shall be added when a document is served by express mail.

§ 2.711 Extension and reduction of time limits. [37 FR 15127]

(a) Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer, or by stipulation approved by the Commission or the presiding officer.

(b) In any instance in which this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for that action.

§ 2.712 Service of papers, methods, proof. [28 FR 10151]

(a) *Service of papers by the Commission.* Except for subpoenas, the Commission will serve all orders, decisions, notices, and other papers issued by it upon all parties.

(b) *Who may be served.* Any paper required to be served upon a party shall be served upon him or upon the representative designated by him or by law to receive service of papers. When a party has appeared by attorney, service must be made upon the attorney of record. [31 FR 4389]

(c) *How Service may be made.* Service may be made by personal delivery, by first class, certified or registered mail including air mail, by telegraph, or as otherwise authorized by law. Where there are numerous parties to a proceeding, the Commission may make special provision regarding the service of papers. The presiding officer may require service by express mail upon some or all parties and the presiding officer. [46 FR 58279]

(d) *When service complete.* Service upon a party is complete: [27 FR 377]

(1) By personal delivery, on handing the paper to the individual, or leaving it at his office with his clerk or other person in charge or, if there is no one in charge, leaving it in a conspicuous place therein or, if the office is closed or the person to be served has no office, leaving it at his usual place of residence with some person of suitable age and discretion then residing there;

(2) By telegraph, when deposited with a telegraph company, properly addressed and with charges prepaid;

(3) By mail, on deposit in the United States mail, properly stamped and addressed; or

(4) When service cannot be effected in a manner provided by paragraphs (d) (1) to (3) inclusive of this section in any other manner authorized by law.

(e) *Proof of service.* Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, and may be made by:

(1) Written acknowledgment of the party served or his counsel;

(2) The certificate of counsel if he has made the service; or

(3) The affidavit of the person making the service.

(f) *Free copying and service.* Except in an antitrust proceeding, in any adjudicatory proceeding on an application for a license or an amendment thereto, the Commission, upon request by a party other than the applicant, will copy and serve without cost to that party that party's testimony (including attachments), proposed findings of fact and conclusions of law, and responses to discovery requests. These documents should be filed with Docketing and Service not less than five days before they are due to be submitted to an adjudicatory board, unless the presiding officer provides otherwise. [45 FR 49535] [45 FR 69877] *

§ 2.713 Appearance and practice before the Commission in adjudicatory proceedings.

(a) Standards of Practice. In the exercise of their functions under this subpart, the Commission, the Atomic Safety and Licensing Appeal Boards, the Atomic Safety and Licensing Boards, and Administrative Law Judges function in a quasijudicial capacity. Accordingly, parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.

(b) Representation. A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party may be represented by an attorney-at-law provided the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number; the name and address of the person on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

(c) Reprimand, Censure or Suspension from the Proceeding.

(1) A presiding officer, an Atomic Safety and Licensing Appeal Board, or the Commission may, if necessary for the orderly conduct of a proceeding, reprimand, censure or suspend from participation in the particular proceeding pending before it any party or representative of a party who shall refuse to comply with its directions, or who shall be guilty of disorderly, disruptive, or contemptuous conduct.

(2) A reprimand, a censure or a suspension which is ordered to run for one day or less shall be ordered with grounds stated on the record of the proceeding and shall advise the person disciplined of the right to appeal pursuant to paragraph (c)(3) of this section. A suspension which is ordered for a longer period shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal and to

* This paragraph is suspended until further action of the Commission. 46 FR 13681

request a stay pursuant to paragraphs (c)(3) and (c)(4) of this section. A proceeding may be stayed for a reasonable time in order for an affected party to obtain other representation if this would be necessary to prevent injustice.

(3) Anyone disciplined pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Atomic Safety and Licensing Appeal Board or the Commission, as appropriate. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Appeal Board or Commission, as appropriate, shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run, if necessary for a full and fair consideration of the facts, the Appeal Board or Commission, as appropriate, may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Appeal Board or the Commission, as appropriate, provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or if the suspension is upheld at the conclusion of the appeal, the presiding officer, the Appeal Board, or the Commission, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Appeal Board or Commission.

(4) A suspension exceeding 1 day shall not be effective for 72 hours from the date the suspension order is issued. Within this time a suspended individual may request a stay of the sanction from the appropriate reviewing tribunal pending appeal. No responses to the stay request from other parties will be entertained. If a timely stay request is filed, the suspension shall be stayed until the reviewing tribunal rules on the motion. The stay request shall be in writing and contain the information specified in §§ 2.788(b)(1), (2) and (4) of this part. The Appeal Board or Commission, as appropriate, shall rule on the stay request within 10 days after the filing of the motion. The Appeal Board or Commission shall consider the factors specified in §§ 2.788(e)(1) and (e)(2) of this part is determining whether to grant or deny a stay application.

45 FR 69877

§ 2.714 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, or as provided in § 2.102(d)(3). Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

(3) Any person who has filed a petition for leave to intervene or who has been admitted as a party pursuant to this section may amend his petition for leave to intervene. A petition may be amended without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in paragraph (a)(1) of this section. Such an amended petition for leave to intervene must satisfy the requirements of this paragraph (a) of this section pertaining to specificity.

43 FR 17799

(b) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

43 FR 17798

(c) Any party to a proceeding may file an answer to a petition for leave to intervene within ten (10) days after service of the petition, with particular reference to the factors set forth in paragraph (d) of this section. However, the staff may file such an answer within fifteen (15) days after service of the petition.

44 FR 4459

(d) The Commission, the presiding officer or the atomic safety and licensing board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

37 FR 28710

(1) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

37 FR 15127

(e) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, presiding officer or the designated atomic safety and licensing board may direct in the interests of: (1) Restricting irrelevant, duplicative, or repetitive evidence and argument, (2) having common interests represented by a spokesman, and (3) retaining authority to determine priorities and control the compass of the hearing.

37 FR 28710

(f) In any case in which, after consideration of the factors set forth in paragraph (d) of this section, the Commission or the presiding officer finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention

37 FR 15127

shall limit his participation accordingly.

(g) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (f) of this section.

(h) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

37 FR 15127

§ 2.714a Appeals from certain rulings on petitions for leave to intervene and/or requests for hearing.

37 FR 28710

(a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and or requests for hearing may be appealed, in accordance with the provisions of this section, to the Atomic Safety and Licensing Appeal Board within ten (10) days after service of the order. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal within ten (10) days after service of the appeal. No other appeals from rulings on petitions and/or requests for hearing shall be allowed.

43 FR 17798

(b) An order wholly denying a petition for leave to intervene and/or request for a hearing is appealable by the petitioner on the question whether the petition and/or hearing request should have been granted in whole or [illegible].

37 FR 28710

(c) An order granting petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question whether the petition and/or the request for a hearing should have been wholly denied.

§ 2.715 Participation by a person not a party.

43 FR 17798

(a) A person who is not a party may, in the discretion of the presiding officer, be permitted to make a limited appearance by making oral or written statement of his position on the issues at any session of the hearing or any prehearing conference within such limits and on such conditions as may be fixed by the presiding officer, but he may not otherwise participate in the proceeding.

28 FR 10131

(b) The Secretary will give notice of a hearing to any person who requests it prior to the issuance of the notice of hearing, and will furnish a copy of the notice of hearing to any person who requests it thereafter. When a communication bears more than one signature, the Commission will give the notice to the person first signing unless the communication clearly indicates otherwise.

28 FR 10151

(c) The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue. Such participants may also file proposed findings and exceptions pursuant to §§ 2.754 and 2.762 and petitions for review by the Commission pursuant to § 2.786. The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.

43 FR 17798

(d) If a matter is taken up by the Appeal Board on appeal or sua sponte or by the Commission pursuant to § 2.786 or sua sponte, a person who is not a party may, in the discretion of the Appeal Board or the Commission, respectively, be permitted to file a brief "amicus curiae". A person who is not a party and desires to file a brief must submit a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. Except as otherwise provided by the Commission or the Appeal Board, such brief must be filed within the time allowed to the party whose position the brief will support. A motion of a person who is not a party to participate in oral argument before an Appeal Board or the Commission will be granted at the discretion of the Appeal Board or the Commission.

37 FR 15127

§ 2.715a Consolidation of parties in construction permit or operating license proceedings.

On motion or on its or his own initiative, the Commission or the presiding officer may order any parties in a proceeding for the issuance of a construction permit or an operating license for a production or utilization facility who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

43 FR 17798

§ 2.716 Consolidation of proceedings.

On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings, or may hold joint hearings with interested States and/or other federal agencies on matters of concurrent jurisdiction, if it is found that such action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

§ 2.717 Commencement and termination of jurisdiction of presiding officer.

(a) Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Administrative Law Judge has such jurisdiction or, if he is unavailable, another hearing examiner has such jurisdiction.

37 FR 28710

A proceeding is deemed to commence when a notice of hearing or a notice of proposed action pursuant to § 2.105 is issued.

31 FR 12774

When a notice of hearing provides that the presiding officer is to be a hearing examiner, the Chief Administrative Law Judge† will designate by order the hearing examiner who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest.

29 FR 10151

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate may issue an order and take any otherwise proper administrative action with respect to a licensee who is a party to a pending proceeding. Any order related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding.

§ 2.718 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. He has all powers necessary to those ends, including the powers to:

(a) Administer oaths and affirmations.

(b) Issue subpoenas authorized by law.

(c) Rule on offers of proof, and receive evidence.

(d) Order depositions to be taken.

(e) Regulate the course of the hearing and the conduct of the participants.

(f) Dispose of procedural requests or similar matters.

(g) Examine witnesses.

(h) Hold conferences before or during the hearing for settlement, simplification of the issues, or any other proper purpose.

(i) Certify questions to the Commission for its determination, either in his discretion or on direction of the Commission.

(j) Reopen a proceeding for the reception of further evidence at any time prior to initial decision.

(k) Appoint special assistants from the Atomic Safety and Licensing Board Panel pursuant to § 2.722;

(l) Issue initial decisions; and

(m) Take any other action consistent with the Act, this chapter, and sections 551–558 of title 5 of the United States Code.

27 FR 377 — 45 FR 62027

§ 2.719 Separation of functions.

(a) A presiding officer shall perform no duties inconsistent with his responsibilities as a presiding officer, and will not be responsible to or subject to the supervisor or direction of any officer or employee engaged in the performance of investigative or prosecuting functions.

35 FR 11459 — 45 FR 62027

(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff or a special assistant as provided for in § 2.722 on any fact in issue unless on notice and opportunity for all parties to participate, except (1) as required for the disposition of *ex parte* matters as authorized by law and (2) as provided in paragraph (c) of this section.

34 FR 13360 — 27 FR 377

(c) In any adjudication for the determination of an application for initial licensing, other than a contested proceeding, the presiding officer may consult (1) the staff, and (2) members of the panel appointed by the Commission from which members of atomic safety and licensing boards are drawn: *Provided, however,* That in adjudications in which exceptions to the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the presiding officer shall not consult any member of the Atomic Safety and Licensing Appeal Board or any fact in issue.

31 FR 16309 — 27 FR 377

(d) Except as provided in paragraph (c) of this section and § 2.780(e), in any case of adjudication, no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case of a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceeding. Where an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a consultation or communication authorized by paragraph (c) of this section or § 2.780(e), the substance of the communication shall be specified in the record in the proceeding and every party shall be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert such fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an exception to the initial decision, or a petition for reconsideration of a final decision, clearly and concisely setting forth the information or argument relied on to show the contrary.

§ 2.720 Subpoenas.

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

27 FR 377 — 27 FR 377

(b) Every subpoena will bear the name of the Commission, the name and office of the issuing officer and the title of the hearing, and will command the person to whom it is directed to attend and give testimony or produce specified documents or other things at a designated time and place. The subpoena will also advise of the quashing procedure provided in paragraph (f) of this section.

(c) Unless the service of a subpoena is acknowledged on its face by the witness or is served by an officer or employee of the Commission, it shall be served by a person who is not a party to the hearing and is not less than eighteen (18) years of age. Service of a subpoena shall be made by delivery of a copy of the subpoena to the person named in it and tendering him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the Commission, fees and mileage need not be tendered, and the subpoena may be served by registered mail.

(d) Witnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to witnesses in the district courts of the United States.

(e) The person serving the subpoena shall make proof of service by filing the subpoena and affidavit or acknowledgement of service with the officer before whom the witness is required to testify or produce evidence or with the Secretary. Failure to make proof of service shall not affect the validity of the service.

(f) On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the presiding officer or, if he is unavailable, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms.

(g) On application and for good cause shown, the Commission will seek judicial enforcement of a subpoena issued to a party and which has not been quashed.

35 FR 19500

(h)(1) The provisions of paragraphs (a) through (g) of this section are not applicable to the attendance and testimony of the Commissioners or NRC personnel, or to the production of records or documents in the custody thereof.

40 FR 2973

(2)(i) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commis-

sioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: *Provided*, That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

(ii) In addition, a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the staff answer the interrogatories.

(iii) No deposition of a particular named NRC employee or answer to interrogatories by NRC personnel pursuant to paragraphs (h) (2) (i) and (ii) of this section shall be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, pursuant to § 2.751a, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

(iv) The provisions of § 2.740(c) and (e) shall apply to interrogatories served pursuant to this subparagraph.

(3) Records or documents in the custody of the Commissioners and NRC personnel are available for inspection and copying or photographing pursuant to §§ 2.744 and 2.790.

§ 2.721 Atomic safety and licensing boards.

(a) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may from time to time establish one or more atomic safety and licensing boards, each comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission or the Chairman of the Atomic Safety and Licensing Board Panel deems appropriate to the issues to be decided, to preside in such proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, and to perform such other adjudicatory functions as the Commission deems appropriate. The members of an atomic safety and licensing board shall be designated from the Atomic Safety and Licensing Board Panel established by the Commission.

(b) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may designate an alternate qualified in the conduct of administrative proceedings, or an alternate having technical or other qualifications, or both, for an atomic safety and licensing board established pursuant to paragraph (a) of this section. If a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may constitute the alternate qualified in the conduct of administrative proceedings, or the alternate having technical or other qualifications, as appropriate, as a member of the board by notifying the alternate who will, as of the date of such notification, serve as member of the board. In the event that an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or the Chairman of the Atomic Safety and Licensing Board Panel may appoint a member of the Atomic Safety and Licensing Board Panel who is qualified in the conduct of administrative proceedings or a member having technical or other qualifications, as appropriate, as a member of the atomic safety and licensing board by notifying the appointee who will, as of the date of such notification, serve as a member of the board.

(c) In a proceeding in which exceptions to the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the Commission will not designate any members of the Appeal Board as members or alternates of the atomic safety and licensing board established to preside in such proceeding.

(d) An atomic safety and licensing board shall have the duties and may exercise the powers of a presiding officer as granted by § 2.718 and otherwise in this part. At any time when such a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Law Judge* may be exercised with respect to such a proceeding by the chairman of the board having jurisdiction over it.

Two members of an atomic safety and licensing board constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.722 Special assistants to the presiding officer.

(a) In consultation with the Panel Chairman, the presiding officer may, at his discretion, appoint from the Atomic Safety and Licensing Board Panel established by the Commission, personnel to assist the presiding officer in taking evidence and preparing a suitable record for review. Such appointment may occur at any appropriate time during the proceeding but shall, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.704. Such special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. Such interrogators shall be required to study the written testimony and sit with the presiding officer to hear the presentation and cross-examination by the parties of all witnesses on the issues of the interrogators' expertise, taking a leading role in examining such witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, Special Masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special Masters may rule on evidentiary issues brought before them, in accordance with §§ 2.743 and 2.757. Appeals from such rulings may be taken to the presiding officer in accordance with procedures which shall be established in the presiding officer's order appointing the Special Master. Special Masters' reports are advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master; or

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer shall retain final authority on the issue for which the alternate member was designated.

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of Members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues which the presiding officer might otherwise have difficulty in quickly grasping. Such informal briefings shall take place prior to the hearing on the subject involved and shall supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in § 2.704.

MOTIONS

§ 2.730 Motions.

(a) *Presentation and disposition.* All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer. All written motions shall be filed with the Secretary, and served on all parties to the proceeding. [39 FR 24219]

(b) *Form and content.* Unless made orally on the record during a hearing, or the presiding officer directs otherwise, a motion shall be in writing, shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. [27 FR 377]

(c) *Answers to motions.* Within ten (10) days after service of a written motion, or such other period as the Secretary or the Assistant Secretary or presiding officer may prescribe, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. However, the staff may file such an answer within fifteen (15) days after service of a written motion. The moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary. [43 FR 17798]

(d) *Oral arguments; briefs.* No oral argument will be heard on a motion unless the presiding officer or the Commission directs otherwise. A written brief may be filed with a motion or an answer to a motion, stating the arguments and authorities relied on. [27 FR 377]

(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. [46 FR 30328]

(f) *Interlocutory appeals to the Commission.* No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session. [27 FR 377]

(g) *Effect of filing a motion or certification of question to the Commission.* Unless otherwise ordered, neither the filing of a motion nor the certification of a question to the Commission shall stay the proceeding or extend the time for the performance of any act. [28 FR 10151]

(h) Where the motion in question is a motion to compel discovery under § 2.720(h)(2) or § 2.740(f), parties may file answers to the motion pursuant to paragraph (c) of this section. The presiding officer in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone the presiding officer shall issue a written order on the motion which summarizes the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter which is effective at the time of such ruling, provided that the terms of the ruling are incorporated in the subsequent written order. [46 FR 58279]

§ 2.731 Order of procedure. [27 FR 377]

The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.732 Burden of proof. [27 FR 377]

Unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof.

§ 2.733 Examination by experts. [37 FR 15127]

A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and crossexamination of expert witnesses. The presiding officer may permit such individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, where it would serve the purpose of furthering the conduct of the proceeding, upon finding (a) that the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

DEPOSITIONS AND WRITTEN INTERROGATORIES. DISCOVERY. ADMISSION. EVIDENCE

§ 2.740 General provisions governing discovery. [37 FR 15127]

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written interrogatories (§ 2.740a); written interrogatories (§ 2.740b); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§ 2.741); and requests for admission (§ 2.742).

(b) *Scope of discovery.* Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense

of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Trial preparation materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(c) *Protective order.* Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had, (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place, (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) *Sequence and timing of discovery.* Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or agreement of the parties.

(f) *Motion to compel discovery.* (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request for an order compelling a response or inspection in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the presiding officer may make such a protective order as he is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a subpoena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the staff pursuant to § 2.720 (h) (2) or production of NRC documents pursuant to § 2.744 or § 2.790, except for paragraphs (c) and (e) of this section.

§ 2.740a Depositions upon oral examination and upon written interrogatories.

(a) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition, the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) [Deleted 37 FR 15127.]

(c) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(d) The deponent shall be sworn or shall affirm before any questions are put to him. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevance of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time. 37 FR 15127

(e) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission. 27 FR 377

(f) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers shall be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination. 43 FR 17798

(g) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. 27 FR 377

(h) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(i) The witness may be accompanied, represented, and advised by legal counsel.

(j) The provisions of paragraphs (a) through (i) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.720(h). 37 FR 15127

§ 2.740b Interrogatories to parties.

(a) Any party may serve upon any other party (other than the staff)[6] written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission and shall be served on the presiding officer and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 14 days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.740a(g)).

§ 2.741 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Request for discovery.* Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of § 2.740 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.740.

(b) *Service.* The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in § 2.740, the request may be served after the proceeding is set for hearing.

(c) *Contents.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) *Response.* The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. 37 FR 15127

(e) *NRC records and documents.* The provisions of paragraphs (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of such records or documents is subject to the provisions of §§ 2.744 and 2.790.

§ 2.742 Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document shall be delivered with the request unless a copy has already been furnished.

(b) Each requested admission shall be deemed made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the re- 27 FR 377

[6] Interrogatories addressed to the staff are subject to § 2.720(h)(2)(ii).

quest is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated. 27 FR 377.

(c) Admissions obtained pursuant to the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

§ 2.743 Evidence. 28 FR 10051

(a) *General.* Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts.

(b) *Written testimony.* The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its proposed written testimony on each other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity to examine it. Written testimony shall be incorporated in the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit. This paragraph does not apply to proceedings under Subpart B for modification, suspension, or revocation of a license. 43 FR 17798

(c) *Admissibility.* Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(d) *Objections.* An objection to evidence shall briefly state the grounds of objection. The transcript shall include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on the record. 27 FR 377

(e) *Offer of proof.* An offer of proof made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony shall consist of a statement of the substance of the proffered evidence. If the excluded evidence is written, a copy shall be marked for identification. Rejected exhibits, adequately marked for identification, shall be retained in the record.

(f) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy furnished to each party, or the parties have previously been furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence. 27 FR 377

(g) *Proceedings involving applications.* In any proceeding involving an application, there shall be offered in evidence by the staff any report submitted by the ACRS in the proceeding in compliance with section 182b. of the Act, any safety evaluation prepared by the staff and any Detailed Statement on environmental considerations prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee in the proceeding pursuant to Part 51 of this chapter. 39 FR 26279

(h) *Official record.* An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody. 27 FR 377

(i) *Official notice.* (1) the Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact. 37 FR 15127

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by exceptions to an initial decision or a petition for reconsideration of a final decision clearly and concisely setting forth the information relied upon to show the contrary.

§ 2.744 Production of NRC records and documents.

(a) A request for the production of an NRC record or document not available pursuant to § 2.790 by a party to an initial licensing proceeding may be served on the Executive Director for Operations without leave of the Commission or the presiding officer. The request shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(b) If the Executive Director for Operations objects to producing a requested record or document on the grounds that (1) it is not relevant or (2) it is exempted from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party. 37 FR 15127

(c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance with § 2.730(a) through (d). The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine—

(1) The relevancy of that record or document;

2) Whether the document is exempt from disclosure under § 2.790;

(3) Whether the disclosure is necessary to a proper decision in the proceeding;

(4) Whether the document or the information therein is reasonably obtainable from another source.

(d) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under § 2.790 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations to produce the document. 40 FR 2973

46 FR 51718

(e) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.790, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating pursuant to § 2.715(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

37 FR 15127

(f) A ruling by the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission for the production of a record or document will specify the time, place, and manner of production.

40 FR 2973

(g) No request pursuant to this section shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

37 FR 15127

(h) The provisions of § 2.740(c) and (e) shall apply to production of NRC records and documents pursuant to this section.

SUMMARY DISPOSITION ON PLEADINGS

46 FR 30328

§ 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.

(b) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The presiding officer may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered.

37 FR 15127

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

(d) The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. However, if any proceeding involving a construction permit for a production or utilization facility, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall be issued.

HEARINGS

27 FR 377

§ 2.750 Official reporter; transcript.

(a) A hearing will be reported under the supervision of the presiding officer, stenographically or by other means, by an official reporter who may be designated from time to time by the Commission or may be a regular employee of the Commission. The transcript prepared by the reporter shall be the sole official transcript of the proceeding. Except as limited pursuant to Section 181 of the Act

or order of the Commission, the transcript will be open for inspection at the Public Document Room. Copies of transcripts are available to parties and to the public from the official reporter on payment of the charges fixed therefor.

(b) Transcript corrections: Corrections of the official transcript may be made only in the manner provided by this paragraph. Corrections ordered or approved by the presiding officer shall be included in the record as an appendix, and when so incorporated the Secretary shall make the necessary physical corrections in the official transcript so that it will incorporate the changes ordered. In making corrections there shall be no substitution of pages but, to the extent practicable, corrections shall be made by running a line through the matter to be changed without obliteration and writing the matter as changed immediately above. Where the correction consists of an insertion, it shall be added by rider or interlineation as near as possible to the text which is intended to precede and follow it.

(c) Free transcript: Except in an antitrust proceeding, in any adjudicatory proceeding on an application for a license or an amendment thereto, the presiding officer may arrange for provision of one free transcript to a party, other than the applicant, upon request by that party. The transcript will be made available to a party at the same time and location as it is made available to the NRC staff. If a transcript is mailed to the staff, it will also be mailed to the requesting party. A presiding officer has the discretion to control the distribution of transcripts to parties.[1*]

§ 2.751 Hearings to be public.

Except as may be requested pursuant to Section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

§ 2.751a Special prehearing conference in construction permit and operating license proceedings.

(a) In any proceeding involving an application for a construction permit or an operating license for a production or utilization facility, the Commission or the presiding officer will direct the parties and any petitioners for intervention, or their counsel, to appear at a specified time and place, within ninety (90) days after the notice of hearing is published, or such other time as the Commission or the presiding officer may deem appropriate, for a conference[7] to:

(1) Permit identification of the key issues in the proceeding;

(2) Take any steps necessary for further identification of the issues;

(3) Consider all intervention petitions to allow the presiding officer to make such preliminary or final determination as to the parties to the proceeding, as may be appropriate; and

(4) Establish a schedule for further actions in the proceeding.

(b) The presiding officer may order any further informal conferences among the parties, including telephone conferences, to the extent that he considers that such a conference would expedite the proceeding.

(c) A prehearing conference held pursuant to this section may be stenographically reported.

(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 filing of objections shall not stay the decision unless the presiding officer so orders. 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.

§ 2.752 Prehearing conference.

(a) The Commission or the presiding officer may, and in the case of a proceeding on an application for a construction permit or an operating license for a facility of a type described in §§ 50.21(b) or 50.22 of this chapter or a testing facility, shall direct the parties or their counsel to appear at a specified time and place for a conference to consider:

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

(2) The necessity or desirability of amending the pleadings;

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

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

(5) The setting of a hearing schedule; and

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

A prehearing conference held under this section in a proceeding involving a construction permit or operating license shall be held within sixty (60) days after discovery has been completed,[8] or such other time as the Commission or the presiding officer may specify.

[1*] This paragraph is suspended until further action of the Commission. 46 FR 13641

[7] This conference may be omitted in proceedings other than contested proceedings.

[8] Discovery, as used in this section, does not include the production of the WASH report, the safety evaluation prepared by the regulatory staff, or any detailed statement on environmental considerations prepared by the Director of Regulation or his designee in the proceeding pursuant to Appendix D of Part 50 of this chapter.

[27 FR 377]

(b) Prehearing conferences may be stenographically reported.

[46 FR 30328]

§ 2.752 Prehearing conference.

(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 filing of objections shall not stay the decision unless the presiding officer so orders. 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 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.

[37 FR 15127]

§ 2.753 Stipulations.

Apart from any stipulations made during or as a result of a prehearing conference, the parties may stipulate in writing at any stage of the proceeding or orally during the hearing, any relevant fact or the contents or authenticity of any document. Such a stipulation may be received in evidence. The parties may also stipulate as to the procedure to be followed in the proceeding. Such stipulations may, on motion of all parties, be recognized by the presiding officer to govern the conduct of the proceeding.

[46 FR 30328]

§ 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.

[43 FR 17798]

(b) Failure to file proposed findings of fact, conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

[27 FR 377]

(c) Proposed findings of fact shall be clearly and concisely set forth in numbered paragraphs and shall be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law shall be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. Proposed findings of fact and conclusions of law submitted by a person who does not have the burden of proof and who has only a limited interest in the proceeding may be confined to matters which affect his interests.

§ 2.755 Oral argument before presiding officer.

When, in the opinion of the presiding officer, time permits and the nature of the proceeding and the public interest warrant, he may allow and fix a time for the presentation of oral argument. He will impose appropriate limits of time on the argument. The transcript of the argument shall be a part of the record.

[35 FR 11459]

§ 2.756 Informal procedures.

The Commission encourages the use of informal procedures consistent with the Act, sections 551-558 of title 5 of the United States Code, and the regulations in this chapter, and with the orderly conduct of the proceeding and the necessity for preserving a suitable record for review.

§ 2.757 Authority of presiding officer to regulate procedure in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer may:

(a) Limit the number of witnesses whose testimony may be cumulative;

(b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;

(c) Take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and

(d) Impose such time limitations on arguments as he determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

[37 FR 15127]

§ 2.758 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof, issued in its program for the licensing and regulation of production and utilization facilities, source material, special nuclear material or by-product material, shall not be subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial licensing subject to this subpart, other than a pending proceeding wherein a party has attacked such rule or regulation, and the presiding officer, the Atomic Safety and Licensing Appeal Board or the Commission has ruled thereon before August 27, 1972.**

**Effective date of these amendments.

(b) A party to an adjudicatory proceeding involving initial licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter-affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provisions thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission[*] for determination the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial licensing proceeding may file a petition for rule making pursuant to § 2.802.

§ 2.759 Settlement in initial licensing proceedings.

The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

Initial Decision and Commission Review

§ 2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty-five (45) days after its date when it authorizes the issuance or amendment of a license or limited work authorization for a facility, or thirty (30) days after its date in any other case, unless exceptions are taken in accordance with section 2.762 or the Commission directs that the record be certified to it for final decision.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may

(1) Prepare its own initial decision, which will become final unless exceptions are filed; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order or denial of relief with the effective date;

(4) The time within which exceptions to the decision and a brief in support of them may be filed, the time within which briefs in support of or in opposition to exceptions filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section the date when it may become final.

§ 2.760a Initial decisions in contested proceedings on applications for facility operating licenses.

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the license.

§ 2.761 Expedited decisional procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file exceptions, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

[*] The matter will be certified to the Commission notwithstanding the provisions of § 2.788.

(b) An order entered pursuant to paragraph (a) of this section shall be subject to review by the Commission on its own motion within thirty (30) days after its date. [27 FR 377]

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter when: [38 FR 1015]

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file exceptions, to request oral argument, and to seek judicial review; [31 FR 4339]

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and [27 FR 377]

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization. [35 FR 837]

§ 2.761a Separate hearings and decisions.

In a proceeding on an application for a construction permit for a utilization facility which is subject to § 51.5(a) of this chapter, and is of the type specified in §§ 50.21(b)(2) or (3) or 50.22 of this chapter or is a testing facility, the presiding officer shall unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by §50.10(e)(2)(ii) and Part 51 of this chapter as soon as practicable after issuance by the staff of its final environmental impact statement but no later than thirty (30) days after issuance of such statement, and complete such a hearing and issue an initial decision on such matters. Prehearing procedures regarding issues covered by Part 51 and § 50.10(e)(2)(ii) of this chapter, including any discovery and special prehearing conferences and prehearing conferences as provided in §§ 2.740, 2.740a, 2.740b, 2.741, 2.742, 2.751a, and 2.752, shall be scheduled accordingly. The provisions of §§ 2.754, 2.755, 2.760, 2.762, 2.763, and 2.764(a) shall apply to any proceeding conducted and any initial decision rendered in accordance with this section. Paragraph 2.764(b) shall not apply to any partial initial decision rendered in accordance with this section. This section shall not preclude separate hearings and decisions on other particular issues. [42 FR 22882]

§ 2.762 Appeals to the Commission from initial decisions. [38 FR 5624]

(a) Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by the filing of exceptions to that decision or designated portions thereof. Each exception shall be separately numbered and shall (1) state concisely, without supporting argumentation, the single error of fact or law which is being asserted in that exception; and (2) identify with particularity the portion of the decision (or earlier order or ruling) to which the exception is addressed. A brief in support of the exceptions shall be filed within thirty (30) days thereafter (forty (40) days in the case of the staff). The brief shall be confined to a consideration of the exceptions previously filed by the party and, with respect to each exception, shall specify, inter alia, the precise portion of the record relied upon in support of the assertion of error. [43 FR 17798]

(b) Within thirty (30) days of the filing and service of the brief of the appellant (forty (40) days in the case of the staff), any other party may file a brief in support of, or in opposition to, the exceptions. Each factual assertion made in such supporting or opposing brief shall be supported by a reference to the precise portion of the record upon which it is based.

(c) A brief in excess of 10 pages shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. [38 FR 5624]

(d) All documents filed under this section shall be accompanied by a certificate reflecting service upon all other parties to the proceeding.

(e) Briefs shall not exceed seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request for good cause an enlargement of this page limitation. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement required. [46 FR 12192]

(f) Any exception or brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative. [46 FR 12192]

§ 2.763 Oral argument. [31 FR 4339]

In its discretion the Commission may allow oral argument upon the request of a party made in his exceptions or brief or upon its own initiative.

§ 2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license. [47 FR 40535]

(a) **Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances,** an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to the review thereof and further decision by the Commission upon exceptions filed by any party pursuant to § 2.762 or upon its own motion. [46 FR 47764]

(b) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of exceptions, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

45 FR 74693

(c) An initial decision directing the issuance of an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) under 10 CFR Part 72 of this chapter shall not become effective until review by the Commission has been completed. The Director of Nuclear Material Safety and Safeguards shall not issue an initial license for the construction and operation of an independent spent fuel storage installation (ISFSI) under 10 CFR Part 72 of this chapter until expressly authorized to do by the Commission.

46 FR 13971

(d) An initial decision directing the issuance of a construction authorization or license under Part 60 of this chapter (relating to disposal of high-level radioactive wastes in geologic repositories) or any amendment to such an authorization or a license authorizing actions which may significantly affect the health and safety of the public, shall become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards shall not issue a construction authorization or a license under Part 60 of this chapter, or any amendment to such an authorization or license which may significantly affect the health and safety of the public until expressly authorized to do so by the Commission.

46 FR 47764

(e) *Nuclear power reactor construction permits*

46 FR 28627

(1) Atomic Safety and Licensing Boards

(i) Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. The Boards' decisions concerning construction permits shall not become effective until the Appeal Board and Commission actions outlined below in paragraphs (2) and (3) have taken place.

47 FR 2286

(ii) In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. As provided in paragraph (e)(3) of this section, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment, present issues on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directives, such policy issues shall not be the subject of discovery, examination, or cross-examination.

46 FR 28627

(2) Atomic Safety and Licensing Appeal Boards

(i) Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Appeal Board shall decide any stay motions that are timely filed.[1] For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Appeal Board and Commission action described herein. If no stay papers are filed, the Appeal Board shall, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and decide whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard.

(ii) In deciding these stay questions, the Appeal Board shall employ the procedures set out in 10 CFR 2.788. However, in addition to the factors set out in 10 CFR 2.788(e), the Board will give particular attention to whether issuance of the permit prior to full administrative review may: (A) Create novel safety or environmental issues in light of the Three Mile Island accident; or (B) prejudice review of significant safety or environmental issues. In addition to deciding the stay issue, the Appeal Board will inform the Commission if it believes that the case raises issues on which prompt Commission policy guidance, particularly guidance on possible changes to present Commission regulations and policies, would advance the Board's appellate review. If the Appeal Board is unable to issue a decision within the sixty-day period, it should explain the cause of the delay to the Commission. The Commission shall thereupon either allow the Appeal Board the additional time necessary to complete its task or take other appropriate action, including taking the matter over itself. The running of the sixty-day period shall not operate to make the Licensing Board decision effective. Unless otherwise ordered by the Commission, the Appeal Board will conduct its normal appellate review of the Licensing Board decision after it has issued its decision on any stay request.

46 FR 28627

(3) Commission

(i) Reserving to itself the right to step in at any earlier stage of the proceeding, the Commission will, upon receipt of the Appeal Board decision on whether the effectiveness of a Licensing Board construction permit decision should be further delayed, review the matter on its own motion, applying the same criteria. The parties shall have no right to file pleadings with the Commission with regard to the Appeal Board's stay decision unless requested to do so.

(ii) The Commission will seek to issue a decision in each construction permit case within 20 days of receipt of the Appeal Board's stay decision. If the Commission does not act finally within that time, it will state the reason for its further consideration and indicate that time it anticipates will be required to reach its decision. In such an event, if the Appeal Board has not stayed the Licensing Board's decision, the initial decision will be considered stayed pending the Commission's decision.

[1] Such motions shall be filed as provided by 10 CFR 2.788. No request need be filed with the Licensing Board prior to filing with the Appeal Board. Cf. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10 (1976). The sixty-day period has been selected in recognition of two facts: first, allowing time for service by mail, close to thirty days may elapse before the Appeal Board has all the stay papers before it; second, the Appeal Board may find it necessary to hold oral argument.

47 FR 2286

(iii) In announcing the result of its review of any Appeal Board stay decision, the Commission may allow the proceeding to run its ordinary course or give whatever instructions as to the future handling of the proceeding it deems appropriate (for example, it may direct the Appeal Board to review the merits of particular issues in expedited fashion; furnish policy guidance with respect to particular issues; or decide to review the merits of particular issues itself, bypassing the Appeal Board).

46 FR 47764

(f) *Nuclear power reactor operating licenses*—(1) *Atomic Safety and Licensing Boards.* (i) Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would authorize. A Board's decision authorizing issuance of an operating license (including a fuel loading and low power testing license) shall not become effective insofar as it authorizes operating at greater than 5 percent of rated power until the Commission actions outlined below in paragraph (f)(2) of this section have taken place. Insofar as it authorizes operation up to 5 percent, the decision shall become effective and the Director shall issue the appropriate license in accordance with paragraph (b) of this section.

46 FR 28627

(ii) In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. As provided in paragraph (f)(2) of this section, in addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies in conducting its reviews in adjudicatory proceedings. The Boards shall, in turn, apply these revised regulations and policies in cases then pending before them to the extent that they are applicable. The Commission expects the Licensing Boards to pay particular attention in their decisions to analyzing the evidence on those safety and environmental issues arising under applicable Commission regulations and policies which the Boards believe present serious, close questions and which the Boards believe may be crucial to whether a license should become effective before full appellate review is completed. Furthermore, the Boards should identify any aspects of the case which in their judgment present issues on which prompt Commission policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues but, absent specific Commission directive, such policy issues shall not be the subject of discovery, examination, or cross-examination.

46 FR 47764

(2) *Commission.* (i) Reserving the power to step in at an earlier time, the Commission will, upon receipt of the Licensing Board decision authorizing issuance of an operating license, other than a decision authorizing only fuel loading and low power (up to 5 percent of rated power) testing, review the matter on its own motion to determine whether to stay the effectiveness of the decision. An operating license decision will be stayed by the Commission, insofar as it authorizes other than fuel loading and low power testing, if it determines that it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.

(ii) For operating license decisions other than those authorizing only fuel loading and low power testing consistent with the target schedule set forth below, the parties may file brief comments with the Commission pointing out matters which, in their view, pertain to the immediate effectiveness issue. To be considered, such comments must be received within 10 days of the Board decision. However, the Commission may dispense with comments by so advising the parties. No extensive stay shall be issued without giving the affected parties an opportunity to be heard.

(iii) The Commission intends to issue a stay decision within 30 days of receipt of the Licensing Board's decision. The Licensing Board's initial decision will be considered stayed pending the Commission's decision insofar as it may authorize operations other than fuel loading and low power (up to 5 percent of rated power) testing.

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding (for example, it may direct the Appeal Board to review the merits of particular issues in expedited fashion; furnish policy guidance with respect to particular issues; or decide to review the merits of particular issues itself, bypassing the Appeal Board). Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may not longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

46 FR 47764

47 FR 40535

(g) Unless the Commission otherwise explicitly so directs in its immediate effectiveness determination, no comment made in the course of the opinion or statement reflecting that determination is to be given any weight by the Atomic Safety and Licensing Board or Appeal Board in its consideration of either a stay motion pursuant to § 2.788(e) or an appeal on the merits pursuant to §§ 2.762 and 2.785, or in any subsequent formal adjudication. The Commission's effectiveness determination is entirely without prejudice to such consideration in subsequent proceedings.

47 FR 57446

§ 2.765 Immediate effectiveness of initial decision directing issuance or amendment of licenses under Part 61 of this chapter.

An initial decision directing the issuance of a license under Part 61 of this chapter (relating to land disposal of radioactive waste) or any amendment to such a license authorizing actions which may significantly affect the health and safety of the public, will become effective only upon order of the Commission. The Director of Nuclear Material Safety and Safeguards may not issue a license under Part 61 of this chapter, or any amendment to such a license which may significantly affect the health and safety of the public, until expressly authorized to do so by the Commission.

FINAL DECISION

§ 2.770 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed and consider only findings and conclusions to which exceptions have been filed.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material exception;

(4) The appropriate ruling, order, or denial of relief, with the effective date.

[27 FR 377]

§ 2.771 Petition for reconsideration.

[31 FR 4339]

(a) A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision. No petition may be filed with respect to an initial decision which has become final through failure to file exceptions thereto.

[42 FR 22148]

(b) The petition for reconsideration shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the petition, and the relief sought. Within ten (10) days after a petition for reconsideration has been filed, any other party may file an answer in opposition to or in support of the petition. However, the staff may file such an answer within twelve (12) days after a petition for reconsideration has been filed.

[27 FR 377]

(c) Neither the filing nor the granting of the petition shall stay the decision unless the Commission orders otherwise.

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

[39 FR 24219]

When briefs, motions or other papers listed herein are submitted to the Commission itself, as opposed to officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary are authorized to:

(a) Prescribe schedules for the filing of briefs, motions, or other pleadings, where such schedules may differ from those elsewhere prescribed in these rules or where these rules do not prescribe a schedule;

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the Commission later than the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule, or regulation of the Commission unless good cause is shown for the late filing;

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission;

[43 FR 22345]

(e) Extend the time for the Commission to rule on a petition for review under 10 CFR 2.786(b);

(f) Extend the time for the Commission to grant review on its own motion under 10 CFR 2.786(a);

(g) Extend time for Commission review on its own motion of a Director's denial under 10 CFR 2.206(c); and

[46 FR 34794]

(h) Direct pleadings improperly filed before the Commission to the appropriate adjudicatory board for action.

[47 FR 47802]

(i) Deny a request for hearings, where the request fails to comply with the Commission's pleading requirements set forth in this Part, and fails to set forth an arguable basis for further proceedings.

(j) Refer to the Atomic Safety and Licensing Board Panel or an Administrative Law Judge, as appropriate, requests for hearings not falling under section 2.104 of this Part, where the requester is entitled to further proceedings.

(k) Take action on minor procedural matters.

EX PARTE COMMUNICATIONS

[37 FR 15122]

§ 2.780 Ex parte communications.

(a) Except as provided in paragraph (e) of this section, neither (1) Commissioners, members of their immediate staffs, or other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions will request or entertain off the record except from each other, nor (2) any party to a proceeding for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit, or any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof, shall submit off the record to Commissioners or such staff members, officials, and employees, any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding on the record then pending before the NRC for the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit. For the purposes of this section, the term "proceeding on the record then pending before the NRC" shall include any application or matter which has been noticed for hearing or concerning which a hearing has been requested pursuant to this part.

[27 FR 377]

(b) Copies of written communications covered by paragraph (a) of this section shall be placed in the NRC public document room and served by the Secretary on the communicator and the parties to the proceeding involved.

(c) A Commissioner, member of his immediate staff, or other NRC official or employee advising the Commissioners in the exercise of their quasi-judicial functions, to whom is attempted any oral communication concerning any substantive matter at issue in a proceeding on the record as described in paragraph (a) of this section, will decline to listen to such communication and will explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof will advise the communicator that a written summary of the conversation will be delivered to the NRC public document room and a copy served by the Secretary of the Commission on the communicator and the parties to the proceeding involved. The recipient of the oral communication thereupon will make a fair, written summary of such communication and deliver such summary to the NRC public document room and serve copies thereof upon the communicator and the parties to the proceeding involved.

[31 FR 12774]

(d) This section does not apply to communications authorized by paragraph (e) of this section, to the disposition of ex parte matters authorized by law, or to communications requested by the Commission concerning:

(1) Its proprietary functions;

(2) General health and safety problems and responsibilities of the Commission; or

(3) The status of proceedings.

(e) In any adjudication for the determination of an application for initial licensing, other than a contested proceeding, Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions may consult the staff, and the staff may communicate with Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions.

(f) The provisions and limitations of this section applicable to Commissioners, members of their immediate staffs, and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions are applicable to members of the Atomic Safety and Licensing Appeal Board, members of their immediate staffs, and other NRC officials and employees who advise members of the Appeal Board in the exercise of their quasi-judicial functions.

[46 FR 13971]

(g) In the case of an application for a license under Part 60 of this chapter (relating to disposal of high-level radioactive wastes in geologic repositories), this part requires a proceeding on the record prior to the issuance of a construction authorization. Unless the Commission orders otherwise, the issuance of a construction authorization (or a final decision to deny a construction authorization) shall be deemed, for purposes of this section, to terminate all proceedings on the record then pending before the NRC with respect to such application.

[37 FR 22791]

ATOMIC SAFETY AND LICENSING APPEAL BOARD

[40 FR 8774]

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

(a) The Commission has authorized Atomic Safety and Licensing Appeal Board to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission, including, but not limited to, those under §§ 2.760–2.771, 2.912, and 2.913 in: (1) Proceedings on applications for licenses under Part 50 of this chapter and (2) such other licensing proceedings under the regulations in this chapter as the Commission may specify.

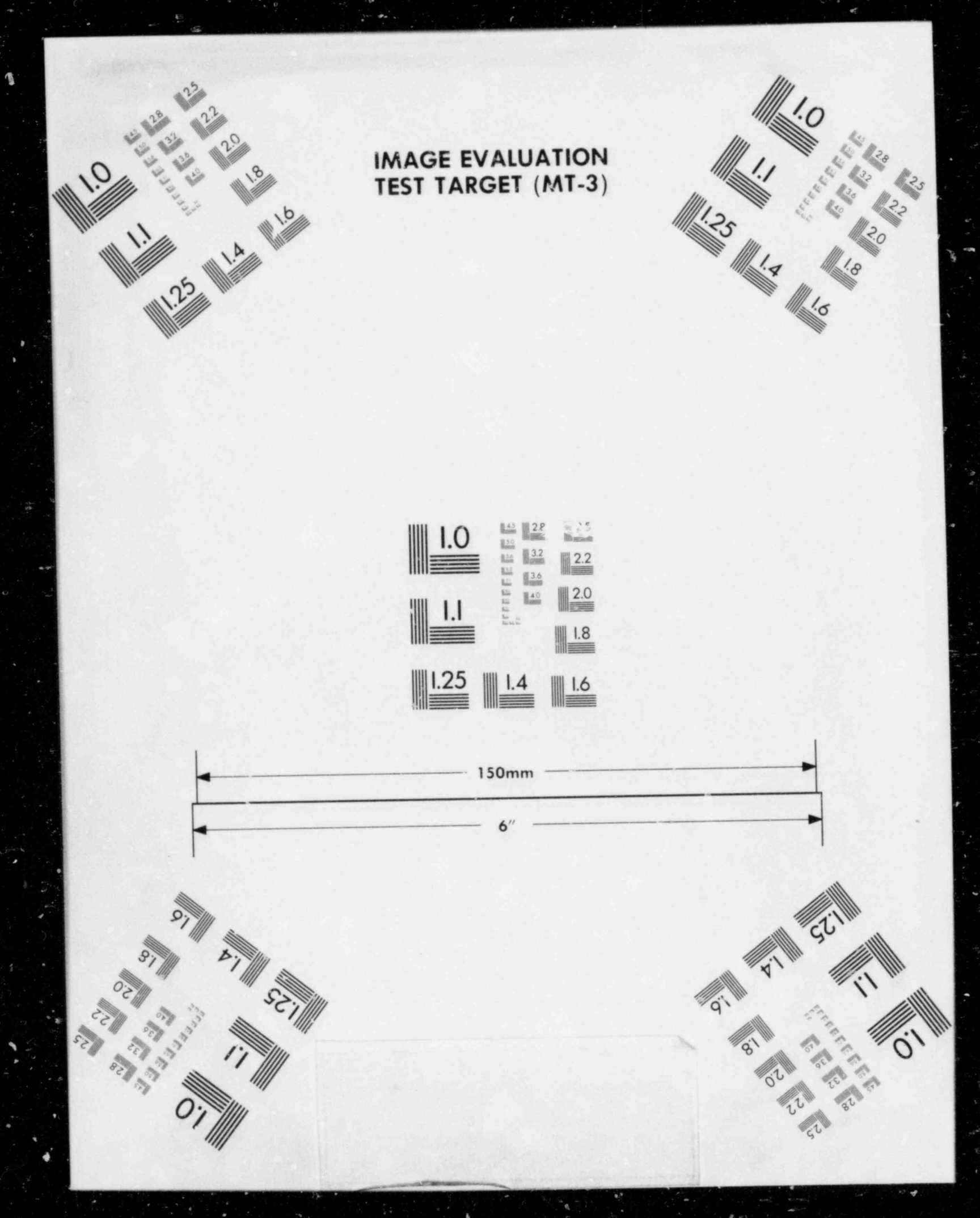
IMAGE EVALUATION
TEST TARGET (MT-3)
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
150mm
6"

(b)(1) In the proceedings described in paragraph (a) of this section, the Atomic Safety and Licensing Appeal Board will also exercise the authority and perform the functions which would otherwise have been exercised and performed by the Commission under §§ 2.711, 2.717(a), 2.718(i), 2.720(f), 2.730, 2.742(b), 2.743(b), 2.752 (a) and (c) and Subpart I, except those functions referred to in § 2.905 (c), (e)(2), (g), and (h)(2). [41 FR 53329]

(2) In a proceeding on an application for an operating license where the Atomic Safety and Licensing Appeal Board determines that a serious safety, environmental, or common defense and security matter exists that has not been raised by the parties, it may give appropriate consideration to that matter. [47 FR 6088]

(c) In the proceedings described in paragraph (a) of this section, the Atomic Safety and Licensing Appeal Board shall exercise the authority and perform the functions delegated to it subject to the provisions and limitations of the referenced sections and subpart. Except as provided in § 2.786, any action taken by the Atomic Safety and Licensing Appeal Board pursuant to its delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission. [40 FR 8774]

(d) In the proceedings described in paragraph (a) of this section, an Atomic Safety and Licensing Appeal Board may, either in its discretion or on direction of the Commission, certify to the Commission for its determination major or novel questions of policy, law or procedure.

§ 2.786 Review of decisions and actions of an Atomic Safety and Licensing Appeal Board. [45 FR 73465]

(a) Within forty (40) days after the date of a decision or action by an Atomic Safety and Licensing Appeal Board under § 2.785, or within thirty (30) days after a petition for review of such decision or action has been filed under paragraph (b) of this section, the Commission may, in cases of exceptional legal or policy importance, review the decision or action on its own motion.

(b) (1) Within fifteen (15) days after service of a decision or action by an Atomic Safety and Licensing Appeal Board under § 2.785 other than a decision or action on a referral or certification under §§ 2.718(i) or 2.730(f), a party may file a petition for review with the Commission on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy. [42 FR 22128]

(2) A petition for review under this paragraph shall be no longer than ten (10) pages, and shall contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Atomic Safety and Licensing Appeal Board and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer opposing Commission review. Such an answer shall be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. No answer in support of a petition for review or further replies to answers will be entertained by the Commission.

(4) The grant or denial of a petition for review is within the discretion of the Commission, except that: [42 FR 22128]

(i) A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy;

(ii) A petition for review of matters of fact will not be granted unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board;

(iii) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the Atomic Safety and Licensing Appeal Board. A matter raised sua sponte by an Appeal Board has been raised before the Appeal Board for the purpose of this section; and

(iv) A petition for review will not be granted as to issues raised before the Atomic Safety and Licensing Appeal Board on a pending motion for reconsideration.

(5) If within thirty (30) days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto. [45 FR 45890]

(6) If a petition for review is granted, the Commission may issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both. [42 FR 22128]

(7) Petitions for reconsideration of Commission decisions upon review, or granting or denying review in whole or in part, will not be entertained.

(8) Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the Atomic Safety and Licensing Appeal Board, unless otherwise ordered by the Commission.

(9) Except as provided in this section and Section 2.788, no petition or other request for Commission review of a decision or action of an Atomic Safety and Licensing Appeal Board will be entertained.

§ 2.787 Composition of Atomic Safety and Licensing Appeal Boards.

(a) An Atomic Safety and Licensing Appeal Board is composed of three members, possessing qualifications deemed appropriate to the issues to be decided, assigned for each proceeding from the Atomic Safety and Licensing Appeal Panel. Members shall be assigned by the permanent Chairman of the Panel or, in his absence, by the permanent Vice-Chairman. The Chairman of an Appeal Board for a particular proceeding shall be qualified in the conduct of administrative proceedings. An alternate may be assigned to serve as a member of an Atomic Safety and Licensing Appeal Board for a particular proceeding in the event that a member assigned to such proceeding becomes unavailable.

(b) In the absence of a quorum, the following individuals are authorized to act for an Appeal Board on procedural matters, including requests for stays of orders by presiding officers: [37 FR 22791]

(1) The Chairman of the Appeal Board assigned for a particular proceeding;

(2) The permanent Chairman of the Atomic Safety and Licensing Appeal Panel, in the event that the Chairman for a particular proceeding is not available to act upon the matter in question or has not been assigned;

(3) The permanent Vice-Chairman of the Appeal Panel, in the event that the individuals listed above are not available to act upon the matter in question, or in the event that a Chairman for a particular proceeding has not been assigned, or in the event that the position of permanent Chairman of the Appeal Panel is vacant.

Except with respect to requests for stays of orders of presiding officers, action by a designated individual under the authority of this paragraph shall be reviewable by the Appeal Board for the particular proceeding, upon its own mo-

tion or upon a motion filed within three (3) days of the date of the particular action in accordance with § 2.730. Action under this authority with respect to requests for stays of orders of presiding officers shall be reviewable by the Commission, upon its own motion or upon a motion filed within three (3) days of the date of the particular action in accordance with § 2.730. [37 FR 22791]

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal boards pending review. [42 FR 22128]

(a) Within ten (10) days after service of a decision or action any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on an appeal or petition for review. Except as provided in paragraph (f) of this section, such an application may be filed with the Commission, Atomic Safety and Licensing Appeal Board, or the presiding officer. [43 FR 17798]

(b) An application for a stay shall be no longer than ten (10) pages, exclusive of affidavits, and shall contain the following: [42 FR 22128]

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section;

(3) In the case of an application to the Commission for stay of decisions or actions by an Atomic Safety and Licensing Appeal Board, a statement where (including record citation, if available) a stay was requested from the Appeal Board and denied. If no such request was made of the Appeal Board, the application should state why it could not have been made; and

(4) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g. telegram, mail, as the method for filing the application with the Commission, Atomic Safety and Licensing Appeal Board, or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. Such answer shall be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties shall be by the same method, e.g. telegram, mail, as the method for filing the application for the stay. [43 FR 17798]

(e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties, and

(4) Where the public interest lies.

(f) An application to the Commission for a stay of a decision or action by an Atomic Safety and Licensing Appeal Board will be denied if a stay was not, but could have been, sought before the Appeal Board. An application for a stay of a decision or action of a presiding officer may be filed before either the Atomic Safety and Licensing Appeal Board or the presiding officer, but not both at the same time. [42 FR 22128]

(g) In extraordinary cases, where prompt application is made under this section, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by telegram. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

(h) A party may file an application for a stay of a decision or action granting or denying a stay. As to a decision or action of a presiding officer the application shall be filed with the Atomic Safety and Licensing Appeal Board. As to a decision or action of the Atomic Safety and Licensing Appeal Board the application shall be filed with the Commission. In each case the procedures and criteria of paragraphs 2.788(a)–(e) shall be followed.

AVAILABILITY OF OFFICIAL RECORDS

§ 2.790 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (d), and (e) of this section, final NRC records and documents,[10] including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rule making proceeding subject to this part shall not, in the absence of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying in the NRC Public Document Room, except for matters that are: [41 FR 11808]

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (ii) are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types or matters to be withheld. [42 FR 12875]

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; [41 FR 11808]

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy,

[10] Such records and documents do not include handwritten notes and drafts.

(iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b)(1) A person who proposes that a document or a part be withheld in whole or part from public disclosure on the ground that it contains trade secrets or privileged or confidential commercial or financial information shall submit an application for withholding accompanied by an affidavit which:

(i) Identifies the document or part sought to be withheld and the position of the person making the affidavit, and

(ii) Contains a full statement of the reasons on the basis of which it is claimed that the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section.

In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper.

The affiant may designate with appropriate markings information submitted in the affidavit as a trade secret or confidential or privileged commercial or financial information within the meaning of § 9.5(a)(4) of this chapter and such information shall be subject to disclosure only in accordance with the provisions of § 9.12 of this chapter.

(2) A person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the bases for and effects of licensing or rule making actions, and that it is within the discretion of the Commission to withhold such information from public disclosure.

(3) The Commission shall determine whether the information sought to be withheld from public disclosure pursuant to this paragraph: (i) is a trade secret or confidential or privileged commercial or financial information; and (ii) if so, should be withheld from public disclosure.

(4) In making the determination required by paragraph (b)(3)(i) of this section, the Commission will consider:

(i) Whether the information has been held in confidence by its owner;

(ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(iii) Whether the information was transmitted to and received by the Commission in confidence;

(iv) Whether the information is available in public sources;

(v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(5) If the Commission determines, pursuant to paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine (i) whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph. If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it shall be returned to the applicant.

(6) Withholding from public inspection shall not affect the right, if any, of persons properly and directly concerned to inspect the document. The Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection: (i) under a protective agreement, by contractor personnel or government officials other than NRC officials; (ii) by the presiding officer in a proceeding; and (iii) under protective order, by parties to a proceeding, pending a decision of the Commission on the matter of whether the information should be made publicly available or when a decision has been made that the information should be withheld from public disclosure. In camera sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available.

(c) If a request for withholding pursuant to paragraph (b) of this section is denied, the Commission will notify an applicant for withholding of the denial with a statement of reasons. The notice or denial will specify a time, not less than thirty (30) days after the date of the notice, when the document will be placed in the Public Document Room. If, within the time specified in the notice, the applicant requests withdrawal of the document, the document will not be placed in the Public Document Room and will be returned to the applicant: Provided, That information submitted in a rule making proceeding which subsequently forms the basis for the final rule will not be withheld from public disclosure by the Commission and will not be returned to the applicant after denial of any application for withholding submitted in connection with that information. If a request for withholding pursuant to paragraph (b) of this section is granted, the Commission will notify the applicant of its determination to withhold the information from public disclosure.

41 FR 11808

41 FR 11808

41 FR 11808

(d) The following information shall be deemed to be commercial or financial information within the meaning of § 9.5(a)(4) of this chapter and shall be subject to disclosure only in accordance with the provisions of § 9.12 of this chapter:

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

(2) Information submitted in confidence to the Commission by a foreign source.

(e) The presiding officer, if any, or the Commission may, with reference to the NRC records and documents made available pursuant to this section, issue orders consistent with the provisions of this section and § 2.740(c).

Subpart H--Rule Making

§ 2.800 Scope of rule making.

This subpart governs the issuance, amendment and repeal of regulations in which participation by interested persons is prescribed under section 553 of title 5 of the United States Code.

§ 2.801 Initiation of rule making.

Rule making may be initiated by the Commission at its own instance, on the recommendation of another agency of the United States, or on the petition of any other interested person.

§ 2.802 Petition for rule making.

(a) Any interested person may petition the Commission to issue, amend or rescind any regulation. The petition should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Branch.

(b) A prospective petitioner is encouraged to confer with the staff prior to the filing of a petition for rulemaking. Questions regarding applicable NRC regulations sought to be amended, the procedures for filing a petition for rulemaking, or requests for a meeting with the appropriate NRC staff to discuss a petition should be addressed to the Director, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Rules and Procedures Branch. A prospective petitioner may also telephone the Division of Rules and Records on (301) 492-7088 to obtain assistance.

(c) Each petition filed under this section shall:

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

(3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unrduly burdensome, deficient, or needs to be strengthened.

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rule making.

(e) If it is determined that the petition includes the information required by paragraph (c) of this section and is complete, the Director, Division of Rules and Records, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will deposit a copy of the docketed petition in the Commission's Public Document Room. Public comment may be requested by publication of a notice of the docketing of the petition in the Federal Register, or, in appropriate cases, may be invited for the first time upon publication in the Federal Register of a proposed rule developed in response to the petition. Publication will be limited by the requirements of section 181 of the Atomic Energy Act of 1954, as amended, and may be limited by order of the Commission.

(f) If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be made within 30 days from the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete, the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition.

(g) The Director, Division of Rules and Records, Office of Administration, or his designee, will prepare on a quarterly basis a summary of petitions for rule making pending before the Commission, including the status thereof. A copy of the report will be available for public inspection and copying in the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555.

§ 2.803 Determination of petition.

No hearing will be held on the petition unless the Commission deems it advisable. If the Commission determines that sufficient reason exists, it will publish a notice of proposed rule making. In any other case, it will deny the petition and will notify the petitioner with a simple statement of the grounds of denial.

§ 2.804 Notice of proposed rule making.

(a) When the Commission proposes to adopt, amend, or repeal a regulation it will cause to be published in the FEDERAL REGISTER a notice of proposed rule making, unless all persons subject to the notice are named and either are personally served or otherwise have actual notice in accordance with law.

(b) The notice will include:

(1) Either the terms or substance of the proposed rule, or a specification of the subjects and issues involved;

(2) The manner and time within which interested members of the public may comment, and a statement that copies of comments may be examined in the Public Document Room;

41 FR 11808 41 FR 11808 46 FR 51718 41 FR 11808 35 FR 11459 27 FR 377 44 FR 61320 44 FR 61320 46 FR 35486 44 FR 61320 27 FR 377

(3) The authority under which the regulation is proposed;

(4) The time, place, and nature of the public hearing, if any;

(5) If a hearing is to be held, designation of the presiding officer and any special directions for the conduct of the hearing; and

(6) Such explanatory statement as the Commission may consider appropriate.

(c) The publication or service of notice will be made not less than fifteen (15) days prior to the time fixed for hearing, if any, unless the Commission for good cause stated in the notice provides otherwise.

§ 2.805 Participation by interested persons.

(a) The Commission will afford interested persons an opportunity to participate in rule making through the submission of statements, information, opinions, and arguments in the manner stated in the notice. The Commission may grant additional reasonable opportunity for the submission of comments.

(b) The Commission may hold informal hearings at which interested persons may be heard, adopting procedures which in its judgment will best serve the purpose of the hearing.

§ 2.806 Commission action.

The Commission will incorporate in the notice of adoption of a regulation a concise general statement of its basis and purpose, and will cause the notice and regulation to be published in the FEDERAL REGISTER or served upon affected persons.

§ 2.807 Effective date.

The notice of adoption of a regulation will specify the effective date. Publication or service of the notice and regulation, other than one granting or recognizing exemptions or relieving from restrictions, will be made not less than thirty (30) days prior to the effective date unless the Commission directs otherwise on good cause found and published in the notice of rule making.

§ 2.808 Authority of the Secretary to Rule on Procedural Matters.

When briefs, motions or other papers listed herein are submitted to the Commission itself, as opposed to officers who have been delegated authority to act for the Commission, the Secretary or the Assistant Secretary are authorized to:

(a) Prescribe schedules for the filing of statements, information, briefs, motions, responses or other pleadings, where such schedules may differ from those elsewhere prescribed in these rules or where these rules do not prescribe a schedule.

(b) Rule on motions for extensions of time;

(c) Reject motions, briefs, pleadings, and other documents filed with the Commission later than the time prescribed by the Secretary or the Assistant Secretary or established by an order, rule, or regulation of the Commission unless good cause is shown for the late filing; and

(d) Prescribe all procedural arrangements relating to any oral argument to be held before the Commission.

§ 2.809 Participation by the Advisory Committee on Reactor Safeguards.

(a) In its advisory capacity to the Commission, the ACRS may recommend that the Commission initiate rulemaking in a particular area. The Commission will respond to such rulemaking recommendation in writing within 90 days, noting its intent to implement, study, or defer action on the recommendation. In the event the Commission decides not to accept or decides to defer action on the recommendation, it will give its reasons for doing so. Both the ACRS recommendation and the Commission's response will be placed in the NRC Public Document Room following transmittal of the Commission's response to the ACRS.

(b) When a rule involving nuclear safety matters within the purview of the ACRS is under development by the NRC Staff, the Staff will ensure that the ACRS is given an opportunity to provide advice at appropriate stages and to identify issues to be considered during rulemaking hearings.

Subpart I—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

§ 2.900 Purpose.

This subpart is issued pursuant to section 181 of the Atomic Energy Act of 1954, as amended, and section 201 of the Energy Reorganization Act of 1974, as amended, to provide such procedures in proceedings subject to this part as will effectively safeguard and prevent disclosure of Restricted Data and National Security Information to unauthorized persons, with minimum impairment of procedural rights.

§ 2.901 Scope.

This subpart applies to all proceedings subject to subpart G.

§ 2.902 Definitions.

As used in this subpart:

(a) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America, which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(b) "Interested party" means a party having an interest in the issue or issues to which particular Restricted Data or National Security Information is relevant. Normally the interest of a party in an issue may be determined by examination of the notice of hearing, the answers and replies.

(c) The phrase "introduced into a proceeding" refers to the introduction or incorporation of testimony or documentary matter into any part of the official record of a proceeding subject to this part.

(d) "National Security Information" means information that has been classified pursuant to Executive Order 12356.

(e) "Party," in the case of proceedings subject to this subpart includes a person admitted as a party pursuant to § 2.714 or in interested State admitted pursuant to § 2.715(e).

§ 2.903 Protection of restricted data and national security information.

Nothing in this subpart shall relieve any person from safeguarding Restricted Data or National Security Information in accordance with the applicable provisions of laws of the United States and rules,

regulations or orders of any Government Agency.

§ 2.904 Classification assistance.

On request of any party to a proceeding or of the presiding officer, the Commission will designate a representative to advise and assist the presiding officer and the parties with respect to security classification of information and the safeguards to be observed.

§ 2.905 Access to restricted data and national security information for parties; security clearances.

(a) Access to restricted data and national security information introduced into proceedings. Except as provided in paragraph (h) of this section, restricted data or national security information introduced into a proceeding subject to this part will be made available to any interested party having the required security clearance: to counsel for an interested party provided the counsel has the required security clearance: and to such additional persons having the required security clearance as the Commission or the presiding officer determined are needed by such party for adequate preparation or presentation of his case. Where the interest of such party will not be prejudiced, the Commission or presiding officer may postpone action upon an application for access under this subparagraph until after a notice of hearing, answers, and replies have been filed.

(b) Access to Restricted Data or National Security Information not introduced into proceedings. (1) On application showing that access to Restricted Data or National Security Information may be required for the preparation of a party's case, and except as provided in paragraph (h) of this section, the Commission or the presiding officer will issue an order granting access to such Restricted Data or National Security Information to the party upon his obtaining the required security clearance, to counsel for the party upon their obtaining the required security clearance, and to such other individuals as may be needed by the party for the preparation and presentation of his case upon their obtaining the required clearance.

(2) Where the interest of the party applying for access will not be prejudiced, the Commission or the presiding officer may postpone action on an application pursuant to this paragraph until after a notice of hearing, answers and replies have been filed.

(c) The Commission will consider requests for appropriate security clearances in reasonable numbers pursuant to this section. A reasonable charge will be made by the Commission for costs of security clearance pursuant to this section.

(d) The presiding officer may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising under this section. Any party affected by a determination or order of the presiding officer under this section may appeal forthwith to the Commission from the determination or order. The filing by the staff of an appeal from an order of a presiding officer granting access to Restricted Data or National Security Information shall stay the order pending determination of the appeal by the Commission.

(e) Application granting access to restricted data or national security information. (1) An application under this section for orders granting access to restricted data or national security information not received from another Government agency will normally be acted upon by the presiding officer, or if a proceeding is not before a presiding officer, by the Commission. (2) An application under this section for orders granting access to restricted data or national security information where the information has been received by the Commission from another Government agency will be acted upon by the Commission.

(f) To the extent practicable, an application for an order granting access under this section shall describe the subjects of Restricted Data or National Security Information to which access is desired and the level of classification (confidential, secret or other) of the information; the reasons why access to the information is requested; the names of individuals for whom clearances are requested; and the reasons why security clearances are being requested for those individuals.

(g) On the conclusion of a proceeding, the Commission will terminate all orders issued in the proceeding for access to Restricted Data or National Security Information and all security clearances granted pursuant to them; and may issue such orders requiring the disposal of classified matter received pursuant to them or requiring the observance of other procedures to safeguard such classified matter as it deems necessary to protect Restricted Data or National Security information.

(h) Refusal to grant access to restricted data or national security information. (1) The Commission will not grant access to restricted data or national security information unless it determines that the granting of access will not be inimical to the common defense and security. (2) Access to Restricted Data or National Security Information which has been received by the Commission from another Government agency will not be granted by the Commission if the originating agency determines in writing that access should not be granted. The Commission will consult the originating agency prior to granting access to such data or information received from another Government agency.

§ 2.906 Obligation of parties to avoid introduction of restricted data or national security information.

It is the obligation of all parties in a proceeding subject to this part to avoid, where practicable, the introduction of Restricted Data or National Security Information into the proceeding. This obligation rests on each party whether or not all other parties have the required security clearance.

§ 2.907 Notice of intent to introduce restricted data or national security information.

(a) If, at the time of publication of a notice of hearing, it appears to the staff that it will be impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding, it will file a notice of intent to introduce Restricted Data or National Security Information.

(b) If, at the time of filing of an answer to the notice of hearing it appears to the party filing that it will be impracticable for the party to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall state in the answer a notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(c) If, at any later stage of a proceeding, it appears to any party that it will be impracticable to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall give to the other parties prompt written notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(d) Restricted Data or National Security Information shall not be introduced into a proceeding after publication of a

41 FR 53328

41 FR 53328

41 FR 53328

notice of hearing unless a notice of intent has been filed in accordance with § 2.908, except as permitted in the discretion of the presiding officer when it is clear that no party or the public interest will be prejudiced.

§ 2.908 Contents of notice of intent to introduce restricted data or other national security information.

(a) A party who intends to introduce Restricted Data or other National Security Information shall file a notice of intent with the Secretary. The notice shall be unclassified and, to the extent consistent with classification requirements, shall include the following:

(1) The subject matter of the Restricted Data or other National Security Information which it is anticipated will be involved;

(2) The highest level of classification of the information (confidential, secret, or other);

(3) The stage of the proceeding at which he anticipates a need to introduce the information; and

(4) The relevance and materiality of the information to the issues on the proceeding.

41 FR 53328

(b) In the discretion of the presiding officer, such notice, when required by § 2.907(c), may be given orally on the record.

§ 2.909 Rearrangement or suspension of proceedings.

In any proceeding subject to this part where a party gives a notice of intent to introduce Restricted Data or other National Security Information, and the presiding officer determines that any other interested party does not have required security clearances, the presiding officer may in his discretion:

(a) Rearrange the normal order of the proceeding in a manner which gives such interested parties an opportunity to obtain required security clearances with minimum delay in the conduct of the proceeding.

(b) Suspend the proceeding or any portion of it until all interested parties have had opportunity to obtain required security clearances. No proceeding shall be suspended for such reasons for more than 100 days except with the consent of all parties or on a determination by the presiding officer that further suspension of the proceeding would not be contrary to the public interest.

(c) Take such other action as he determines to be in the best interest of all parties and the public.

§ 2.910 Unclassified statements required.

(a) Whenever Restricted Data or other National Security Information is introduced into a proceeding, the party offering it shall submit to the presiding officer and to all parties to the proceeding an unclassified statement setting forth the information in the classified matter as accurately and completely as possible.

(b) In accordance with such procedures as may be agreed upon by the parties or prescribed by the presiding officer, and after notice to all parties and opportunity to be heard thereon, the presiding officer shall determine whether the unclassified statement or any portion of it, together with any appropriate modifications suggested by any party, may be substituted for the classified matter or any portion of it without prejudice to the interest of any party or to the public interest.

41 FR 53328

(c) If the presiding officer determines that the unclassified statement, together with such unclassified modifications as he finds are necessary or appropriate to protect the interest of other parties and the public interest, adequately sets forth information in the classified matter which is relevant and material to the issues in the proceeding, he shall direct that the classified matter be excluded from the record of the proceeding. His determination will be considered by the Commission as a part of the decision in the event of review.

(d) If the presiding officer determines that an unclassified statement does not adequately present the information contained in the classified matter which is relevant and material to the issues in the proceeding, he shall include his reasons in his determination. This determination shall be included as part of the record and will be considered by the Commission in the event of review of the determination.

(e) The presiding officer may postpone all or part of the procedures established in this section until the reception of all other evidence has been completed. Service of the unclassified statement required in paragraph (a) of this section shall not be postponed if any party does not have access to Restricted Data or other National Security Information.

§ 2.911 Admissibility of restricted data or other national security information.

A presiding officer shall not receive any Restricted Data or other National Security Information in evidence unless:

(a) The relevance and materiality of the Restricted Data or other National Security Information to the issues in the preceeding, and its competence, are clearly established; and

(b) The exclusion of the Restricted Data or other National Security Information would prejudice the interests of a party or the public interest.

§ 2.912 Weight to be attached to classified evidence.

In considering the weight and effect of any Restricted Data or other National Security Information received in evidence to which an interested party has not had opportunity to receive access, the presiding officer and the Commission shall give to such evidence such weight as is appropriate under the circumstances, taking into consideration any lack of opportunity to rebut or impeach the evidence.

§ 2.913 Review of Restricted data or other National Security Information received in evidence.

At the close of the reception of evidence, the presiding officer shall review the record and shall direct that any Restricted Data or other National Security Information be expunged from the record where such expunction would not prejudice the interests of a party or the public interest. Such directions by the presiding officer will be considered by the Commission in the event of review of the determinations of the presiding officer.

§ 2.914 [Deleted 40 FR 44124.]

[1] Except as the context may otherwise indicate, this statement is also generally applicable to the conduct of authorization proceedings conducted under Part 115, Procedures for Review of Certain Nuclear Reactors Exempted from Licensing Requirements, and to licensing proceedings of the type described in the statement which may be conducted by a hearing examiner as the presiding officer.

[2] In the event of any conflict between the provisions of this appendix and any section of this part, the section governs.

APPENDIX A—STATEMENT OF GENERAL POLICY AND PROCEDURE: CONDUCT OF PROCEEDINGS FOR THE ISSUANCE OF CONSTRUCTION PERMITS AND OPERATING LICENSES FOR PRODUCTION AND UTILIZATION FACILITIES FOR WHICH A HEARING IS REQUIRED UNDER SECTION 189A OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED*

37 FR 15127

The following statement of general policy and procedure explains in detail the procedures which the Atomic Energy Commission expects to be followed by atomic safety and licensing boards in the conduct of proceedings relating to the issuance of construction permits for nuclear power and test reactors and other production or utilization facilities for which a hearing is mandatory under section 189a. of the Atomic Energy Act of 1954, as amended (the Act).[1] The provisions are also applicable to proceedings for the issuance of operating licenses for such facilities, except as the context would otherwise indicate, or except as indicated in section VIII. Section VIII sets out the procedures specifically applicable to operating license proceedings. The Statement reflects the Commission's intent that such proceedings be conducted expeditiously and its concern that its procedures maintain sufficient flexibility to accommodate that objective. This position is founded upon the recognition that fairness to all the parties in such cases and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays. These factors take on added importance in nuclear power reactor licensing proceedings where the growing national need for electric power and the companion need for protecting the quality of the environment call for decision making which is both sound and timely. The Commission expects that its responsibilities under the Atomic Energy Act of 1954, the National Environmental Policy Act of 1969 and other applicable statutes, as set out in the statement which follows, will be carried out in a manner consistent with this position in the overall public interest.

37 FR 15127

Atomic safety and licensing boards are appointed from time to time by the Commission or the Chairman of the Atomic Safety and Licensing Board Panel to conduct hearings in licensing cases under the authority of section 191 of the Act. Section 191 authorizes the Commission to establish one or more atomic safety and licensing boards to conduct public hearings and to make intermediate or final decisions in administrative proceedings relating to granting, suspending, revoking or amending licenses issued by the Commission. It requires that each board consist of one member who is qualified in the conduct of administrative proceedings and two members who have such technical or other qualifications as the Commission deems appropriate to the issues to be decided. Members of each board may be appointed by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel from a panel selected from private life, the staff of the Commission or other Federal agencies.

45 FR 62027

An Atomic Safety and Licensing Board may at its discretion appoint special assistants to the Board from the membership of the Atomic Safety and Licensing Board Panel established by the Commission. These special assistants are to be employed to facilitate the hearing process and improve the quality of the record produced for review. The special assistants may serve as technical interrogators in their individual fields of expertise, alternate Atomic Safety and Licensing Board members to sit with the Board and participate in the evidentiary sessions on the issue for which the alternate members were designated, Special Masters to hear evidentiary presentations by the parties on specific technical matters upon the consent of all parties, or informal consultants to brief the board prior to the hearing on the general technical background of subjects involving complex issues. The term "alternate board member" as a "special assistant" within the meaning of 10 CFR 2.722(a)(3) should not be confused with the use of the term "alternate" in 10 CFR 2.721(b). In the latter situation the "alternate" is a substitute for a member of a Board who becomes unavailable. As a special assistant, the "alternate" sits with the three-member Board and not instead of the Board or any of its members.

I. PRELIMINARY MATTERS

37 FR 15127

(a) A public hearing is announced by the issuance of a notice of hearing, published in the FEDERAL REGISTER as soon as practicable after the application has been docketed, signed by the Secretary of the Commission stating the nature of the hearing and the issues to be considered. The time and place of the first prehearing conference pursuant to § 2.751a. will ordinarily be stated in the notice of hearing. Unless the initial notice of hearing states the time and place of the hearing, and the Chairman and other members of the Atomic Safety and Licensing Board that will conduct the hearing, those matters will be the subject of further notice in the FEDERAL REGISTER after publication of the initial notice of hearing. It is the Commission's policy and practice to begin the evidentiary hearing in the vicinity of the site of the proposed facility. The notice of hearing also states the procedures whereby persons may seek to intervene or make a limited appearance and explains the differences between those forms of participation in the proceeding, and states the times and places of the availability, in an appropriate office near the site of the proposed facility, of the notice of hearing, an updated copy of the application, the report of the Advisory Committee on Reactor Safeguards (ACRS), the staff safety evaluation, the applicant's environmental report, the Commission's detailed statement on environmental considerations, the proposed construction permit or operating license and the transcripts of the prehearing conference and the hearing.

(b) In fixing the time and place of any conference, including prehearing conferences, or of any adjourned session of the evidentiary hearing, due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as of the Board members, the nature of such conference or adjourned session, and the public interest. Adjourned sessions of hearings may be held in the Washington, D.C. area if all parties so stipulate. If the parties disagree, and any party considers that there are valid reasons for holding such session in the Washington, D.C. area, the matter should be referred to the Atomic Safety and Licensing Appeal Board for resolution.

*In the event of any conflict between the provisions of this appendix and any section of this part, the section governs.

[1] Except as the context may otherwise indicate, this statement is also generally applicable to licensing proceedings of the type described in the statement which may be conducted by a hearing examiner as the presiding officer.

42 FR 22882

(c)(1) The Commission or the Atomic Safety and Licensing Board may consider on their own initiative, or a party may request the Commission or the board to consider, a particular issue or issues separately from, and prior to, other issues relating to the effect of the construction and/or operation of the facility upon the public health and safety, the common defense and security, and the environment or in regard to anti-trust considerations. If the Commission or the board determines that a separate hearing should be held, the notice of hearing or other appropriate notice will state the time and place of the separate hearing on such issue or issues. the board designated to conduct the hearing will issue an initial decision, if deemed appropriate, which will be dispositive of the issue(s) considered at the hearing, in the absence of an appeal or Commission or Appeal Board review pursuant to §§ 2.760 and 2.762, before the hearing on, and consideration of, the remaining issues in the proceeding.

(2) In a proceeding relating to the issuance of a construction permit for a facility which is subject to the environmental impact statement requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 and Part 51 of this chapter and which is a utilization facility for industrial or commercial purposes or is a testing facility, separate hearings may be held and decisions may be issued on National Environmental Policy Act and site suitability issues and other specified issues as provided by Subpart F and § 2.761a.

37 FR 15127

(d) Prior to a hearing, board members should review and become familiar with: The record of any relevant prior proceedings in the case, including initial decisions and Commission orders, the application, the ACRS report, the staff safety evaluation, the applicant's environmental report, the Commission's detailed statement on environmental considerations, all other papers filed in the proceeding, the Commission's rules of practice, and other regulations or published statements of policy of the Commission as may be pertinent to the proceeding.

(e) At any time when a board is in existence but is not actually in session, the chairman has all the powers of the board to take action on procedural matters. The chairman may have occasion, when the board is not in session, to dispose of preliminary procedural requests including, among other things, motions by parties relating to the conduct of the hearing. He may wish to discuss such requests with the other members of the board before ruling on them. No interlocutory appeal[2] may be taken by a party as a matter of right from a ruling of the chairman or the board. The board should refer the challenged ruling to the Commission for a final decision if, in its judgment, a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. This authority should be exercised sparingly, and only when deemed essential in fairness to the parties or the public.

37 FR 15127

II. PREHEARING CONFERENCES

43 FR 17798

(a) A special prehearing conference will be held, within ninety (90) days after the notice of hearing has been published, or such other time as the Commission or the Board may deem appropriate, in addition to the standard prehearing conference provided by § 2.752. The special prehearing conference, authorized by § 2.751a, should be used to permit identification of key issues; take steps necessary for further identification of the issues; consider all intervention petitions to allow preliminary or final determination as to the parties; and establish a schedule for further actions in the proceeding.

37 FR 15127

(b) Within sixty (60) days after discovery has been completed,[3] or such other time as the presiding officer or the Commission deems appropriate, a second prehearing conference—the prehearing conference provided by § 2.752—is held to consider simplification, clarification, and specification of the issues; consider amendments to the pleadings; obtain stipulations and admissions of facts and of the contents and authenticity of documents to avoid unnecessary proof; identification of witnesses; the setting of a hearing schedule; and such other matters as may aid in the orderly disposition of the hearing.

37 FR 15127

(c) A transcript of each prehearing conference will be prepared. The board will issue an order after the conclusion of the special prehearing conference which recites the action taken at the conference and agreements by the parties, identifies the key issues in controversy, makes a preliminary or final determination as to the parties, and provides for submission of status reports on discovery by the parties. The board will also issue an order after the conclusion of the second prehearing conference that specifies the issues in controversy in the proceeding. Each order shall be served upon all parties to the proceeding. Objections to such order may be filed by a party within five (5) days, or, in the case of the staff, within ten (10) days. 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. As specified in § 2.752, the order shall control the subsequent course of the proceeding unless modified for good cause.

(d) Prehearing conferences are open to the public except under exceptional circumstances involving such matters as classified information and certain privileged information not normally a part of the hearing record.

(e) The applicant, the staff and other parties are required to provide each other and the board with copies of prepared testimony in advance of its being offered at the hearing. A schedule may be established at the second prehearing conference for exchange of prepared testimony. Prepared testimony is filed in the Commission's public document room and is available for public inspection. When the staff has reached its conclusions with respect to the application and prepared a safety evaluation, the safety evaluation will be made available—a point of time which may or may not be prior to the hearing.

[2] An interlocutory appeal means an appeal to the Commission from a ruling made by the board during the time between the issuance of a notice of hearing and the issuance of the initial decision.

[3] "Discovery", for this purpose, does not include production of the ACRS report, the staff's safety evaluation, or the detailed statement on environmental considerations prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee.

III. INTERVENTION AND LIMITED APPEARANCES

(a)(1) As required by § 2.714, a person who wishes to intervene must set forth, in a petition for leave to intervene, his interest in the proceeding and how the interest may be affected by Commission action. Petitions for leave to intervene shall, as a basis for enabling the board or the Commission to determine how the petitioner's interest may be affected by the proceeding, set forth (i) the nature of his right under the Act to be made a party to the proceeding, (ii) the nature and extent of the interest that may be affected by the proceeding, and (iii) the effect of any order which may be entered in the proceeding on the petitioner's interest. The petition must identify the specific aspects as to which the petitioner wishes to intervene and set forth with particularity the facts pertaining to his interest. The petitioner must file a supplement to his petition containing his contention(s) and basis therefor not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a. After consideration of any answers to the petition, the board will rule on the petition. If the board finds that the petitioner's interest is limited to one or more of the issues in the proceeding, the intervenor's participation will be limited to those issues.

43 FR 17798

Petitions and supplements thereto which set forth contentions relating only to matters outside the jurisdiction of the Commission will be denied. In any event, the granting of a petition for leave to intervene does not operate to enlarge the issues, or become a basis for receipt of evidence, with respect to matters beyond the jurisdiction of the Commission.

(2) Petitions for leave to intervene which are not filed within the time specified in the notice of hearing will not be granted unless the board determines that the petition should be granted based upon paragraph (a)(1) of this section and upon a balancing of (i) good cause, if any, for petitioner's failure to file on time, (ii) the availability of other means whereby the petitioner's interest will be protected, (iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record, (iv) the extent to which petitioner's interest will be represented by existing parties, and (v) the extent which the petitioner's participation will broaden the issues or delay the proceedings.

(3) Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have all the rights of the applicant to participate fully in the conduct of the hearing, such as the examination and cross-examination of witnesses, with respect to their contentions related to the matters at issue in the proceeding.

(4) If more than one person who has been granted leave to intervene has substantially the same kind of interest that may be affected by the proceeding, and raises the same basic questions, the board or the Commission may order those persons to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact and conclusions of law and argument, unless such consolidation cannot be accomplished without prejudice to the rights of a party.

(b) A person who does not wish to, or is not qualified to become a party may be permitted at the discretion of the board, to make a limited appearance pursuant to § 2.715. Persons permitted to make limited appearances do not become parties, but should be permitted to make statements at such stage of the proceeding as the board may consider appropriate. A person making a limited appearance may only make an oral or written statement on the record, and may not participate in the proceeding in any other way. The board may wish to limit the length of oral statements. A member of the public does not have the right to participate unless he has been granted the right to intervene as a party or the right of limited appearance for the purpose of making a statement.

37 FR 15127

IV. DISCOVERY

(a) Once the key issues in controversy are identified in the special prehearing conference order (§ 2.751a.(d)), discovery may proceed and will be limited to those matters. In no event should the parties be permitted to use discovery procedures to conduct a "fishing expedition" or to delay the proceeding.

(b) Under the Commission's rules of practice, discovery permitted by §§ 2.720, 2.740, 2.740a, 2.740b, 2.741, 2.742, and 2.744 must be completed by the second prehearing conference, except upon leave for good cause shown.

(c) Depositions, interrogatories and document production between parties other than the staff are obtainable on notice or request to the other party and without leave of the Commission or the board, in line with the Federal rules of Civil Procedure.

(d) In general, staff documents that are relevant to a proceeding will be publicly available as a matter of course unless there is a compelling justification for their nondisclosure. Therefore, document discovery directed at the staff will be restricted, as provided in § 2.744, since most staff documents will be publicly available and should reasonably disclose the basis for the staff's position. Formal discovery of documents against the staff will be limited to cases where it concerns a matter necessary to a proper decision in a case and the information sought is not obtainable elsewhere. Discovery as a legitimate means of obtaining information will not be inhibited, but in view of the comprehensive body of information routinely available without request, there should be minimum need to resort to time consuming discovery procedures. Discovery against the staff (and other NRC personnel, including consultants) by way of deposition is permitted upon a showing of exceptional circumstances. Interrogatories may be addressed to the staff where the information is necessary to proper decision in the case and not obtainable elsewhere.

V. THE HEARING

The board should use its powers under §§ 2.718 and 2.757 to assure that the hearing is focused upon the matters in controversy among the parties and that the hearing process for the resolution of controverted matters is conducted as expeditiously as possible, consistent with the development of an adequate decisional record.

The following procedures should be observed in the conduct of public hearings:

(a) Preliminary:

(1) A verbatim transcript will be made of the hearing.

(2) The Chairman should convene the hearing by stating the title of the proceeding and describing its nature.

(3) He should state the date, time, and place at which the prehearing conferences were held, and identify the persons participating in them. He should summarize the second prehearing conference order.

(4) He should explain the procedures for the conduct of the hearing. He should request that counsel for the parties identify themselves on the record, and provide them with the opportunity to make opening statements of their respective positions.

37 FR 15127

(5) He should describe, for the benefit of members of the public who may be present, the respective roles of the board, the ACRS and the staff, and the Commission procedures for review of the decision. He should also describe the continuing review and inspection surveillance conducted by the Commission after a construction permit or an operating license has been issued.

(b)(1) The Chairman should call attention to the provisions of § 2.715 for participation by limited appearance. He should briefly explain these provisions and the rights of persons who are permitted to make limited appearances.

(2) The Chairman should inquire of those in attendance whether there are any who wish to participate in the hearing by limited appearance.

(3) Should any person seek leave to intervene when the hearing has been convened, he must set forth, with particularity in a written petition, the reasons why it was not possible to file a petition within the time prescribed in the notice of hearing, as described in Section III, to afford a basis for the board to determine whether or not good cause has been shown for the untimely filing. In granting a petition for leave to intervene which is not timely filed, the board will impose such conditions as are appropriate to minimize any delay in the proceeding.

(4) A person making a limited appearance may want not only to state his position, but to raise questions which he would like to have answered. This should be permitted to the extent the questions are within the scope of the proceeding as defined by the issues set out in the notice of hearing, the prehearing conference order, and any later orders. Usually such persons should be asked to make their statements and raise their questions early in the proceeding so that the board will have an opportunity to be sure that relevant and meritorious questions are properly dealt with during the course of the hearing.

37 FR 15127

(5) It is the Commission's view that the rules governing intervention and limited appearances are necessary in the interest of orderly proceedings. The Commission also believes that through these two methods of public participation all members of the public are assured of the right to participate by a method appropriate to their interest in the matter. This should be fully explained at the beginning of the hearing. In some cases the board may feel that it must deny an application to intervene but that it can still accommodate the desire of the person involved by allowing him to make a statement and raise questions under the limited appearance rule.

(6) Boards have considerable discretion as to the manner in which they accommodate their conduct of the hearing to local public interest and the desires of local citizens to be heard. Particularly in cases where it is evident that there is local concern as to the safety of the proposed plant, boards should so conduct the hearing as to give appropriate opportunity for local citizens to express their views, while at the same time protecting the legal interests of all parties and the public interest in an orderly and efficient licensing process.

(7) In some cases, argument and further hearing can add nothing to the filings of the parties. In those cases the board is authorized, pursuant to § 2.749, on motion, to render a decision, if the filings in the proceeding and other materials show that there is no genuine issue as to any material fact. However, in proceedings involving construction permits, this procedure may be used only for determining subordinate issues and not the ultimate issues as to whether the construction permit should be issued.

(c) Opening statements:

(1) It is anticipated that the applicant, who has the burden of proof will, at an appropriate time early in the proceeding, make an oral statement describing in terms that will be readily understood by the public, the principal safety and environmental considerations involved in carrying out the activity sought to be authorized.

(2) Other parties to the proceeding may also make an oral opening statement describing their position on the proposed licensing action.

37 FR 15127

(d) Evidence:

(1) Pursuant to § 2.732, the applicant has the burden of proof.

(2) The parties are required to submit direct testimony in written form and serve copies of such prepared written testimony of all parties pursuant to the schedule established at the second prehearing conference—in any event, at least 15 days in advance of the session of the hearing at which such testimony is to be presented, as provided by § 2.743(b), unless the board orders otherwise on the basis of objections presented. The staff's position is reflected primarily in the safety evaluation and final detailed environmental statement. Consequently, the staff will not present its case until these documents are available. The use of such advance written testimony is expected to expedite the hearing process.

(3) The testimony of all witnesses will be given under oath. These witnesses may be collectively sworn at the opening of the hearing or if additional witnesses are called upon to testify at a subsequent stage they may be sworn at the time of their appearance. There is ordinarily no need for oral recital of prepared testimony unless the Board considers that some useful purpose will be served.

(4) The proceedings should be conducted as expeditiously as practicable, without impairing the development of a clear and adequate record. The order of presenting testimony may be freely varied in the conduct of the hearing. The Board may find it helpful to take expert testimony from witnesses on a roundtable basis after the receipt in evidence of prepared testimony.

(5) To prevent unnecessary delays and an unnecessarily large record, the Board may, pursuant to § 2.757, limit cumulative testimony, strike argumentative, repetitious, cumulative, or irrelevant evidence, take other necessary and proper steps to prevent argumentative, repetitious or cumulative cross examination, and impose appropriate time limitations on arguments.

(6) Documentary evidence may be offered in evidence as provided in § 2.743. Such evidence offered during the course of the hearing should be described by counsel, and furnished to the reporter for marking. Documents offered for marking should be numbered in order of receipt. On identification of a document, it may be offered in evidence.

(7) Objections may be made by counsel to any questions or any line of questioning, and to the admission of any document and should be ruled upon by the board. The board may admit the evidence, may sustain the objection, or may receive the evidence, reserving for later determination the question of admissibility. In passing on objections, the board, while not bound to view proferred evidence according to its admissibility under strict application of the rules of evidence in judicial proceedings, should exclude evidence that is irrelevant to issues in the case as defined in the notice of hearing or the prehearing conference order, or that pertains to matters outside the jurisdiction of the board or the Nuclear Regulatory Commission. Irrelevant material in prepared testimony submitted in advance under § 2.743(b) may be subject to a motion to strike under the procedures provided in § 2.730.

(8) Use of scientifically or technically trained persons who are not attorneys to conduct direct or cross-examination on behalf of a party is provided for in § 2.733. This procedure is a privilege, not a right.

and may be granted to further the conduct of the hearing. Before permitting such a pet[illegible]onduct examination of witnesses, the board must determine (i) that he has technical or scientific qualifications, (ii) that he has read the written testimony and any documents which are to be the subject of his examination, and (iii) that he has prepared himself to conduct a meaningful and expeditious examination. Permission to conduct examination will be limited to the areas in which the interrogator is shown to be qualified. The party on whose behalf the interrogator conducts the examination and his attorney are responsible for the interrogator's conduct of examination or cross-examination.

(9) The extent to which challenges to NRC regulations can be made in a licensing proceeding is limited. A party may petition for waiver of or exception to the application of a specified NRC rule or regulation to an aspect of the subject matter of the proceeding. The party must file a petition and an affidavit that identifies the specific aspect of the subject matter of the proceeding as to which application of the rule or regulation would not serve the purpose for which the regulation was adopted and that sets forth with particularity the special circumstances alleged to justify a waiver or exception on that ground (§ 2.758). Upon a finding by the board, based on the petition and affidavits and any material submitted by other parties, that the party has not made a prima facie case, no evidence, discovery, or argument will be allowed on the matter. If the Board finds that such a showing has been made, it will certify the matter, without ruling, directly to the Commission for a determination as to whether the application of the regulation to a particular aspect of the subject matter of the proceeding should be waived or an exception made.

(10) The Commission has recognized the public interest in achieving fair and reasonable settlement of contested proceedings (§ 2.759). Therefore, to the extent not inconsistent with the Act, fair and reasonable settlements are encouraged, either as to particular issues in a proceeding or the entire proceeding.

(11) Unless testimony is being taken on a roundtable basis or there is some occasion for clarification of testimony as rendered, the board may wish to reserve its questions until the parties have completed questioning of the witnesses, since counsel for the respective parties will generally be prepared to develop the various lines of pertinent questions.

(12) Conferences for the clarification of matters between the board and the parties, or the formulation of more meaningful questions, may be used to expedite the hearing and simplify the record. Informal conferences, including telephone conferences, should be encouraged to this end.

(13) The board should ordinarily not adjourn the hearing once it has begun, except as the hearing may be divided into segments to permit consideration of discrete areas, such as (i) radiological health and safety or (ii) environmental impact. To the extent practicable, legal questions should be resolved prior to the hearing. If the board believes that additional information is required in the presentation of the case, it would be expected to request the applicant or other party to supplement the presentation. If a recess should prove necessary to obtain such additional evidence, the recess should ordinarily be postponed until available evidence has been received.

(14) Many of the time limitations prescribed in part 2 were set to allow the maximum time for the parties to the proceedings to perform various activities. Where the activities covered by the limitations can be performed in less time, the time limits may be reduced by order of the board, if appropriate, where such action would not prejudice a party. Similarly, in any case in which a time limit is not set by part 2, the board should impose reasonable time limits.

(e) Record:

(1) The transcript of testimony and the exhibits, together with all of the papers and requests filed in a proceeding, constitute the record for decision, except to the extent that official notice is taken.

(2) Generally speaking, a decision by a board must be made on the basis of evidence which is in the record of the proceeding. A board, however, is expected to use its expert knowledge and experience in evaluating and drawing conclusions from the evidence that is in the record. The board may also take account of and rely on certain facts which do not have to be "proved" since they are "officially noticed"; these facts do not have to be "proved" since they are matters of common knowledge. Pursuant to § 2.743(i) "official notice" may be taken of any fact of which judicial notice might be taken by the courts of the United States and of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before the final decision, and each party adversely affected by the decision must be afforded an opportunity to controvert the noticed fact. (For example, a board might take "official notice" of the fact that high level wastes are encountered mainly as liquid residue from fuel reprocessing plants.) Matters which are "officially noticed" by a board furnish the same basis for findings of fact as matters which have been placed in evidence and proved in the usual sense.

(f) Participation by board members:

(1) In contested proceedings, the board will determine controverted matters as well as decide whether the findings required by the Act and the Commission's regulations should be made and whether, in accordance with Part 51, the construction permit should be issued as proposed. Thus, in such proceedings, the board will determine the matters in controversy and may be called upon to make technical judgments of its own on those matters. As to matters pertaining to radiological health and safety which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the staff and ACRS, and they are authorized to rely upon the testimony of the staff, the applicant, and the conclusions of the ACRS, which are not controverted by any party.

(2) In an uncontested case, boards are neither required nor expected to duplicate the radiological safety review already performed by the staff and the ACRS and they are authorized to rely upon the testimony of the staff and the applicant, and the conclusions of the ACRS. The role of the board is not to conduct a de novo evaluation of the application, but rather to decide whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff, including the environmental review pursuant to the National Environmental Policy Act of 1969, has been adequate, to support the findings proposed to be made by the Director of Regulation and the issuance of the construction permit proposed by the Director of Regulation. In doing so, the board is expected to be mindful of the fact that it is the applicant, not the staff, who is the proponent of the construction permit and who has the burden of proof.

(3) Whether the construction permit proceeding is contested or uncontested, the board will, as to environmental impact matters, (a) determine whether the requirements of section 102(2) (C) and (E) of the National Environmental Policy Act of 1969 and Part 51 of this chapter has been complied with; (b) independently consider the final balance among conflicting factors contained in the record, with a view to determining the appropriate action to be taken; and (c) determine whether the construction permit should be granted, denied, or appropriately conditioned to protect environmental values.

(2) A question may be certified to the Commission or the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interests of a party. For example, a board may find it appropriate to certify novel questions as to the regulatory jurisdiction of the Commission or the right of persons to intervene.

(g) Close of hearing:

(1) If, at the close of the hearing, the board should have uncertainties with respect to the matters in controversy because of a need for a clearer understanding of the evidence which has already been presented, it is expected that the board would normally invite further argument from the parties—oral or written or both—before issuing its initial decision. If the uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted in writing with opportunity for the other parties to reply or reopen the hearing for the taking of further evidence, as appropriate. If either of such courses is followed, it is expected that the applicant would normally be afforded the opportunity to make the final submission.

(2) A board should give each party the opportunity to make a brief closing statement.

(3) A schedule should be set by the board and recorded, either in the transcript or by written order, of the dates upon which the parties are directed by the board to file proposed findings of fact and conclusions of law. In uncontested cases, the proposed findings will ordinarily be extremely brief. In contested proceedings, proposed findings of fact and conclusions of law submitted by the parties may be more detailed. While brevity in such submissions is encouraged, the proposed findings and conclusions should be such as to reflect the position of parties submitting them, and the technical and factual basis therefor.

(4) The board should dispose of any additional procedural requests.

(5) The chairman should formally close the hearing.

37 FR 15127 37 FR 15127 37 FR 15127 37 FR 15127 43 FR 7209 37 FR 24736 43 FR 7209

VI. POSTHEARING PROCEEDINGS, INCLUDING THE INITIAL DECISION

(a) A board, acting through the Chairman, should dispose of procedural requests made after the close of the hearing, including motions of the parties for correction of the transcript. Responses to requests and motions of the parties are made part of the record by issuance of written orders.

(b) On receipt of proposed findings and conclusions from the parties, the board should prepare the initial decision. Under the Administrative Procedure Act and the Commission's regulations, the decision should include:

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on, if any, in making the decision;

(3) The appropriate ruling, order, or denial or relief, with the effective date and time within which exceptions to the initial decision may be filed;

(4) The time when the decision becomes final.

(c) Issues to be decided by the board:

(1) In a contested proceedings for the issuance of a construction permit, the board will determine the following issues:

(i) Whether in accordance with the provisions of, § 50.35(a) of this chapter:

(a) The applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public;

(b) Such further technical or design information as may be required to complete the safety analysis and which can reasonably be left for later consideration, will be supplied in the final safety analysis report;

(c) Safety features or components, if any, which requires research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features and components; and

(d) On the basis of the foregoing, there is reasonable assurance that

(1) Such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, and

(2) Taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public.

(ii) Whether the applicant is technically qualified to design and construct the proposed facility;

(iii) Whether the applicant is financially qualified to design and construct the proposed facility, except that this subject shall not be an issue if the applicant is an electric utility seeking a license to construct a production or utilization facility of the type described in § 50.21(b) or 50.22;

(iv) Whether the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;

(v) Whether, with respect to the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act, in accordance with Part 51 of this chapter, the construction permit should be issued as proposed.

(2) In an uncontested proceeding for the issuance of a construction permit, the board will, without conducting a de novo evaluation of the application, determine:

(i) Whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate, to support the findings proposed to be made and required by the Act for the issuance of the construction permit proposed by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, and

(ii) Whether the review conducted pursuant to the National Environmental Policy Act of 1969 has been adequate.

(3) Regardless of whether the proceeding is contested or uncontested, the board will, in its initial decision, in accordance with Part 51 of this chapter:

(i) Determine whether the requirements of section 102(2)(A), (C) and (E) of the National Environmental Policy Act and Part 51 of this chapter have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

(d) It is expected that ordinarily a board will render its initial decision within 35 days after its receipt of proposed findings of fact and conclusions of law filed by the parties in a contested case and within 15 days after receipt of such proposed findings and conclusions in an uncontested case.

(e) The initial decision will be transmitted to the Chief, Docketing and Service Section, Office of the Secretary, for issuance.

(f) After the board's initial decision is issued, the entire record of the hearing, including the board's initial decision, will be sent to the Commission or the Appeal Board, as appropriate, for review. In the course of this review, the Commission may allow the board's decision to become the final decision of the Commission, may modify a board decision, or may send the case back to the board for additional testimony on particular points or for further consideration of particular issues.

VII. GENERAL

(a) Two members, being a majority of the board, constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings. The vote of a majority controls in any decision by a board, including rulings during the course of a hearing as well as formal orders and the initial decision. A dissenting member is of course, free to express his dissent and the reasons for it in a separate opinion for the record.

(b) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel may designate a technically qualified alternate or an alternate qualified in the conduct of administrative proceedings, or both, for a board. The designation of an alternate is discretionary. Alternates may be designated where the Commission (or the Chairman of the Atomic Safety and Licensing Board Panel) in its judgment believes that a proceeding involves factors that warrant the continuing assignment and presence of an alternate. If any alternates are designated before the hearing, they will receive copies and become familiar with the application and other documents filed by the parties prior to the start of the hearing. It is expected that an alternate will be constituted or appointed by the Commission or the Chairman of the Atomic Safety and Licensing Board Panel as a member of the board in situations where a technically qualified member of the board, or the member qualified in the conduct of administrative proceedings, becomes unavailable.

(c) Sections 2.719 and 2.780 specify the conditions on which there is permitted to be consultation between Commissioners and boards, on the one hand, and the staff, on the other hand, in initial licensing proceedings other than contested proceedings. Section 2.719 also permits a board, in the same type of proceeding, to consult with members of the panel from which members of the boards are drawn. Except for consultation by a board with the Chairman or Vice Chairman of the Atomic Safety and Licensing Board Panel, it is expected that such consultation by a board, when it occurs, will relate to specific technical matters rather than to matters of broad policy.

Such intraagency consultation and communications are not permitted in contested proceedings. A board may, however, obtain information from the Chairman or Vice Chairman of the Atomic Safety and Licensing Board Panel for the purpose of identifying relevant decisions or statements of Commission policy. It should also be noted that the provisions of § 2.780 prohibiting intraagency consultation and communication in contested proceedings are not applicable to matters certified to the Commission or to the Atomic Safety and Licensing Appeal Board under the Commission's rules in §§ 2.720(h) and 2.744(e), since those matters are not deemed to involve substantive matters at issue in a proceeding on the record.

VIII. PROCEDURES APPLICABLE TO OPERATING LICENSE PROCEEDINGS

(a) This section sets out certain differences in procedure from those described in sections I-VII above, which are required by the fact that the proceeding is for the issuance of an operating license rather than a construction permit. Otherwise, the provisions of sections I through VII of this statement of general policy also apply to an operating license proceeding, except as the context requires otherwise.

43 FR 7209 · 43 FR 7209 · 47 FR 13750 · 39 FR 26279 · 40 FR 51995 · 37 FR 15127

44 FR 6088 (b) In an operating license proceeding the board will determine the matters in controversy among the parties, and where the board determines that a serious safety, environmental, or common defense and security matter was not raised by the parties, the board will determine such matter as being among the issues to be decided. Those issues will be specified in the notice of a hearing issued by the Commission, or in a prehearing conference order issued by the board in the exercise of its discretion during the hearing.

40 FR 2973 The issues will be the matters in controversy among the parties or raised by the board within the purview of the following:

37 FR 15127 (1) Whether there is reasonable assurance that construction of the facility will be substantially completed, on a timely basis, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission;

(2) Whether the facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission;

(3) Whether there is reasonable assurance (i) that the activities to be authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;

47 FR 13750 **(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the Commission's regulations, except that the issue of financial qualifications shall not be considered by the board if the applicant is an electric utility seeking a license to operate a production or utilization facility of the type described in § 50.21(b) or § 50.22.**

37 FR 15127 (5) Whether the applicable provisions of 10 CFR Part 140 have been satisfied;

(6) Whether issuance of the license will be inimical to the common defense and security or to the health and safety of the public; and

43 FR 7205 (7) Whether, with respect to the requirements of section 102(2)(A), (C) and (E) of the National Environmental Policy Act, in accordance with Part 51, the operating license should be issued as proposed.

40 FR 2973 (c) The board, in operating license proceedings, will make findings on the matters in controversy among the parties and any matter not raised by the parties but examined by the board in its discretion in accordance with paragraph (b) of this section and § 2.760a. Depending on the resolution of those matters, the Director of Regulation would issue, deny, or appropriately condition the operating license.

37 FR 1512 (d) In operating license proceedings, the procedure for summary disposition of the proceeding on the pleadings described in § 2.749 may be used to determine the ultimate issue of whether the operating license should be issued.

IX. Licensing Proceedings Subject to Appellate Jurisdiction of Atomic Safety and Licensing Appeal Board

40 FR 2973 (a) An Atomic Safety and Licensing Appeal Board, composed of three members assigned from the Atomic Safety and Licensing Appeal Panel, designated by the Commission, reviews initial decisions of presiding officers in (1) proceedings on applications under Part 50 for facility licenses or construction permits and (2) such other licensing proceedings as the Commission specifies. In such proceedings, an Atomic Safety and Licensing Appeal Board performs the functions and exercises the authority of the Commission described in sections I(e), V(f)(4), and VI(f), except as their context may require otherwise. The Atomic Safety and Licensing Appeal Board is required to decide each matter before it in accordance with the rules and regulations, case precedent, and established policies of the Commission.

44 FR 6088 In a proceeding on an application for an operating license, if the Atomic Safety and Licensing Appeal Board determines that a serious safety, environmental, or common defense and security matter has not been raised by the parties, it has the authority to give appropriate consideration to that matter.

40 FR 2973 It has no responsibility or authority for issuing rules or regulations. The Appeal Board for a particular proceeding is composed of three members assigned from the Atomic Safety and Licensing Appeal Panel and possessing qualifications deemed appropriate to the issues to be decided. The Chairman of the Appeal Board for a particular proceeding shall be qualified in the conduct of administrative proceedings.

34 FR 13360 (b) Two members, being a majority of the Appeal Board, constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings.

37 FR 17159 Except as permitted by § 2.787(b), the vote of a majority controls in any decision by the Appeal Board, including orders in interlocutory matters and final decisions.

34 FR 13360 A dissenting member is, of course, free to express his dissent and the reasons for it in a separate opinion for the record.

37 FR 22751 (c) Consultation between members of the Atomic Safety and Licensing Appeal Board for a particular proceeding and the staff, in initial licensing proceedings other than contested proceedings, is permitted on the conditions specified for the Commissioners under 10 CFR 2.780. However, members of atomic safety and licensing boards for particular proceedings shall not consult, on any fact in issue in those proceedings—whether contested or uncontested—with members of the Appeal Board Panel.

38 FR 5624 (d)(1) Appeals to the Appeal Board from initial decisions, or designated portions thereof, are initiated by the filing of exceptions. Such exceptions must be filed within 10 days of the issuance and service of the initial decision.

42 FR 22168 A brief in support of the exceptions shall be filed by the appellant within 30 days thereafter (40 days in the case of the staff).

A responsive brief may be filed by any other party within 15 days (20 days in the case of the staff) of the filing and service of the appellant's brief. The prescribed time limits are subject to being lengthened or shortened in a particular case, either on motion of a party or by the Appeal Board on its own initiative (10 CFR 2.711). The time limits are also subject to the provisions of 10 CFR 2.710 relating to service by mail.

38 FR 5624 (2) Exceptions must be separately numbered, must be concisely stated, and must specify with particularity the portion or portions of the initial decision (or earlier order or ruling) as to which error is asserted. Care should be taken to avoid the assertion of essentially the same error in more than one exception. Since their purpose is simply to identify the alleged errors which the appellant wishes the Appeal Board to consider, the exceptions themselves shall not contain any supporting argumentation. Rather, such argumentation shall be reserved for the brief, which must be confined to the exceptions previously filed and must contain specific references to the portions of the record or other authority relied upon for each assertion of error. The contentions advanced in all other briefs similarly must be supported by such references.

46 FR 12192 **No brief is to exceed 70 pages in length unless leave to file a brief of a specified greater length has been previously sought and granted (10 CFR 2.762(e)).**

38 FR 5624 In this connection, inasmuch as the Appeal Board has available to it the entire record of the proceeding, extended quotations in a brief from the record are neither required nor desirable. A summary is preferable, accompanied by explicit references to the record sources. Every brief in excess of 10 pages shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.

(3) There must be strict compliance with the time limits prescribed for the filing of exceptions or briefs by the rules of practice or by an order of the Appeal Board which extends or shortens those limits in the particular case. Absent a showing of extraordinary and unanticipated circumstances, motions for exceptions of time must be received by the Appeal Board at least 1 day prior to the date upon which the document in question is then due for filing. In no circumstances will a document be accepted by the Appeal Board on an untimely basis unless it is accompanied by a motion for leave to file it out of time, which similarly must be founded upon extraordinary and unanticipated circumstances. Exceptions and briefs which in form or content are not in substantial compliance with the requirements imposed by the rules of practice are subject to being stricken.

38 FR 5624

(e) The holding of oral argument, whether or not specifically requested by a party, is within the Appeal Board's discretion (10 CFR 2.763). Where exceptions have been filed, the Appeal Board routinely will consider whether the case should be calendared for oral argument. This consideration normally will take place following the receipt of all briefs. Oral argument will be directed if at least one member of the Appeal Board votes in favor of it. If oral argument is to be held, an order will be issued by the Appeal Board which will set the specific date and location, as well as the time allotted to each of the parties. In some instances, the order may also restrict the scope of the oral argument to one or more specified issues. It is anticipated that oral arguments will be conducted in either Washington, D.C., or Bethesda, Md.

X. Proceedings for the Consideration of Antitrust Aspects of Facility License Applications

(a) Under the Atomic Energy Act of 1954, as amended, the Commission is required, with respect to applications for construction permits or operating licenses for production and utilization facilities for industrial or commercial purposes licensed under section 103, which include power reactors subject to the mandatory hearing requirements of section 189a of the Act, to follow procedures for antitrust review in section 105c of the Act. This section outlines the procedures used by the Commission to implement that section.

47 FR 9983

(b)(1) When the antitrust information portion of an application is received and docketed for a facility construction permit under section 103 of the Act which is subject to antitrust review under section 105c, the notice of receipt of the antitrust information published in the Federal Register shall state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration shall submit such views to the Commission within sixty (60) days after publication of the notice.

(2) Upon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility operating license under section 103 of the Act, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall publish in the Federal Register and in appropriate trade journals a "Notice of Receipt of Operating License Antitrust Information." The notice shall invite persons to submit, within thirty (30) days after publication of the notice, comments or information concerning antitrust aspects of the application to assist the Director in determining, pursuant to section 105c of the Act, whether significant changes in the licensee's activities or proposed activities have occurred since completion of the previous antitrust review in connection with the construction permit application. The notice shall also state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within thirty (30) days after publication of the notice to: U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Chief, Antitrust and Economic Analysis Branch.

(3) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, after reviewing any comments or information received in response to the published notice and any comments or information regarding the applicant received from the Attorney General, concludes that there have been no significant changes since the completion of the previous antitrust review in connection with the construction permit, a finding of no significant changes shall be published in the Federal Register, together with a notice stating that any request for reevaluation of such finding should be submitted within thirty (30) days of publication of the notice. If no requests for reevaluation are received within that time, the finding shall become the NRC's final determination. Requests for a reevaluation of the no significant changes determination shall be accepted after the date when the Director's finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

47 FR 9983

(4) If, as a result of the reevaluation of the finding described above, it is determined that there have been no significant changes, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, shall deny the request and shall publish a notice of finding of no significant changes in the Federal Register. The notice and finding become the final NRC decision thirty (30) days after being made and only in the event that the Commission has not exercised sua sponte review.

(5) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, concludes that significant changes have occurred since the completion of the previous antitrust review in connection with the construction permit, then the provisions of § 2.102(d) shall apply.

(c)(1) Except as provided in paragraph (c)(2) below, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall refer and transmit a copy of each application for a construction permit or an operating license for a utilization or production facility under section 103 of the Act, to the Attorney General as required by section 105c of the Act. Under that section, the Attorney General will, within a reasonable time, but in no event to exceed 180 days after receipt, render such advice to the Commission as is determined to be appropriate in regard to the finding to be made by the Commission as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in subsection 105a of the Act.

47 FR 9983

(2) The review by the Attorney General described in paragraph (c)(1) above is not required for applications for operating licenses for production or utilization facilities under section 103 of the Act for which the construction permit was also issued under section 103, unless the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, determines, after consultation with the Attorney General and in accordance with § 2.101(e), that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and by the Commission under section 105c of the Act in connection with the construction permit.

(d) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will publish the Attorney General's advice in the FEDERAL REGISTER promptly upon receipt, and will make such advice a part of the record in any proceeding on antitrust matters conducted in accordance with subsection 105c(5) and section 189a of the Act. The Director of Regulation will also publish in the FEDERAL REGISTER a notice that the Attorney General has not rendered any such advice. The notice published in the FEDERAL REGISTER will also include a notice of hearing, if appropriate, or, if the Attorney General has not recommended a hearing, will state that any person whose interest may be affected by the proceeding may, pursuant to and in accordance with § 2.714, file a petition for leave to intervene and request a hearing on the antitrust aspects of the application. The notice will state that petitions for leave to intervene and requests for hearing shall be filed within 30 days after publication of the notice.

37 FR 15127

(e) If a hearing on antitrust aspects of the application is requested, or is recommended by the Attorney General, it will generally be held separately from the hearing held on matters of radiological health and safety and common defense and security described in sections I-VIII of this appendix. The notice of hearing will fix a time for the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with section 189a of the Act and other provisions of this part. However, as permitted by subsection 105c(8) of the Act, with respect to proceedings in which an application for a construction permit was filed prior to December 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust consideration or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER of notice of filing of the applica-

37 FR 15127

tion for an operating license or December 19, 1970, whichever is later, the Commission may issue a construction permit or operating license, provided that the permit or license so issued contains the condition specified in § 50.55b of this chapter.

46 FR 55083

(f) Hearings on antitrust aspects will be conducted by a presiding officer, either an Administrative Law Judge or an atomic safety and licensing board comprised of three members, one of whom will be qualified in the conduct of administrative proceedings and two of whom will have such technical or other qualifications as the Commission deems appropriate to the issues to be decided.

35 FR 19655

(g) When the Attorney General has advised that there may be adverse antitrust aspects and recommends that a hearing be held, the Attorney General or his designee may participate as a party in the proceedings.

46 FR 55083

(h) At the hearing, the presiding officer will give due consideration to the advice received from the Attorney General and to evidence pertaining to antitrust aspects received at the hearing.

(i) The presiding officer will, in the initial decision, make a finding as to whether the activities under the proposed license would create or maintain a situation inconsistent with the antitrust laws as specified in section 105a of the Act. If the presiding officer finds that such a situation would be created or maintained, it will consider, in determining whether the permit or license should be issued or continued, such other factors as it deems necessary to protect the public interest, including the need for power in the affected area. The certainty of contravening the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. The finding will be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. The presiding officer will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

(j) On the basis of the findings in the proceeding on the antitrust aspect of the application, the presiding officer may (i) authorize the issuance of the permit or license after favorable consideration of matters of radiological health and safety and common defense and security, and matters raised under the National Environmental Policy Act of 1969, at the hearing described in sections I–VIII of this appendix; (ii) authorize the continuation of a permit or license already issued; (iii) direct the denial of the application for the permit or license, or the rescission of a permit or license already issued; or (iv) authorize the issuance of a permit or license subject to appropriate conditions, and subject to favorable consideration of matters of radiological health and safety and common defense matters raised under the National Environmental Policy Act of 1969 at the hearing described in sections I–VIII of this appendix.

Appendix C—General Policy and Procedure for NRC Enforcement Actions

The following statement of general policy and procedure explains the enforcement policy and procedures of the U.S. Nuclear Regulatory Commission and its staff in initiating enforcement actions and of presiding officers, the Atomic Safety and Licensing Appeal Boards, and the Commission in reviewing these actions. This statement is applicable to enforcement in matters involving the public health and safety, the common defense and security, and the environment.[1]

I. Introduction and Purpose

47 FR 9987

The purpose of the NRC enforcement program is to promote and protect the radiological health and safety of the public, including employees' health and safety, the common defense and security, and the environment by:

- Ensuring compliance with NRC regulations and license conditions;
- Obtaining prompt correction of noncompliance;
- Deterring future noncompliance; and
- Encouraging improvement of licensee performance, and by example, that of industry, including the prompt identification and reporting of potential safety problems.

Consistent with the purpose of this program, prompt and vigorous enforcement action will be taken when dealing with licensees who do not achieve the necessary meticulous attention to detail and the high standard of compliance which the NRC expects of its licensees.

47 FR 16005

It is the Commission's intent that noncompliance should be more expensive than compliance.

Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures. In no case, however, will licensees who cannot achieve and maintain adequate levels of protection be permitted to conduct licensed activities.

II. Statutory Authority and Procedural Framework

A. Statutory Authority

47 FR 9987

The NRC's enforcement jurisdiction is drawn from the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended.

Section 161 of the Atomic Energy Act authorizes NRC to conduct inspections and investigations and to issue orders as may be necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. Section 186 authorizes NRC to revoke licenses under certain circumstances (e.g., for material false statements, in response to conditions that would have warranted refusal of a license on an original application, for a licensee's failure to build or operate a facility in accordance with the terms of the permit or license, and for violation of a NRC regulation). Section 234 authorizes NRC to impose civil penalties not to exceed $100,000 per violation per day for the violation of certain specified licensing provisions of the Act, rules, orders, and license terms implementing these provisions, and for violations for which licenses can be revoked. Section 232 authorizes NRC to seek injunctive or other equitable relief for violation of regulatory requirements.

Section 206 of the Energy Reorganization Act authorizes NRC to impose civil penalties for knowing and conscious failures to provide certain safety information to the NRC.

Chapter 18 of the Atomic Energy Act provides for varying levels of criminal penalties (i.e., monetary fines and imprisonment) for willful violations of the act and regulations or orders issued under Sections 65, 161(b), 161(i), or 161(o) of the Act. Section 223 provides that criminal penalties may be imposed on certain individuals employed by firms constructing or supplying basic components of any utilization facility if the individual knowingly and willfully violates NRC requirements such that a basic component could be significantly impaired. Section 235 provides that criminal penalties may be imposed on persons who interfere with inspectors. Section 236 provides that criminal penalties may be imposed on persons who attempt to or cause sabotage at a nuclear facility or to nuclear fuel. Alleged or suspected criminal violations of the Atomic Energy Act are referred to the Department of Justice for appropriate action.

47 FR 9987

B. Procedural Framework

10 CFR Part 2, Subpart B, of NRC's regulations sets forth the procedures the NRC uses in exercising its enforcement authority. 10 CFR 2.201 sets forth the procedures for issuing notices of violation.

The procedure to be used in assessing civil penalties is set forth in 10 CFR 2.205. This regulation provides that the appropriate NRC Office Director initiates the civil penalty process by issuing a notice of violation and proposed imposition of a civil penalty. The licensee is provided an opportunity to contest in writing the proposed imposition of a civil penalty. After evaluation of the licensee's response, the Director may mitigate, remit, or impose the civil penalty. An opportunity is provided for a hearing if a civil penalty is imposed.

The procudure for issuing an order to show cause why a license should not be modified, suspended, or revoked or why such other action should not be taken is set forth in 10 CFR 2.202. The mechanism for modifying a license by order is set forth in 10 CFR 2.204. These sections of Part 2 provide an opportunity for a hearing to the affected licensee. However, the NRC is authorized to make orders immediately effective if the public health, safety or interest so requires or, in the case of an order to show cause, if the alleged violation is willful.

[1] Antitrust enforcement matters will be dealt with on a case-by-case basis.

47 FR 9987

III. Severity of Violations

Regulatory requirements [2] have varying degrees of safety, safeguards, or environmental significance. Therefore, it is essential that the relative importance of each violation be identified as the first step in the enforcement process.

Consequently, violations are categorized in terms of five levels of severity to show their relative importance within each of the following seven activity areas:

Reactor Operations;
Facility Construction;
Safeguards;
Health Physics;
Transportation;
Fuel Cycle and Materials Operations; and
Miscellaneous Matters.

Within each activity area Severity Level I has been assigned to violations that are the most significant and Severity Level V violations are the least significant. Severity Level I had II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential impact on the public. Severity Level III violations are cause for significant concern. Severity Level IV violations are less serious but are of more than minor concern; *i.e.*, if left uncorrected, they could lead to a more serious concern. Severity Level V violations are of minor safety or environmental concern.

The relative seriousness of violations at the several severity levels applies within each activity area, but comparisons between activity areas are inappropriate. For example, while the immediacy of any hazard to the public associated with Severity Level I violations in Reactor Operations is greater than that associated with Severity Level I violations in Reactor Construction, both areas have violations which cover the full range of severity levels. This disparity in relative seriousness of violations in different activity areas is due to the diversity of licensed activities regulated by NRC and the need for continuing improvement in licensee performance of certain activities.

While examples are provided in Supplements I through VII for determining the appropriate severity level for violations in each of the seven activity areas, the examples are neither exhaustive nor controlling. These examples do not create new requirements. They reflect the seriousness of violations of requirements. Each of the examples in the supplements is predicated on a violation of a regulatory requirement.

In each case, the severity of a violation will be characterized at the level best suited to the significance of the particular violation. Licensed activities not directly covered by one of the above listed areas, e.g., export license activities, will be placed in the activity area most suitable in light of the particular violation involved.

The severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard of requirements, deception, or other indications of willfulness. The term "willfulness" as used here embraces a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements. Willfulness does not comprehend acts which do not rise to the level of careless disregard. In determining the specific severity level of a violation involving willfulness consideration will be given to such factors as the position of the person involved in the violation (e.g., first line supervisor or senior manager), the significance of any underlying violation, the intent of the violator (i.e., negligence not amounting to careless disregard, careless disregard, or deliberateness), and the economic advantage, if any, gained by the violation. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of the violation.

The NRC expects licensees to provide full, complete, timely, and accurate information and reports. Accordingly, unless otherwise categorized in the Supplements, the severity level of a violation involving the failure to make a required report to the NRC will be based upon the significance of and the circumstances surrounding the matter. However, the severity level of an untimely report, in contrast to no report, may be reduced depending on the circumstances surrounding the matter.

[2] The term "requirement" as used in this policy means a legally binding requirement such as a statute, regulation, license condition, technical specification, or order.

47 FR 9987

IV. Enforcement Actions

This section describes the enforcement sanctions available to NRC and specifies the conditions under which each may be used. The basic sanctions are notices of violation, civil penalties, and orders of various types. Additionally, related administrative mechanisms such as bulletins and confirmatory action letters are used to supplement the enforcement program. In selecting the enforcement sanctions to be applied, NRC will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, such as in transportation matters.

With very limited exceptions, whenever noncompliance with NRC requirements is identified, enforcement action is taken. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations, action by an NRC regional office is appropriate in the form of a Notice of Violation requiring a formal response from the licensee describing its corrective actions. The relatively small number of cases involving elevated enforcement action receives substantial attention by the public, and may have signficant impact on the licensee's operation. These elevated enforcement actions include civil penalties; orders modifying, suspending or revoking licenses; or orders to cease and desist from designated activities.

A. Notice of Violation

A notice of violation is a written notice setting forth one or more violations of a legally binding requirement. The notice normally requires the licensee to provide a written statement describing (1) corrective steps which have been taken by the licensee and the results achieved; (2) corrective steps which will be taken to prevent recurrence; and (3) the date when full compliance will be achieved. NRC may require responses to notices of violation to be under oath. Normally, responses under oath will be required only in connection with civil penalties and orders.

NRC uses the notice of violation as the standard method for formalizing the existence of a violation. A notice of violation is normally the only enforcement action taken, except in cases where the criteria for civil penalties and orders, as set forth in Sections IV.B and IV.C respectively, are met. In such cases, the notice of violation will be issued in conjunction with the elevated actions.

Because the NRC wants to encourage and support licensee initiative for self-identification and correction of problems, NRC will not generally issue a notice of violation for a violation that meets all of the following tests:

(1) It was identified by the licensee;
(2) It fits in Severity Level IV or V;
(3) It was reported, if required;
(4) It was or will be corrected, including measures to prevent recurrence, within a reasonable time; and
(5) It was not a violation that could reasonably be expected to have been prevented by the licensee's corrective action for a previous violation.

Licensees are not ordinarily cited for violations resulting from matters not within their control, such as equipment failures that were not avoidable by reasonable licensee quality assurance measures or management controls. Generally, however, licensees are held responsible for the acts of their employees. Accordingly, this policy should not be construed to excuse personnel errors. Enforcement actions involving individuals, including licensed operators, will be determined on a case-by-case basis.[3]

B. Civil Penalty

A civil penalty is a monetary penalty that may be imposed for violation of (a) certain specified licensing provisions of the Atomic Energy Act or supplementary NRC rules or orders, (b) any requirement for which a license may be revoked, or (c) reporting requirements under Section 206 of the Energy Reorganization Act. Civil penalties are designed to emphasize the need for lasting remedial action and to deter future violations.

Generally, civil penalties are imposed for Severity Level I and II violations, are considered and usually imposed for Severity Level III violations, and may be imposed for Severity Level IV violations that are similar

[3] Section 234 of the Atomic Energy Act gives the Commission authority to impose civil penalties for violations on "any person." "Person" is broadly defined in Section 11s of the AEA to include individuals, a variety of organizations, and any representatives or agents. This gives the Commission authority to impose civil penalties on employees of licensees or on separate entities when a violation of a requirement directly imposed on them is committed.

[4] The word "similar," as used in this policy, refers to those violations which could have been reasonably expected to have been prevented by the licensee's corrective action for the previous violation.

to violations discussed in a previous enforcement conference, and for which the enforcement conference was ineffective in achieving the required corrective action.

In applying this guidance for Severity Level IV violations, NRC normally considers civil penalties only for similar violations that occur after the date of the last inspection or within two years, whichever period is greater. Enforcement conferences are normally conducted for all Severity Level I, II, and III violations and for Severity Level IV violations that are considered symptomatic of program deficiencies, rather than isolated concerns. Licensees will be put on notice when a meeting is an enforcement conference.

Civil penalties will normally be assessed for knowing and conscious violations of the reporting requirements of Section 206 of the Energy Reorganization Act, and for any willful violation, including those at any severity level.

NRC imposes different levels of penalties for different severity level violations and different classes of licensees. Tables 1A and 1B show the base civil penalties for various reactor, fuel cycle, and materials programs. The structure of these tables generally takes into account the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration. Generally, operations involving greater nuclear material inventories and greater potential consequences to the public and licensee employees receive higher civil penalties. Regarding the secondary factor of ability of various classes of licensees to pay the civil penalties, it is not the NRC's intention that the economic impact of a civil penalty be such that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities. The deterrent effect of civil penalties is best served when the amounts of such penalties take into account a licensee's "ability to pay." In determining the amounts of civil penalties for licensees for whom the tables do not reflect the ability to pay, NRC will consider as necessary an increase or decrease on a case-by-case basis.

NRC attaches great importance to comprehensive licensee programs for detection, correction, and reporting of problems that may constitute, or lead to, violation of regulatory requirements. This is emphasized by giving credit for effective licensee audit programs when licensees find, correct, and report problems expeditiously and effectively. To encourage licensee self-identification and correction of violations and to avoid potential concealment of problems of safety significance, application of the adjustment factors set forth below may result in no civil penalty being assessed for violations which are identified, reported (if required), and effectively corrected by the licensee, provided that such violations were not disclosed as a result of overexposures or unplanned releases of radioactivity or other specific, self-disclosing incidents.

47 FR 9987

On the other hand, ineffective licensee programs for problem identification or correction are unacceptable. In cases involving willfulness, flagrant NRC-identified violations or serious breakdown in management controls, NRC intends to apply its full enforcement authority where such action is warranted, including issuing appropriate orders and assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $100,000 per violation, per day.

NRC reviews each proposed civil penalty case on its own merits and adjusts the base civil penalty values upward or downward appropriately. Tables 1A and 1B identify the base civil penalty values for different severity levels, activity areas, and classes of licensees. After considering all relevant circumstances, adjustments to these values may be made for the factors described below:

1. *Prompt Identification and Reporting.* Reduction of up to 50% of the base civil penalty may be given when a licensee identifies the violation and promptly reports the violation to the NRC. In weighing this factor, consideration will be given to, among other things, the length of time the violation existed prior to discovery, the opportunity available to discover the violation, and the promptness and completeness of any required report. This factor will not be applied to violations which constitute or are identified as a result of overexposures, unplanned releases of radioactivity or other specific, self-disclosing incidents. In addition, no consideration will be given to this factor if the licensee does not take immediate action to correct the problem upon discovery.

2. *Corrective Action to Prevent Recurrence.* Recognizing that corrective action is always required to meet regulatory requirements, the promptness and extent to which the licensee takes corrective action, including actions to prevent recurrence, may be considered in modifying the civil penalty to be assessed. Unusually prompt and extensive corrective action may result in reducing the proposed civil penalty as much as 50% of the base value shown in Table 1. On the other hand, the civil penalty may be increased as much as 25% of the base value if initiation of corrective action is not prompt or if the corrective action is only minimally acceptable. In weighing this factor consideration will be given to, among other things, the timeliness of the corrective action, degree of licensee initiative, and comprehensiveness of the corrective action—such as whether the action is focused narrowly to the specific violation or broadly to the general area of concern.

3. *Enforcement History.* The base civil penalty may be increased as much as 25% depending on the enforcement history in the general area of concern. Specifically, failure to implement previous corrective action for prior similar problems may increase the civil penalty value.

4. *Prior Notice of Similar Events.* The base civil penalty may be increased as much as 25% for cases where the licensee had prior knowledge of a problem as a result of a licensee audit, or specific NRC or industry notification, and had failed to take effective preventive steps.

5. *Multiple Occurrences.* The base civil penalty may be increased as much as 25% where multiple examples of a particular violation are identified during the inspection period. This factor is applicable only where NRC identifies the violation, or for violations associated with self-disclosing incidents.

The above factors are additive so that the civil penalty for any severity level may range from plus or minus 100% of the base value. However, in no instance will a civil penalty for any one violation exceed $100,000 per day.

The duration of a violation may also be considered in assessing a civil penalty. A greater civil penalty may be imposed if a violation continues for more than a day. Generally, if a licensee is aware of the existence of a condition which results in an ongoing violation and fails to initiate corrective action, each day the condition existed may be considered as a separate violation and, as such, subject to a separate additional civil penalty.

Generally, for situations where a licensee is unaware of a condition resulting in a continuing violation, a separate violation and attendant civil penalty may be considered for each day that the licensee clearly should have been aware of the condition or had an opportunity to correct the condition, but failed to do so. Civil penalties in excess of 3.75 times the maximum civil penalty for a single Severity Level I violation for each type of licensee require specific Commission approval in accordance with guidance set forth in Section VI below.

47 FR 9987

47 FR 9987

NRC statutory authority permits the assessment of the maximum civil penalty for each violation. The Tables and the mitigating factors determine the civil penalties which may be assessed for each violation. However, to emphasize the focus on the fundamental underlying causes of a problem for which enforcement action appears to be warranted, the cumulative total for all violations which contributed to or were unavoidable consequences of that problem will generally be based on the amount shown in the table, as adjusted. If an evaluation of such multiple violations shows that more than one fundamental problem is involved, each of which, if viewed independently, could lead to civil penalty action by itself, then separate civil penalties may be assessed for each such fundamental problem. In this regard, the failure to make a required report of an event requiring such reporting is considered a separate problem and will normally be assessed a separate civil penalty.

47 FR 16005

TABLE 1A.—BASE CIVIL PENALTIES

[For Severity I Violations]

	Plant operations construction and health physics	Safeguards		Transportation	
		Category 1 [1]	Noncategory 1	High level waste, spent fuel [2]	Low specific activity [3]
a. Power Reactors	$80,000	$80,000	$40,000	$80,000	$5,000
b. Test Reactors	10,000	10,000	5,000	10,000	2,000
c. Research Reactors and Critical Facilities	5,000	5,000	2,500	5,000	1,000
d. Fuel Facilities	40,000	80,000	40,000	40,000	5,000
e. Industrial Users of Material [4]	8,000			5,000	2,000
f. Waste Disposal Licensees	6,000			6,000	3,000
g. Academic or Medical Institutions [5]	4,000			2,500	1,000
h. Other Material Licensees	1,000			2,500	1,000

[1] Category 1 licensees are those authorized to possess formula quantities of strategic special nuclear material (10 CFR 73.2(bb)).

[2] Also Type B packages.

[3] Also Type A limited quantity packages.

[4] Includes industrial radiographers, nuclear pharmacies, industrial processors and firms engaged in manufacturing or distribution of byproduct or source materials.

[5] This applies to nonprofit institutions not otherwise categorized under a through f in this table.

47 FR 9987

TABLE 1B.—BASE CIVIL PENALTIES

Severity level	Base civil penalty amount [1]
I	100
II	80
III	50
IV	15
V	5

[1] Percent of amount listed in table 1A.

C. Orders

An order is a written NRC directive to modify, suspend, or revoke a license; to cease and desist from a given practice or activity; or to take such other action as may be proper (*see* 10 CFR 2.202 and 2.204). Orders may be issued as set forth below. Orders may also be issued in lieu of, or in addition to, civil penalties, as appropriate.

(1) License Modification Orders are issued when some change in licensee equipment, procedures, or management controls is necessary.

(2) Suspension Orders may be used:

(a) To remove a threat to the public health and safety, common defense and security, or the environment;

(b) To stop facility construction when (i) further work could preclude or significantly hinder the identification or correction of an improperly constructed safety-related system or component, or (ii) the licensee's quality assurance program implementation is not adequate to provide confidence that construction activities are being properly carried out;

(c) When the licensee has not responded adequately to other enforcement action;

(d) When the licensee interferes with the conduct of an inspection or investigation; or

(e) For any reason not mentioned above for which license revocation is legally authorized.

Suspensions may apply to all or part of the licensed activity. Ordinarily, a licensed activity is not suspended (nor is a suspension prolonged) for failure to comply with requirements where such failure is not willful and adequate corrective action has been taken.

(3) Revocation Orders may be used:

(a) When a licensee is unable or unwilling to comply with NRC requirements,

(b) When a licensee refuses to correct a violation,

(c) When a licensee does not respond to a notice of violation where a response was required,

(d) When a licensee refuses to pay a fee required by 10 CFR Part 170, or

(e) For any other reason for which revocation is authorized under Section 186 of the Atomic Energy Act (e.g., any condition which would warrant refusal of a license on an original application).

(4) Cease and Desist Orders are typically used to stop an unauthorized activity that has continued after notification by NRC that such activity is unauthorized.

Orders are made effective immediately, without prior opportunity for hearing, whenever it is determined that the public health, interest, or safety so requires, or when the order is responding to a violation involving willfulness. Otherwise, a prior opportunity for a hearing on the order is afforded. For cases in which the NRC believes a basis could reasonably exist for not taking the action as proposed, the licensee will ordinarily be afforded an opportunity to show cause why the order should not be issued in the proposed manner.

D. Escalation of Enforcement Sanctions

NRC considers violations of Severity Levels I, II, or III to be serious. If serious violations occur, NRC will, where necessary, issue orders in conjunction with civil penalties to achieve immediate corrective actions and to deter further recurrence of serious violations. NRC carefully considers the circumstances of each case in selecting and applying the sanction(s) appropriate to the case in accordance with the criteria described in Sections IV.B and IV.C, above.

Examples of enforcement actions that could be taken for similar Severity Level I, II, or III violations are set forth in Table 2. The actual progression to be used in a particular case will depend on the circumstances. However, enforcement sanctions will normally escalate for recurring similar violations.

Normally the progression of enforcement actions for similar violations will be based on violations under a single license. When more than one facility is covered by a single license, the normal progression will be based on similar violations at an individual facility and not on similar violations under the same license. However, it should be noted that under some circumstances, e.g., where there is common control over some facet of facility operations, similar violations may be charged even though the second violation occurred at a different facility or under a different license. For example, a physical security violation at Unit 2 of a dual unit plant that repeats an earlier violation at Unit 1 might be considered similar.

TABLE 2.—EXAMPLES OF PROGRESSION OF ESCALATED ENFORCEMENT ACTIONS FOR SIMILAR VIOLATIONS IN THE SAME ACTIVITY AREA UNDER THE SAME LICENSE

Severity of violation	Number of similar violations from the date of the last inspection or within the previous 2 years (whichever period is greater)		
	1st	2d	3d
I	a+b	a+b+c	d.
II	a	a+b	a+b+c.
III	a [1]	a	a+b.

a. Civil penalty.

b. Suspension of affected operations until the Office Director is satisfied that there is reasonable assurance that the licensee can operate in compliance with the applicable requirements; or modification of the license, as appropriate.

c. Show cause for modification or revocation of the license, as appropriate.

d. Further action, as appropriate.

[1] Consideration of.

47 FR 9987

E. Related Administrative Actions

In addition to the formal enforcement mechanisms of notices of violation, civil penalties, and orders, NRC also uses administrative mechanisms, such as enforcement conferences, bulletins, circulars, information notices, generic letters, notices of deviation, and confirmatory action letters to supplement its enforcement program. NRC expects licensees to adhere to any obligations and commitments resulting from these processes and will not hesitate to issue appropriate orders to make sure that such commitments are met.

(1) Enforcement Conferences are meetings held by NRC with licensee management to discuss safety, safeguards or environmental problems, licensee's compliance with regulatory requirements, a licensee's proposed corrective measures (including schedules for implementation) and enforcement options available to the NRC.

(2) Bulletins, Circulars, Information Notices and Generic Letters are written notifications to groups of licensees identifying specific problems and recommending specific actions.

(3) Notices of Deviation are written notices describing a licensee's or a vendor's failure to satisfy a commitment. The commitment involved has not been made a legally binding requirement. The notice of deviation requests the licensee or vendor to provide a written explanation or statement describing corrective steps taken (or planned), the results achieved, and the date when corrective action will be completed.

(4) Confirmatory Action Letters are letters confirming a licensee's agreement to take certain actions to remove significant concerns about health and safety, safeguards, or the environment.

F. Referrals To Department of Justice

Alleged or suspected criminal violations of the Atomic Energy Act (and of other relevant Federal laws) are referred to the Department of Justic for investigation. Referral to the Department of Justice does not preclude the NRC from taking other enforcement action under this General Statement of Policy. However, such actions will be coordinated with the Department of Justice to the extent practicable.

V. Public Disclosure of Enforcement Actions

In accordance with 10 CFR 2.790, all enforcement actions, inspection reports, and licensees' responses are publicly available for inspection. In addition, press releases are generally issued for civil penalties and orders. In the case of orders and civil penalties related to violations at Severity Levels I, II, or III press releases are issued at the time of the order or the proposed imposition of the civil penalty. Press releases are not normally issued for Notices of Violation.

VI. Responsibilities

The Director, Office of Inspection and Enforcement, as the principal enforcement officer of the NRC, has been delegated the authority to issue notices of violations, civil penalties, and orders.[5] In recognition that the regulation of nuclear activities in many cases does not lend itself to a mechanistic treatment, the Director must exercise judgement and discretion in determining the severity levels of the violations and the appropriate enforcement sanctions, including the decision to impose a civil penalty and the amount of such penalty, after considering the general principles of this statement of policy and the technical significance of the violations and the surrounding circumstances.

The Commission will be provided written notification of all enforcement actions involving civil penalties or orders. The Commission will be consulted prior to taking enforcement action in the following situations (unless the urgency of the situation dictates immediate action):

(1) An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;

(2) Proposals to impose civil penalties in amounts greater than 3.75 times the Severity Level I values shown in Table 1A;

(3) Any proposed enforcement action on which the Commission asks to be consulted; or

(4) Any action the Office Director believes warrants Commission involvement.

Supplement I—Severity Categories

Reactor Operations

A. Severity I—Very significant violations involving:

1. A Safety Limit, as defined in 10 CFR 50.36 and the Technical Specifications, being exceeded;

2. A system [6] designed to prevent or mitigate a serious safety event not being able to perform its intended safety function [7] when actually called upon to work;

3. An accidental criticality; or

4. Release of radioactivity offsite greater than ten (10) times the Technical Specifications limit.[8]

B. Severity II—Very significant violations involving:

1. A system designed to prevent or mitigate serious safety events not being able to perform its intended safety function; or

2. Release of radioactivity offsite greater than five (5) times the Technical Specifications limit.

C. Severity III—Significant violations involving:

1. A Technical Specification Limiting Condition for Operation being exceeded where the appropriate Action Statement was not satisfied that resulted in:

(a) Loss of a safety function; or

(b) A degraded condition, and sufficient information existed which should have alerted the licensee that he was in an Action Statement condition;

2. A system designed to prevent or mitigate a serious safety event not being able to perform its intended function under certain conditions (e.g., safety system not operable unless offsite power is available; materials or components not environmentally qualified);

3. Serious dereliction of duty on the part of personnel involved in licensed activities;

4. Changes in reactor parameters which cause unanticipated reductions in margins of safety;

5. Release of radioactivity offsite greater than the Technical Specifications limit; or

6. 10 CFR 50.59 such that a required license amendment was not sought.

D. Severity IV—Violations involving:

1. 10 CFR 50.59 that do not result in a Severity Level I, II, or III violation;

2. Failure to meet regulatory requirements that have more than minor safety or environmental significance; or

3. Failure to make a required Licensee Event Report when the reported matter does not constitute a violation.

E. Severity Level V—Violations that have minor safety or environmental significance.

Supplement II—Severity Categories

Part 50 Facility Construction

A. Severity I—Very significant violations involving a structure or system that is completed [9] in such a manner that it would not have satisfied its intended safety related purpose.

47 FR 16005

B. Severity II —Very significant violations involving:

1. A breakdown in the quality assurance program as exemplified by deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations). Such deficiencies normally involve the licensee's failure to conduct adequate audits or to take prompt corrective action on the basis of such audits and normally involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation; or

2. A structure or system that is completed in such a manner that it could have an adverse effect on the safety of operations.

C. Severity III—Significant violations involving:

1. A deficiency in a licensee quality assurance program for construction related to a single work activity (e.g., structural, piping, electrical or foundations). Such significant deficiency normally involves the licensee's failure to conduct adequate audits or to take prompt corrective action on the basis of such audits, and normally involves multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation;

2. Failure to confirm the design safety requirements of a structure or system as a result of inadequate preoperational test program implementation; or

3. Failure to make a required 10 CFR 50.55(e) report.

D. Severity IV—Violations involving failure to meet regulatory requirements including one or more Quality Assurance Criteria not amounting to Severity Level I, II, or III violations that have more than minor safety or environmental significance.

E. Severity V—Violations that have minor safety or environmental significance.

Supplement III—Severity Categories

Safeguards

A. Severity I—Very significant violations involving:

1. An act of radiological sabotage or actual theft, loss or diversion of a formula quantity of strategic special nuclear material [10] (SSNM);

2. Actual entry of an unauthorized individual into a vital area or material access area from outside the protected area (i.e., penetration of both barriers) that was not detected at the time of entry; or

3. Failure to promptly report knowledge of an actual or attempted theft or diversion of SSNM or an act of radiological sabotage.

B. Severity II—Very significant violations involving:

1. Actual theft, loss or diversion of special nuclear material (SNM) of moderate strategic significance.[11]

47 FR 9987

47 FR 9987

47 FR 9987

[5] The Directors of the Offices of Nuclear Reactor Regulation and Nuclear Material Safety and Safeguards have also been delegated similar authority, but it is expected that normal use of this authority by NRR and NMSS will be confined to actions necessary in the interest of public health and safety. The Director, Office of Administration, has been delegated the authority to issue orders where licensees violate Commission regulations by nonpayment of license fees. It is planned to consider redelegation of some or all of these authorities to the Administrators of the NRC Regional Offices over the next several years.

[6] "System" as used in these supplements, includes administrative and managerial control systems, as well as physical systems.

[7] "Intended safety function" means the total safety function, and is not directed toward a loss of redundancy. For example, considering a BWR's high pressure ECCS capability, the violation must result in complete invalidation of both HPCI and ADS subsystems. A loss of one subsystem does not defeat the intended safety function as long as the other subsystem is operable.

[8] The Technical Specification limit as used in this Supplement (Items A.4, B.2 and C.5) does not apply to the instantaneous release limit.

[9] "Completed" means completion of construction including review and acceptance by the construction QA organization.

[10] See 10 CFR 73.2(bb).

[11] See 10 CFR 73.2(x).

2. Failure to use established security systems (including compensatory measures) designed or used to prevent any unauthorized individual from entering a vital area or material access area from outside the protected area (i.e., entry through two barriers) so that access could have been gained without detection;

3. Failure to implement approved compensatory measures when the central (or secondary) alarm station is inoperable;

4. Failure to establish or maintain safeguards systems designed or used to prevent or detect the unauthorized removal of a formula quantity of SSNM from areas of authorized use or storage; or

5. Failure to use established transportation security systems designed or used to prevent the theft, loss, or diversion of a formula quantity of SSNM or acts of radiological sabotage.

C. Severity III—Significant violations involving:

1. Failure to control access to a vital area or material access area from inside the protected area or failure to control access to a protected area from outside the protected area; (i.e., such that only a single security element remained);

2. Failure to control access to a transport vehicle or the SNM being transported that does not constitute a Severity I or II violation;

3. Failure to establish or maintain safeguards systems designed or used to detect the unauthorized removal of SNM of moderate strategic significance from areas of authorized use or storage; or

4. Failure to properly secure or protect classified or other sensitive safeguards information.

D. Severity IV—Violations involving:

1. Failure to establish or maintain safeguards systems designed or used to detect the unauthorized removal of SNM of low strategic significance [15] from areas of authorized use or storage;

2. Failure to implement 10 CFR Parts 25 and 95 and information addressed under Section 142 of the Act, and the NRC approved security plan relevant to those parts; or

3. Other violations, such as failure to follow an approved security plan, that have more than minor safeguards significance.

E. Severity V—Violations that have minor safeguards significance.

Supplement IV—Severity Categories

Health Physics 10 CFR Part 20 [13]

A. Severity I—Very significant violations involving:

1. Single exposure of a worker in excess of 25 rems of radiation to the whole body, 150 rems to the skin of the whole body, or 375 rems to the feet, ankles, hands, or forearms;

2. Annual whole body exposure of a member of the public in excess of 2.5 rems of radiation;

3. Release of radioactive material to an unrestricted area in excess of ten times the limits of 10 CFR 20.106;

4. Disposal of licensed material in quantities or concentrations in excess of ten times the limits of 10 CFR 20.303; or

5. Exposure of a worker in restricted areas of ten times the limits of 10 CFR 20.103.

B. Severity II—Very significant violations involving:

1. Single exposure of a worker in excess of 5 rems of radiation to the whole body, 30 rems to the skin of the whole body, or 75 rems to the feet, ankles, hands or forearms;

2. Annual whole body exposure of a member of the public in excess of 0.5 rems of radiation;

3. Release of radioactive material to an unrestricted area in excess of five times the limits of 10 CFR 20.106;

4. Failure to make an immediate notification as required by 10 CFR 20.403(a)(1) and 10 CFR 20.403(a)(2);

5. Disposal of licensed material in quantities or concentrations in excess of five times the limits of 10 CFR 20.303, or

6. Exposure of a worker in restricted areas in excess of five times the limits of 10 CFR 20.103.

C. Severity III—Significant violations involving:

1. Single exposure of a worker in excess of 3 rems of radiation to the whole body, 7.5 rems to the skin of the whole body, or 18.75 rems to the feet, ankles, hands or forearms;

2. A radiation level in an unrestricted area that exceeds 100 millirem/hour for a one hour period;

3. Failure to make a 24-hour notification as required by 10 CFR 20.403(b) or an immediate notification required by 10 CFR 20.402(a);

4. Substantial potential for an exposure or release in excess of 10 CFR 20 whether or not such exposure or release occurs (e.g., entry into high radiation areas, such as under reactor vessels or in the vicinity of exposed radiographic sources, without having performed an adequate survey, operation of a radiation facility with a nonfunctioning interlock system);

5. Release of radioactive material to an unrestricted area in excess of the limits of 10 CFR 20.106;

6. Improper disposal of licensed material not covered in Severity Levels I or II;

7. Exposure of a worker in restricted areas in excess of the limits of 10 CFR 20.103;

8. Release for unrestricted use of contaminated or radioactive material or equipment which poses a realistic potential for significant exposure to members of the public, or which reflects a programmatic (rather than isolated) weakness in the radiation control program;

9. Cumulative worker exposure above regulatory limits when such cumulative exposure reflects a programmatic, rather than an isolated weakness in radiation protection;

10. Conduct of licensee activities by a technically unqualified person; or

11. Significant failure to control licensed material.

D. Severity IV—Violations involving:

1. Exposures in excess of the limits of 10 CFR 20.101 not constituting Severity Level I, II, or III violations;

2. A radiation level in an unrestricted area such that an individual could receive greater than 2 millirem in a one hour period or 100 millirem in any seven consecutive days;

3. Failure to make a 30-day notification required by 10 CFR 20.405;

4. Failure to make a followup written report as required by 10 CFR 20.402(b), 20.408, and 20.409; or

5. Any other matter that has more than minor safety or environmental significance.

E. Severity V—Violations that have minor safety or environmental significance.

Supplement V—Severity Categories

Transportation [14]

A. Severity I—Very significant violations of NRC transportation requirements involving:

1. Annual whole body radiation exposure of a member of the public in excess of 0.5 rems of radiation; or

2. Breach of package integrity resulting in surface contamination or external radiation levels in excess of ten times the NRC limits.

B. Severity II—Very significant violations of NRC transportation requirements involving:

1. Breach of package integrity resulting in surface contamination or external radiation levels in excess of NRC requirements;

2. Surface contamination or external radiation levels in excess of three times NRC limits that did not result from a breach of package integrity; or

3. Failure to make required initial notifications associated with Severity Level I or II violations.

C. Severity III—Significant violations of NRC transportation requirements involving:

1. Breach of package integrity;

2. Surface contamination or external radiation levels in excess of, but less than a factor of three above NRC requirements, that did not result from a breach of package integrity;

3. Any noncompliance with labelling, placarding, shipping paper, packaging, loading, or other requirements that could reasonably result in the following:

a. Improper identification of the type, quantity, or form of material; or

b. Failure of the carrier or recipient to exercise adequate controls; and

c. Substantial potential for personnel exposure or contamination, or improper transfer of material; or

4. Failure to make required initial notification associated with Severity Level III violations.

D. Severity IV—Violations of NRC transportation requirements involving:

1. Package selection or preparation requirements which do not result in a breach of package integrity or surface contamination or external radiation levels in excess of NRC requirements; or

2. Other violations that have more than minor safety or environmental significance.

E. Severity V—Violations that have minor safety or environmental significance.

[13] See 10 CFR 73.2(y).

[15] Personnel overexposures and associated violations, incurred during a life saving effort, will be treated on a case-by-case basis.

[14] Some transportation requirements are applied to more than one licensee involved in the same activity such as a shipper (10 CFR 73.20) and a carrier (10 CFR 70.20a). When a violation of such a requirement occurs, enforcement action will be directed against the responsible licensee which under the circumstances of the case may be one or more of the licensees involved.

47 FR 9987

Supplement VI—Severity Categories

Fuel Cycle and Materials Operations

A. Severity I—Very significant violations involving:

1. Radiation levels, contamination levels, or releases that exceed ten times the limits specified in the license;

2. A system designed to prevent or mitigate a serious safety event not being operable when actually required to perform its design function; or

3. A nuclear criticality accident.

B. Severity II—Very significant violations involving:

1. Radiation levels, contamination levels, or releases that exceed five times the limits specified in the license; or

2. A system designed to prevent or mitigate a serious safety event being inoperable.

C. Severity III—Significant violations involving:

1. Failure to control access to licensed materials for radiation purposes as specified by NRC requirements;

2. Possession or use of unauthorized equipment or materials in the conduct of licensee activities;

3. Use of radioactive material on humans where such use is not authorized;

4. Conduct of licensed activities by a technically unqualified person;

5. Radiation levels, contamination levels, or releases that exceed the limits specified in the license; or

6. Medical therapeutic misadministrations.

D. Severity IV—Violations involving:

1. Failure to maintain patients hospitalized who have cobalt-60, cesium-137, or iridium-192 implants or to conduct required leakage or contamination tests, or to use properly calibrated equipment;

2. Other violations that have more than minor safety or environmental significance; or

3. Medical diagnostic misadministrations.

E. Severity V—Violations that have minor safety or environmental significance.

Supplement VII—Severity Categories

Miscellaneous Matters[15]

A. Severity I—Very significant violations involving:

1. A Material False Statement (MFS)[16] in which the statement made was deliberately false;

2. A failure to provide the notice required by Part 21 under circumstances for which a civil penalty may be imposed under section 206(b) of the Energy Reorganization Act (ERA); or

3. Deliberate action by management to discriminate (in violation of Section 210 of the ERA) against an employee for attempting to communicate or actually communicating with NRC.

B. Severity II—Very significant violations involving:

1. A MFS or a reporting failure, involving information which, had it been available to the NRC and accurate at the time the information should have been submitted, would have resulted in regulatory action or would likely have resulted in NRC seeking further information;

2. A MFS in which the false statement was made with careless disregard;

3. Discrimination (in violation of Section 210 of the ERA) by management at any level above first-line supervision, against an employee for attempting to communicate or actually communicating with NRC; or

4. A failure to provide the notice required by Part 21.

C. Severity III—Significant violations involving:

1. A MFS not amounting to a severity level I or II violation;

2. Discrimination (in violation of Section 210 of the ERA) against an employee for attempting to communicate or actually communicating with the NRC; or

3. Inadequate review or failure to review such that, if an appropriate review had been made as required, a Part 21 report would have been made.

D. Severity IV—Violations involving:

1. Inadequate review or failure to review under Part 21 or other procedural violations associated with Part 21 with more than minor safety significance; or

2. A false statement caused by an inadvertent clerical or similar error involving information which, had it been available to NRC an[1] accurate at the time the information should have been submitted, would probably not have resulted in regulatory action or NRC seeking additional information.

E. Severity V—Violations of minor procedural requirements of Part 21.

47 FR 9987

47 FR 9987

[15] As noted in Section III, in determining the specific severity level of a violation, consideration will be given to such factors as the position of the person involved in the violation (e.g., first line supervisor or senior manager), the significance of any underlying violation, the intent of the violator (i.e., negligence not amounting to careless disregard, careless disregard, or deliberateness), and the economic advantage, if any, gained by the violation. The relative weight given to each of these factors in arriving at the appropriate severity level will be dependent on the circumstances of the violation.

[16] In essence, a Material False Statement is a statement that is false by omission or commission and is relevant to the regulatory process.