UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

IN RESPONSE, PLEASE
REFER TO: M890628

July 6, 1989

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 11:30 A.M., WEDNESDAY, JUNE 28, 1989, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-89-133 - Final Rule for Revisions to 10 CFR Part 2 to Improve the Hearing Process

The Commission, by a 5-0 vote, approved a final rule amending 10 CFR Part 2 to modify the Commission's Rules of Practice to improve the hearing process, as attached. The amendments, (1) require filing of a list of contentions and information to show that a genuine dispute exists on an issue of law or fact, (2) reduce unnecessary discovery, (3) expand the time during which motions to dispose of contentions summarily and without a hearing may be filed, and (4) limit an intervenor's appeals and filings of proposed findings of fact and conclusions of law to issues which a party actually placed in controversy or sought to place in controversy in the proceeding.

The Federal Register Notice should be reviewed by the Regulatory Publications Branch, ADM, for consistency with the requirements of the Federal Register and forwarded to the Office of the Secretary for signature and publication.
(OGC) (SECY Suspense: 7/28/89)

Attachment:
As stated

cc: Chairman Zech
Commissioner Roberts
Commissioner Carr
Commissioner Rogers
Commissioner Curtiss
EDO
GPA
PDR - Advance
DCS - P1-24

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN: 3150 - AC22, 3150 - AA05

Rules of Practice for Domestic Licensing Proceedings--
Procedural Changes in the Hearing Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its Rules of Practice to improve the hearing process with due regard for the rights of the parties. The amendments require a person seeking to participate as a party in an NRC proceeding to file a list of contentions with the presiding officer together with a brief explanation of the bases for each contention, a concise statement of the alleged facts or expert opinion that support the contention and which, at the time of the filing, the person intends to rely upon in proving the contention at the hearing, and references to the specific sources and documents of which the person is aware and upon which he or she intends to rely to establish such facts or expert opinions. The information submitted by

a potential intervenor must be sufficient to show that a genuine dispute exists between it and the applicant or licensee on an issue of law or fact. If the person fails to satisfy these requirements the presiding officer shall not admit the contention. Other amendments are made to reduce unnecessary discovery, to describe procedures by which a presiding officer may require parties to file a description of the purpose and nature of questions which they intend to ask witnesses during cross-examination, to expand the time during which motions to dispose of contentions summarily and without a hearing may be filed, and to limit an intervenor's appeals and filings of proposed findings of fact and conclusions of law to issues which that party actually placed in controversy or sought to place in controversy in the proceeding.

EFFECTIVE DATE: Insert date 30 days after date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Francis X. Cameron, Senior Attorney, Rulemaking and Fuel Cycle Division, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone (301) 492-1637.

SUPPLEMENTARY INFORMATION.

1. Background.

On July 3, 1986, after extensive study, evaluation and review and careful consideration of prior public comments, [1/] the Commission published a notice of proposed rulemaking stating that it was considering amending certain provisions of its rules of practice in order to improve the licensing process for nuclear power plants and inviting public comment (51 FR 24365, July 3, 1986.) The proposed amendments, which were initially developed by the Regulatory Reform Task Force, addressed specific aspects of the hearings process: admission of contentions; discovery against NRC staff; use of cross-examination plans; timing of motions for summary disposition; and limitations on intervenors' filings of proposed findings of fact, conclusions of law, and appellate briefs. In addition to these proposals, the Commission also requested comments on a series of related proposals developed by former Commissioner Asselstine concerning the intervention process. The comment period expired October 17, 1986. More than 150 comments, including a few late-filed comments, were received from electric utilities, electric utility and nuclear power associations or their counsel, utility stockholders, counsel for NRC licensees, an architect-engineer, intervenors in NRC proceedings, public interest groups, states, local governments, Indian tribes and interested individuals. Copies of all comments received are available for public inspection, and copying for a fee, at the NRC Public Document Room at 2121 L Street, NW., lower level, Washington, DC.

1/ A detailed account of the background of this rulemaking is set out in the preamble of the proposed rule, see 51 FR 24365-24366, July 3, 1986.

II. Summary of Comments.

A. General.

Although objections were raised to some of the specific proposals, the proposed rule received broad support from electric utilities, their counsel and various industry groups. According to these commenters, the proposed rule would streamline the hearing process and make it more efficient. States, local governments, public interest groups, intervenors and individuals generally opposed the proposals on the ground that they would curtail the public's role in the licensing process and meaningful public participation in licensing proceedings would be eliminated. Noting the need for and importance of unbiased factual information in reaching sound regulatory decisions and the effectiveness of intervenors in identifying and obtaining full consideration of vital health and safety issues, these commenters expressed the view that opportunities for full public participation in the licensing process should be expanded, not reduced. Some commenters questioned the need for the proposed changes. Others stated that the Commission's rules of practice should be retained unchanged.

B. Comments on Specific Proposals, with Responses.

The sections which follow contain a description of each of the proposed amendments, a summary of the comments received and an NRC response.

1. Intervention (10 CFR 2.714) Admission of Contentions

The proposed amendments to 10 CFR 2.714 would raise the threshold for the admission of contentions to require the proponent of the contention to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact. The required showing must include references to the specific portions of the application which are disputed. The contention must also be supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware, which will be relied on to establish the facts or expert opinion. Absent this showing, the contention will not be admitted. Under the proposed amendments, admission of a contention may also be refused if it appears unlikely that the petitioner can prove a set of facts in support of the contention or if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief. Finally, the proposed amendments would provide that a contention raising only an issue of law will not be admitted for resolution in an evidentiary hearing but shall be decided on the basis of briefs and any oral argument that may be held.

Electric utilities, their counsel and industry groups, for the most part, supported this change, while environmental and citizen action groups and state and local government representatives opposed the proposed amendments raising the threshold for the admission of contentions.

Characterizing the proposed changes respecting the admission of contentions as one of the most significant aspects of the proposed rule, the commenters who favored adopting more stringent standards of admissibility stated that the Commission's existing procedures permitted too many insignificant, meritless, hypothetical and time-consuming contentions to be admitted and that the proposed amendments would have the salutary effect of requiring petitioners to know in advance of filing a petition to intervene what issues they intended to litigate and how they planned to conduct the litigation. In the opinion of some commenters, the proposed amendments, if vigorously enforced, could become an important tool in crystallizing disputes at an early stage in the proceeding, thereby significantly improving the efficiency and quality of the hearing process. The commenters noted that the proposed amendments should curtail the practice of using discovery procedures to develop contentions and that the proposed amendments would bring NRC practice more in line with Federal practice under the Administrative Procedure Act. The proposed amendments would also, in one respect, conform NRC practice more closely to that permitted by the Federal Rules of Civil Procedure. On this point, one commenter noted the similarity between Rule 12(b)(6) of the Federal Rules of Civil Procedure and the provision in proposed § 2.714(d)(2)(iii) under which a presiding officer could refuse to admit a contention upon a determination that the contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.

Some of the proponents of the proposed amendments expressed the view that the amendments should be further revised. Several commenters expressed the view

that the proposed amendments did not go far enough in that they failed to include more stringent requirements respecting standing. Several commenters questioned the propriety of admitting contentions based on disputes on issues of policy. In the opinion of these commenters, it would be inappropriate for licensing and appeal boards to decide policy issues. Policy and disagreements concerning policy should be addressed by the Commission itself. According to these commenters, to permit policy statements which have been formally adopted by the Commission to be challenged in licensing and regulatory proceedings devoted to other matters would be inconsistent with current NRC practice (see 10 CFR 2.758) which precludes parties in any adjudicatory proceeding involving initial licensing, except as provided in § 2.758(b), (c) and (d), from challenging any Commission rule or regulation. Instead, concerns respecting Commission policies should be raised at the time the Commission is actively engaged in developing and formulating those policies in the forum provided by the Commission for that purpose.

In response, the Commission would note that the use of the terms "law, fact and policy" was not meant to change in any manner the way Commission regulations or policy statements are dealt with in NRC proceedings. The terms were used merely to encompass the variety of issues, often mixed factual, legal or policy issues, which can be the subject of contentions in NRC proceedings. However, to avoid any ambiguity about the manner in which policy issues are to be dealt with before the NRC, the word "policy" has been deleted from the final version of §2.714.

Several commenters criticized the language used in paragraph (b)(2) of § 2.714 to describe the threshold of admissibility on the ground that it was unnecessarily redundant because it included two separate standards of admissibility, i.e., (1) the existence of a genuine dispute with the applicant on a material issue of law, fact or policy, and (2) the information presented prompts reasonable minds to inquire further as to the validity of the contention. Some commenters opposed, while other commenters favored, inclusion of the "reasonable minds" standard. One commenter noted that the genuine dispute standard is the same standard used to determine standing and that if this standard is applied as it has been in the past, adoption of the proposed amendments will have little practical effect. The Commission has concluded that describing the threshold for admissibility by two different phrases is unnecessary and could create confusion. Therefore the "prompts reasonable minds to inquire further" language has been deleted from the final rule.

Commenters opposing the proposed amendments objected on the grounds that the proposed amendments were unnecessary, contrary to due process, unduly burdensome, unfair and in violation of the provisions of section 189a of the Atomic Energy Act of 1954, as amended. According to these commenters, the proposed standard for the admission of contentions is so restrictive that it would be virtually impossible for persons seeking to participate in an NRC adjudicatory proceeding to succeed in having their contentions admitted with the result that significant safety issues might not be fully explored or carefully reviewed. Instead of sharpening the issues in dispute, the proposed

amendments would simply eliminate certain issues from further consideration with the result that the problems presented might never be satisfactorily resolved. This could be highly detrimental to the public health and safety.

Asserting that the proposed standard for admissibility of contentions is far more stringent than that applied by the Federal courts, the commenters argued that, if promulgated, the standard would have the effect of requiring persons seeking to participate in an NRC proceeding to prepare and prove their complete evidentiary case before any determination is made on their right to be a party to the proceeding. Under the proposed procedures, several commenters argued, petitioners would not only be required to produce the proof of their alleged facts in order to be admitted to the proof-gathering and fact-finding process; licensing boards would also be permitted to prejudge the petitioner's evidence before the petitioner was granted standing to participate in the proceeding. Several commenters took strong exception to the provision in § 2.714(d)(2)(ii) which would permit presiding officers to bar an intervenor from participating in a proceeding on the basis of a preliminary determination that "it appears unlikely that petitioner can prove a set of facts in support of its contention."

In the opinion of some commenters, the requirement that petitioners must document and furnish evidence in support of their contentions before they are entitled to participate in an adjudicatory proceeding and take advantage of the mechanisms normally available to parties to such a proceeding to obtain relevant documents and information is patently unfair and constitutes a denial

of due process. In addition, they argue, contrary to the intent of the present regulatory scheme, one immediate effect of the proposed amendments would be to shift the burden of proof from the license applicant to the intervenor. The comments also noted that under the Commission's regulations, license applicants are not required to furnish all the necessary documentation supporting the application at the time the application is first submitted. These circumstances, coupled with the more stringent standard for the admission of contentions prescribed by the proposed amendments, would make it impossible for intervenors to prepare and litigate a fully definitive case.

Some commenters also argue that to the extent that the proposed amendments would operate to bar intervenors from participating in NRC adjudicatory proceedings, they would contravene the provisions of section 189a of the Atomic Energy Act of 1954, as amended, which states, in pertinent part:

> "In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. . . ."

The commenters also opposed the proposed amendments because, in their opinion, the amendments would, if adopted, create a hopeless state of confusion respecting the matters to be considered in determining whether a person should be entitled to participate in a proceeding and the matters to be considered in reaching a decision on the merits of the proceeding. In their view, the standards used in deciding an issue on the merits are not appropriate for deciding whether a particular person should be allowed to participate in a proceeding. The commenters also took exception to the cases cited in the preamble of the proposed rule in support of this proposal.

Finally, some commenters objected to the proposed amendments on the grounds that they are unnecessary. According to these commenters, presiding officers have adequate authority under the Commission's present rules of practice to bar contentions which are frivolous and without merit. In general, when an effort has been made to apply the existing requirements in a disciplined manner, presiding officers have experienced little difficulty in determining whether a particular contention is meritorious and should be admitted as an issue in the proceeding. The commenters are firmly of the view that additional amendments establishing more stringent standards for the admission of contentions are unnecessary.

The Commission disagrees with the assertions that the proposed amendments are unduly burdensome and so restrictive that it will be virtually impossible for persons to have safety contentions admitted to an NRC proceeding.

Under these new rules an intervenor will have to provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing, together with references to the specific sources and documents of which the intervenor is aware and on which the intervenor intends to rely in establishing the validity of its contention. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.

In addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant or the licensee on a material issue of law or fact. This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view. Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.

The Commission does not agree that this rule contravenes section 189a of the Atomic Energy Act of 1954, as amended. A member of the public has no absolute

or unconditional right to intervene in a nuclear power plant licensing proceeding under the Atomic Energy Act. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974). Section 189a of the Act which provides for intervention is subject to the Commission's rulemaking power under section 161p and, thus, to reasonable procedural requirements designed to further the purposes of the Act. BPI v. Atomic Energy Commission, supra, 502 F.2d at 427, 428; see also American Trucking Ass'ns, Inc. v. United States, 627 F.2d 1313, 1320-23 (D.C. Cir. 1980). Furthermore, the right to intervention under section 189a for a member of the public is explicitly conditioned upon a "request." The proposed amendments would, in effect, provide that a "proper request" by a member of the public shall include a statement of the facts supporting each contention together with references to the sources and documents on which the intervenor relies to establish those facts. Finally, the Administrative Procedure Act creates no independent right to intervene in nuclear licensing proceedings. See Easton Utilities Commission v. Atomic Energy Commission, 424 F.2d 847, 852 (D.C. Cir. 1970)(en banc); cf. National Coal Operators' Assn. v. Kleppe, 423 U.S. 388, 398-99, 46 L. Ed. 2d 580, 96 S. Ct. 809 (1976).

Nor does the Commission believe that this requirement represents that substantial a departure from existing practice. Under the Commission's existing requirements, as explained by the Atomic Safety and Licensing Appeal Board, "[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that

could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982); vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). See also Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). Under the current requirement to provide the basis for a contention, a petitioner must provide some sort of minimal basis indicating the potential validity of the contention. "The requirement generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987). The revised rule does, however, overturn the holdings of Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973) and Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 (1980). The Appeal Board found in those cases that the current language of 10 CFR §2.714 does not require a petitioner to describe facts which would be offered in support of a proposed contention. The new rule will require that a petitioner include in its submission some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists.

We reject the arguments that the new rule is unfair and a denial of due process because it requires intervenors to allege facts in support of its contention before the intervenor is entitled to discovery. Several months before contentions are filed, the applicant will have filed an application with the Commission, accompanied by multi-volume safety and environmental reports. These documents are available for public inspection and copying in the Commission's headquarters and local public document rooms. Admitted intervenors will continue to be able to use discovery to develop the facts necessary to support its case. However, the rule will require that before a contention is admitted the intervenor have some factual basis for its position and that there exists a genuine dispute between it and the applicant. It is true that this will preclude a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts. The Commission does not believe this is an appropriate use of discovery or cross-examination. BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974). The Commission believes it is a reasonable requirement that an intervenor be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue.

The Commission agrees with commenters that the new rule may require persons seeking intervention to do more work at an earlier stage of the proceeding than under the current regulations. However, the Commission disagrees with the conclusion reached by some commenters that the rule shifts the burden of

proof to potential intervenors or should be rejected because of the burden placed on potential intervenors. The revised rule does not shift the ultimate burden of persuasion or the question of whether the permit or license should be issued; it rests with the applicant. Rather, the rule only details what is expected of an intervenor as part of its burden of coming forward with information in support of a proposed contention. Cf. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973). The Commission believes it to be a reasonable requirement that before a person or organization is admitted to the proceeding it read the portions of the application (including the applicant's safety and environmental reports) that address the issues that are of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law. Many intervenors in NRC proceedings already ably do what is intended by this requirement: they review the application before submitting contentions, explain the basis for the contention by citing pertinent portions and explaining why they have a disagreement with it.

The Commission also disagrees with the comments that § 2.714(b)(2)(iii) should permit the petitioner to show that it has a dispute with the Commission staff or that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents. Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC

regulatory requirements, rather than the adequacy of the NRC staff performance. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983). 2/ For this reason, and because the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES and SER.

The new rule provides that in ruling on the admissibility of a contention, the presiding officer shall not admit a contention to the proceeding if the intervenor fails to set forth the contention with reasonable specificity or establish a basis for the contention. In addition, the contention will be dismissed if the intervenor sets forth no facts or expert opinion on which it intends to rely to prove its contention, or if the contention fails to establish that a genuine dispute exists between the intervenor and the applicant (or, possibly, the NRC staff on a NEPA issue). Contrary to the assertions of some commenters, the use of this standard for the admission of contentions has been supported by the Federal courts in numerous instances. Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978);

2/ The Commission recognizes that in some cases the applicant's and the NRC staff's position on a particular issue will be similar. Although under these rules the contention must be framed to disagree with the applicant's position, an intervenor's evidentiary presentation in such a case at the hearing may be directed towards both the staff and the applicant to the extent required for a consistent litigation strategy.

Independent Bankers Ass'n v. Board of Governors, 516 F.2d 1206 (D.C. Cir. 1975); Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245 (D.C. Cir. 1980). The court in the latter case emphasized that "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 627 F.2d at 251. The Commission's rule is consistent with these decisions.

Several commenters were concerned that the standard "dispute on a genuine issue of material law or fact" is the same one to be used by the presiding officer in ruling on motions for summary judgment filed under 10 CFR 2.749. The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion. At the summary disposition stage the parties will likely have completed discovery and essentially will have developed the evidentiary support for their positions on a contention. Accordingly, there is much less likelihood that substantial new information will be developed by the parties before the hearing. Therefore, the quality of the evidentiary support provided in affidavits at the summary disposition stage is expected to be of a higher level than at the contention filing stage.

The proposed rule also provided in section 2.714(d)(2) that the presiding officer would refuse to admit a contention where:

(ii) It appears unlikely that petitioner can prove a set of facts in support of its contention; or

(iii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

The requirement in (iii) above was intended to parallel the standard for dismissing a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The intent of Rule 12(b)(6) is to permit dismissal of a claim where the plaintiff would be entitled to no relief under any set of facts which could be proved in support of his claim.

A number of commenters disagreed with the language of proposed §2.714(d)(2)(ii); specifically, the phrase "appears unlikely", because it suggests that the presiding officer is to prejudge the merits of a contention before an intervenor has an opportunity to present a full case. The Commission recognizes the potential ambiguity of the proposed phrasing and the paragraph has been deleted.

Issues which arise under the National Environmental Policy Act (NEPA) are specifically addressed in the new rule. NEPA requires the NRC to analyze the environmental impact of its proposed major actions significantly affecting the quality of the environment. In the licensing context, the NRC fulfills this obligation by issuance of a draft environmental impact statement (DES) and a final environmental impact statement (FES). Any license or permit application

subject to NEPA's impact statement requirement must contain a complete Environmental Report (ER) which is essentially the applicant's proposal for the DES. (See 10 CFR 51.20 and 51.40). As described in § 2.714(b)(2)(iii), an intervenor will be required to demonstrate that a genuine dispute exists between it and the applicant or the staff on a material issue of fact or law which relates to NEPA. Several commenters took exception to the provisions in paragraph (b)(2)(iii) of § 2.714 relating to environmental matters, claiming, among other things, that those provisions appear to authorize petitioners to submit late-filed contentions based on the NRC staff's environmental review documents. One commenter recommended that the discussion of NEPA issues in § 2.714(b)(2)(iii) be deleted as unnecessary, noting the availability of a right, based on past precedents, to amend or supplement environmental documents to reflect new information. The commenters disagreed on whether contentions relating to environmental matters should focus on environmental reports submitted by the applicant or environmental documents prepared by the NRC staff.

The Commission has reexamined those portions of § 2.714(b)(2)(iii) which relate to the filing of environmental contentions in the light of these comments and has concluded that the text of the rule as presently drafted is clear and that no further revision is needed. The rule makes clear that to the extent an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document. The NRC staff in its DES or FES may well take a different position than the applicant. 10 CFR 2.714(b)(2)(iii) explicitly recognizes for environmental matters existing

precedent regarding the right to amend or supplement contentions based on new information. The Commission wishes to emphasize that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw, e.g., Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

One commenter objected to the inclusion of the word "concise" in paragraph (b)(2)(ii) of § 2.714 on the ground that it "could be misconstrued as requiring brevity." The commenter added that a word or phrase which connotes sufficient detail to inform the reader of the various factual or other bases for the contention should be used instead.

The Commission disagrees with the view of the commenter that retention of the word "concise" in paragraph (b)(2)(ii) of § 2.714 could be misleading. In the opinion of the Commission, paragraph (b)(2)(ii), when read in context with paragraphs (b)(2)(i) and (b)(2)(iii) of § 2.714, clearly identifies the kind of detailed information which a petitioner must provide to enable the Commission or the presiding officer to determine whether a contention should be admitted in a particular adjudicatory proceeding.

Several commenters suggested that paragraph (b)(2)(iii) of §2.714 should require that the issue being raised is not only in dispute but is also "material", that is, that the resolution of the dispute would make a

difference in the outcome of the licensing proceeding. The Commission concurs that that was the intention of the requirement, as is demonstrated by the the language of paragraph (d)(2)(i) of §2.714, which provided for "determining whether a genuine dispute exists on a material issue" of law or fact. Section 2.714(a)(2)(iii) has been revised to include the word "material".

One commenter expressed the view that there was very little likelihood that contentions involving purely legal issues would be submitted (in most cases contentions raise mixed questions of law and fact) and therefore paragraph (d)(2)(iv) of § 2.714 is unnecessary and should be deleted. Another commenter disagreed with the form of § 2.714(a)(2)(iv). As written, it conflicts with the proposed definition of a contention in 10 CFR 2.714(b)(2) as a statement of " law, fact or policy". While not opposed to the intent of the proposal, the commenter recommended that this section be revised to read as follows:

> If the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the admissibility of contentions determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the Commission or the presiding officer.

The intent of the proposed rule in § 2.714(d)(2)(iv) was that purely legal contentions, which occur rarely, may be admitted as issues in the proceeding. However, they will not be a part of an evidentiary hearing, but rather, will

be handled on the basis of briefs and oral arguments. A new paragraph (e) has been added to §2.714 to clarify this intention.

The Commission is also making a clarifying change to 10 CFR §2.714(c). That paragraph provides that any party to a proceeding may file an answer to a petition to intervene within certain time periods. Prior to 1978, a person petitioning to intervene in an NRC proceeding was required to state not only how his or her interest might be affected by the results of the proceeding, but also the basis for his or her contentions with regard to each aspect on which he or she desired to intervene. Under that scheme for petitions for leave to intervene, it was clear that a response filed pursuant to 10 CFR §2.714(c) could be a response to the contentions and the bases for any contentions proposed. In 1978, the Rules of Practice were amended to provide that a petitioner could file his or her contentions separately in a supplement to the original petition to intervene, not later than fifteen days prior to the special prehearing conference held pursuant to 10 CFR §2.751a or the first prehearing conference. Section 2.714(c) was not amended to make it clear that answers to these supplemental petitions containing contentions and their bases were permitted as well as to the original petition to intervene. However, the practice before the Commission since 1978 has been that answers to supplements to petitions to intervene as well as to an initial petition to intervene are permissible within the timeframe established by §2.714(c). Language is being added to §2.714(c) to make it clear that answers to both initial petitions and any supplements thereto are permissible.

Former Commissioner Asselstine also suggested in the proposed rule additional changes in the Commission's rules on intervention and public participation in the licensing process. Changes to 10 CFR 2.104, 2.714, 2.751a and 2.752 were proposed to require early publication of notice of receipt of an application, to specify the time within which petitions for intervention can be filed, to separate the decision on standing from the decision on the validity of contentions, to provide for a mandatory ninety day period of time to draft contentions, and to create a two stage screening process to determine whether or not a genuine issue of a material fact exists with respect to each contention.

Those commenters who favored former Commissioner Asselstine's proposals felt they would improve the efficiency of the hearing process without imposing additional burdens on intervenors. They were thought to be logical and easy to understand and dealt with the fact that although the hearing clock begins when an application is docketed, much of the documentation of interest to intervenors may not be ready for some time. Some commenters felt the proposals would encourage informal discussion and resolution of disputes and were generally more equitable and fair.

Those commenting unfavorably on the Asselstine proposals felt they would exacerbate the current problems of instability and unpredictability in the hearing process. The use of provisional admission and the notice of receipt proposals would only add additional steps to the hearing process without increasing its effectiveness. They felt presiding officers already have the

authority to reject petitions for intervention prior to submission of contentions and do so. These proposals would substantially increase the number of parties and contentions without any countervailing benefit. Other commenters, although favoring the approach of Commissioner Asselstine, believed discovery should take place before contentions and that too much discretion was being given to the presiding officer to dismiss contentions.

The Commission has considered the comments on Commissioner Asselstine's proposals and concluded that it does not wish to take any additional action regarding these proposals at this time. Several of them address the same aspects of the hearing process, e.g. the filing of contentions, as the proposed rule changes made by the Commission, and, the Commission has chosen to adopt those rules essentially as proposed.

2. Subpoenas (10 CFR 2.720) Discovery Against NRC Staff

The proposed amendments to 10 CFR 2.720(h)(2)(ii) would codify two existing grounds used by NRC staff to object to responding to interrogatories from parties in NRC adjudicatory proceedings. This change would enable the staff simply to cite the provisions of the rule in objecting to a request, thereby conserving limited staff time and resources. The first ground for objecting reflects existing NRC practice in which a response stating that the requested information is available in either NRC public document rooms or in public compilations and providing sufficient information to enable a party to locate the material requested is considered adequate. The second ground would limit

the scope of an interrogatory by barring the requestor from asking the NRC staff to explain its reasons for not using data, assumptions and analyses where the NRC staff did not rely on this information in its review. Persons submitting interrogatories would also be prevented from asking the staff to perform additional research or analytical work beyond that needed to support the NRC staff's position on any particular matter. Requestors could continue to submit interrogatories seeking to elicit factual information reasonably related to the NRC staff's position in the proceeding, including data used, assumptions made and analyses performed by the NRC staff.

The commenters who supported the proposed amendments did so because they believed it would be advantageous if certain established and well recognized precedents commonly used in NRC adjudicatory proceedings were codified in NRC's Rules of Practice. According to the commenters, the perceived advantages of codification included conservation of increasingly limited NRC staff resources, increased use of accepted legal procedures and reduction of delays in the application review process. One commenter stated that these procedures should not be limited to the NRC staff but that they should be equally available to all parties to any NRC adjudicatory proceeding. Several commenters who opposed the rule, also made this comment.

One commenter supported codification in principle but pointed out that the proposed amendments as presently drafted, do not accurately reflect existing precedent. For example, the proposed amendments convert a statement indicating the availability of a document, long recognized as an acceptable

response, into an acceptable rationale for not responding. The commenter also took issue with the prohibition against the submittal of questions requesting the NRC staff to explain why it did not use certain alternative data or assumptions or perform certain analyses. According to the commenter, questions of this type would not require the staff to perform additional research; the staff need only respond by providing an explanation.

The commenters who opposed placing additional restrictions on interrogatories to the NRC staff did so for a variety of reasons. Considered unfair, unnecessary and unwise as a matter of policy, the proposed amendments were criticized because they would defeat the basic purpose of discovery--to obtain relevant information on issues raised in and pivotal to the proceeding, thereby preventing surprise at trial.

A number of commenters noted that the staff is a major if not crucial party because it is the party with the technical resources and expertise. Intervenors need full opportunity to understand and question the staff's position. Moreover, the staff should be held accountable for its actions. This proposal could restrict the flow of information and would place the burden on intervenors to locate information bearing on the staff's position. This would increase intervention costs. The current rules provide ample protection for the staff. If anything, discovery against the staff should be increased rather than decreased.

A number of commenters opposed to the rule change expressed concerns similar to those described above made by supporters of the rule. They were concerned that the proposed rule would improperly shield the staff from its obligation to explain and justify its position. The stated rationale for the rule--caselaw on the issue of requiring extensive independent research--does not support the proposal in the view of one commenter. The staff may have examined alternative assumptions, data and analyses and chosen not to rely on them. Interrogatories asking the staff to provide an explanation for why one particular source of data or analysis was chosen is fair discovery.

Several commenters argued that parties are entitled to know not just the facts supporting the staff's position but whatever facts are in the staff's possession. It is unreasonable and unfair to limit discovery to information that supports the staff's position. Relevant facts which do not support the staff's final position could be concealed.

A number of commenters were also critical of the assertion that this proposal was an attempt to conserve staff resources. Several asserted that the existing rules already give the staff special status in responding to discovery. If the staff is to remain a full party, it should be equal not privileged. Commission arguments that this rule is necessary to preserve scarce staff resources are not consistent with positions previously taken with respect to other parties to NRC proceedings. The Commission has consistently taken the view that parties are not excused from hearing obligations due to a lack of resources. Inhibiting the flow of information is not an appropriate

way to deal with scarce staff resources. The Commission should either seek additional appropriations or eliminate party status for the staff.

If the Commission wants to institutionalize the two objections discussed in the proposal they should be made applicable to all parties not just the staff. Commenters representing applicants asserted that discovery against them has many of the same objectionable qualities--asking for documents already on the docket or requesting the applicant to perform new analyses. These commenters saw no justification for codifying the NRC caselaw solely for the benefit of the staff.

A number of commenters were also critical of the second element of the proposed rule which would codify the existing NRC practice that an adequate discovery response is to state that the requested information is available in public document rooms or other public compilations. Several commenters noted that this proposal does more than just codify existing practice. If that were all it did, the basis for it is weak, because citing a rule rather than caselaw is not a meaningful reduction in staff workload. The proposal converts a method of response (citation to a specific document) into grounds for not responding. Under the proposed rule the Licensing Board must determine if information is reasonably obtainable from the public document room or another source. But the Licensing Board won't readily be able to determine this on its own. The staff might as well respond at the outset with the information which constitutes an adequate response under existing practice--title, page reference and location of document--rather than object

and become involved in a round of pleadings to determine the staff's duty to respond.

Several commenters objected to the proposal because of the impact they felt it could have on specific types of proceedings. One commenter objected to limitations on interrogatories to the staff in enforcement proceedings regarding alternative assumptions and analyses not relied on. The concern was that if the staff refused to rely on a particular analysis performed by the licensee or its contractor in determining compliance, litigation of the issue could be protracted if the staff were not required to address it during discovery.

The Commission has decided to adopt the proposed changes to its discovery procedures; however, the changes will apply to all parties to NRC proceedings, not just to the NRC staff. Because of this expanded applicability of the changes, they are being incorporated into 10 CFR § 2.740, the general provisions governing discovery rather than into § 2.720 as proposed.

Commission caselaw has long established that while in response to a discovery request a party must reveal information within its possession and control, which may entail some investigation to determine what information is in the party's possession, the party is not required to engage in independent research. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2, ALAB-613, 12 NRC 317, 334 (1980). The breadth of

permissible interrogatories is limited to those which address factual information related to a party's position in the proceeding, such as data used, assumptions made, and analyses performed by the party.

A party must provide the basis for its position on an issue in the proceeding, but the Commission does not believe that a party should be called upon through the discovery process to explain why it did not use other data or be required to perform additional studies. Interrogatories which elicit what data the party has relied on and why are acceptable. Interrogatories which ask a party to describe reasons why other data were not relied upon in developing a party's position will not be permissible. So long as prior to the trial, parties have an opportunity to learn what another party has done or what information that other party has to provide the basis for its position, the party seeking discovery will be able to show in the hearing what, in its view, the other party should have done or why its position is incorrect. By eliminating burdersome interrogatories the Commission will conserve not only its own staff resources, but provide a fair hearing process for all parties.

These principles are particularly important when applied to the NRC staff. To the extent that discovery elicits otherwise unavailable factual information concerning the basis for the staff's position on a particular issue in a proceeding, a party should be better prepared for trial. At the same time, the staff should be able to produce the factual information requested with minimal disruption of its limited resources. Staff documents relevant to a proceeding are publicly available as a matter of course unless there is a

compelling justification for their nondisclosure. These publicly available documents reasonably disclose the basis for the staff's position. Thus formal discovery against the staff may legitimately be narrowed to minimize staff resources involved in time consuming discovery procedures.

The second proposed change to discovery procedures does not, despite suggestion by some commenters to the contrary, add any new bases for objecting to interrogatories. The change merely clarifies current practice that when a document is reasonably available from another source, such as the Commission's Public Document Room or local Public Document Room, the information need not be provided in response to the interrogatory. A sufficient answer to such an interrogatory is the location, title and a page reference to the relevant document.

3. Evidence (10 CFR 2.743) Cross-Examination

The proposed amendment to 10 CFR 2.743 would require a party to a proceeding to obtain the permission of the presiding officer in order to conduct cross-examination and would bar the presiding officer from considering any request to cross-examine unless the request was accompanied by a cross-examination plan containing specified information. The required plan would include a brief description of the issues on which cross-examination would be conducted and a proposed line of questions to achieve stated objectives together with the expected answers. The cross-examination plans

would be kept confidential until the presiding officer issued his or her decision.

The commenters who supported the proposed amendments believed the requirement for a plan would encourage parties to think out their case in advance and would lead to better questions and a shorter proceeding. The proposed changes would add structure to cross-examination and decrease repetitive and cumulative questions. Some noted that cross-examination plans are essentially already standard practice, while others indicated their belief that the proposed changes would improve the Board's ability to control proceedings. One commenter, in supporting the proposal, noted that the NRC was within its authority to limit cross-examination to cases where it is required for full and true disclosure of the facts; nothing in the Atomic Energy Act or the Administrative Procedure Act guarantees an absolute right to cross-examine witnesses. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978); cert. denied, 439 U.S. 824 (1978).

Several of these same commenters believed the Commission's proposed changes did not go far enough. One asserted that the proposal would not change the hearing process but would only increase procedural requirements that will do little absent a vigilant presiding officer. The Commission should only permit cross-examination if the points to be made could not be achieved by written testimony. Under such an approach, cross-examination would be reserved for impeaching credibility. Several suggested that a party's cross-examination should be limited to issues or contentions that the party had placed in

controversy. Another suggested that if more than one interested party had raised an issue, lead responsibility for litigating it should be assigned to one party.

One commenter stated that this proposal was so watered down from the Commission's earlier proposal in its Advanced Notice as to be almost meaningless. The Board should permit cross-examination only where, based on written evidence, there is a genuine and substantial issue of fact and resolution would be substantially assisted by cross-examination. This commenter also believed that the rule should provide for establishing time limits and noted that requiring and enforcing time limits is routine in Federal courts and other administrative agencies.

Commenters opposed to the proposed rule had concerns both with the proposal as a whole and with specific aspects of it. Several asserted that cross-examination is a fundamental right, and is especially important in NRC proceedings which deal with matters of public health and safety. In their view, the public interest in a full look at safety matters outweighs an interest in reducing a cluttered record. The proposal seeks to gain efficiency at the expense of quality decision-making and the openness of the process. To restrict cross-examination is to negate the purpose of adjudicatory proceedings--to adjudicate disputed facts. The purpose of cross-examination is to explore credibility, inconsistency and bias. Effective cross-examination requires an element of surprise and the ability to shift direction. One commenter asserted that the stated reliance on caselaw

is misplaced. While the caselaw does support requiring parties to demonstrate the need for cross-examination, it has never suggested that barriers may be used to actively preclude the public litigant from participating.

Several commenters argued that the proposal imposes a disproportionately severe impact on intervenors. Some argued that the proposed rule was a blatant attempt to limit the record to testimony prepared by applicant and staff who have the resources to file a large amount of direct testimony. Intervenors are more likely to make their case on cross-examination because they lack the resources to produce their own witnesses.

A number of commenters also opposed the rule as unnecessary because the existing rules, 10 CFR 2.718 and 2.757, are more than sufficient to control cross-examination. The conduct of a hearing and the scope and amount of cross-examination are traditionally within the presiding officer's discretion. One commenter noted that prefiled cross-examination plans are essentially already standard practice. Another stated that such requirements are unnecessary for experienced counsel and unenforceable against others. Several noted that the proposal could waste more time than it would save by creating litigation of the cross-examination plans and by creating a new area for appellate litigation. The remedy is for the board to control the hearing, not add new paperwork requirements on counsel.

Another commenter took a slightly different approach in opposing the proposed rule. This commenter felt there were preferable means to limit argumentative

and unnecessary cross examination. Parties should be limited to litigating only their own contentions and only their stated interest in the contention. If parties have a common interest, their contentions may be jointly admitted and lead responsibility assigned for litigating the contention, including cross-examination. Rather than develop more paperwork, the Commission should simply reiterate that hearings be conducted in strict accordance with the NRC's evidentiary practice.

One commenter questioned whether a Board in rejecting a cross-examination plan would not be prejudging an issue because the presiding officer might not understand the party's overall litigation strategy. Another questioned whether NRC can legally require a party to produce its workproduct to the Board and ultimately to other parties. On the other side, one commenter expressed concern that the filing of plans in confidence with the Board could unfairly influence the Board because parties could expound their theory of the case under the guise of describing objectives to be achieved during cross-examination.

One commenter argued that the proposed rule change violates the requirements of the National Environmental Policy Act (NEPA) for full consideration of all environmental impacts of a decision to license a nuclear power plant. Another commenter asserted that it would violate due process requirements if proceedings to impose civil penalties as well as other enforcement proceedings are not excluded from the rule.

Several objections to specific elements of the proposal were also noted. Many felt fifteen days to review prefiled testimony and prepare cross-examination plans was insufficient. A number of commenters objected to the requirement that the plans include not only questions but also the expected answers to questions. Most felt a statement of objectives and a proposed line of questions was sufficient for a Board to determine relevancy. If answers are required, then a party is in effect limited to asking questions for which he or she already knows the answers. A requirement for prefiled questions and answers would unfairly limit the scope of cross-examination because it would not allow questioners to follow up on the unexpected. Cross-examination is dynamic and litigants need the flexibility to try different tacks. The logical extension of the proposed requirement would be plans for redirect and recross-examination which would further delay a proceeding. Several commenters also noted their belief that this requirement could have a negative impact on discovery. They feared it could encourage a lack of full and prompt response to discovery by applicants in order to make it difficult for intervenors to file adequate plans and, consequently, to conduct cross-examination.

The Commission believes that cross examination plans can have a very beneficial impact on the conduct of a hearing by encouraging parties to develop and evaluate the objectives they expect their cross-examination to achieve and by giving the presiding officer the necessary information to effectively manage the proceeding. The Commission disagrees with those commenters who believe that the use of cross-examination plans will sacrifice

the quality or fairness of its decisionmaking for the sake of efficiency. Cross-examination plans have been used effectively in a number of Commission proceedings. We do not believe it is unduly burdensome to require a party to a proceeding to examine prefiled testimony sufficiently to be able to articulate to the presiding officer the nature of the questions the party believes are necessary to illuminate the issues of concern to it. However, because the usefulness of this procedure is highly dependent upon the circumstances of a particular proceeding, the final rule has been changed to give the Presiding Officer discretion to require submittal of the plans.

The regulation makes clear that parties are entitled to conduct such cross-examination, in accordance with a plan if required by the Presiding Officer, as is necessary for full and true disclosure of the facts. This is the standard set forth in section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d) and existing § 2.743(a). That provision has never been understood to confer unfettered rights to cross-examine witnesses. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978); cert. denied, 439 U.S. 824 (1978); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 867 n. 16 (1974), reconsideration denied, ALAB-252, 8 AEC 1175, aff'd., CLI-75-1, 1 NRC 1 (1975). The standard in the rule will assure that issues are appropriately examined and it is also consistent with the Commission's obligations under NEPA to consider the environmental impacts of a decision.

We do not believe, as suggested by some commenters, that a more restrictive test for cross-examination, e.g. where genuine and substantive issues will be substantially assisted by cross-examination, is appropriate. The option of requiring use of cross-examination plans together with the discretion granted to the presiding officer elsewhere in the regulations to limit unnecessary, argumentative or ouplicative cross-examination provide adequate measures to control the conduct of cross-examination.

This regulation will not inhibit a party's ability to use the element of surprise or shift direction as the cross-examination progresses. When a plan is required, parties must submit objectives and a proposed line of questions. They are not required to submit all of the questions to be asked. If the objectives are sufficiently developed and described, there will be no impediment to shifting the direction of questioning in response to the answers received because the presiding officer will be aware of the ultimate objective of the questioner or be able to ascertain through brief queries of the cross-examiner why the change in direction is appropriate. It is also noted that the plans are required to be kept confidential by the presiding officer. The Commission does agree with a number of commenters that a requirement to include the postulated answers to the questions may create an unnecessary burden on the preparer of the plan. The intent of the requirement was to help the presiding officer understand more easily how the proposed line of questions would achieve the stated objective. We have concluded, however, that the statement of objectives can provide sufficient notice to the presiding officer of the party's intentions and the final rule deletes the requirement to include in the plan expected responses to proposed questions.

Several commenters were also concerned that 15 days was insufficient time to examine testimony and prepare cross-examination plans. Deleting the requirement to include postulated answers should eliminate much of the difficulty which commenters identified for preparation of the plans. Therefore, we are retaining the 15 day prefiling requirement. However, language has been added to §2.743(b)(2) to indicate that the schedule for filing cross-examination plans is to be established by the Presiding Officer. This will assure that the presiding officer will have sufficient time after filing of testimony but before the hearing to review the plans and make any necessary rulings. It will also permit the Presiding Officer to accomodate any unique circumstances of a particular proceeding.

Several commenters suggested that the Commission should impose strict limits on when cross-examination will be available, e.g., for impeaching credibility or where a genuine and substantive issue is substantially assisted by cross-examination, and that it should limit the issues on which an intervenor may cross-examine and assign lead responsibility to a party when several have raised the same issues. The agency's rules currently authorize a presiding officer to consolidate parties and limit or consolidate cross-examination. 10 CFR 2.715a, 2.718 and 2.757. The Commission believes it is desirable to retain the presiding officer's flexibility to decide whether such consolidation is appropriate and therefore, has not limited the presiding officer's discretion in this regard.

One commenter noted that civil penalty and enforcement proceedings should be excluded from these requirements. As drafted, proposed paragraph (b)(3) of § 2.743 provided that paragraphs (b)(1) and (2) of the section do not apply to proceedings under Subpart B of this part for modification, suspension, or revocation of a license. This was intended to continue the existing exemption for enforcement proceedings from requirements regarding prefiled testimony and provide a similar exemption concerning cross-examination plans. The Commission agrees that civil penalty proceedings as an additional type of enforcement proceeding should be included within these exemptions. The final rule has been revised to clarify the intended exemptions and to include civil penalty proceedings within the exemptions.

Several changes of a clarifying nature have been made to the rule as proposed. 10 CFR §2.743(b)(2)(iii) has been modified to indicate that the presiding officer is to keep the cross-examination plans in confidence until the initial decision on the matter being litigated has been issued. The language describing how the plans are to become part of the official record has also been clarified.

4. Authority of Presiding Officer to Dispose of Certain Issues on the Pleadings (10 CFR 2.749) Summary Disposition

The proposed amendment to § 2.749(a) would permit motions for summary disposition to be filed at any time during the proceeding, including during the hearing. Current rules provide that summary disposition motions shall be

filed within such time as may be fixed by the presiding officer and also provides that the presiding officer may dismiss motions filed shortly before the hearing commences if responding to or ruling on the motion would divert substantial resources from the hearing. The proposed change is intended to give parties maximum flexibility to file such motions and to terminate litigation at any point in the proceeding when it becomes apparent that no genuine issue of material fact remains in dispute.

Those commenters who favored the proposed change felt that it would help simplify and rationalize the hearing process by preventing unnecessary litigation. Resolution of issues would be permitted at any point where it became apparent further hearing is unnecessary. Thus, the proposal could expedite elimination of frivolous contentions. Another commenter pointed out that § 2.749(c) would still be available to protect a party who for valid reasons could not respond to a motion for summary disposition, and would thus provide sufficient protection against inopportune motions.

Several commenters recommended that the proposal be clarified to provide that during a hearing, where cross-examination has not created a genuine dispute of fact and the intervenor has not called any witnesses, the Board is empowered to grant summary disposition on the applicant's testimony or the evidentiary record, without a requirement for supporting affidavits.

Commenters opposing the proposed change generally felt that it would not increase the effectiveness of the hearing process, but rather could result in

chaos and enormous inefficiencies during the hearing process. Several commenters were particularly concerned that this change would create the opportunity for harassing motions. Well-funded parties could overwhelm other parties with paperwork at crucial times. Several commenters felt the change would be unfair to intervenors, who generally have fewer resources and rely on volunteers. Several indicated that time was needed before trial to prepare testimony and review that of others. If summary judgment motions could be filed anytime, they could divert resources away from trial preparation. In addition, several expressed concern that motions could be filed before discovery was completed and before opponents of the motion could have obtained information to respond to the motion. This could result in legitimate safety issues being lost and never litigated. One commenter noted that this proposed change constitutes a departure from Federal practice. The purpose of summary judgment is to eliminate issues from the evidentiary hearing; therefore, summary disposition motions are appropriately filed before a hearing begins. Once the hearing has started, use of summary judgment motions is more likely to slow down rather than speed up the process.

Another commenter noted that the rule change is unnecessary because the current rule would permit summary judgment motions at all times if the presiding officer permits. If the rule is changed, however, the commenter argued that the last sentence of the current 10 CFR 2.749(a) should be retained. It provides that the Board may summarily dismiss summary disposition motions if they are filed shortly before or during the hearing and would result in a substantial diversion of resources. The commenter expressed

concern that without this sentence the presiding officer's authority to control the hearing process would be diminished. The Board should be able to dismiss or at least hold in abeyance motions filed during the hearing that have the potential to disrupt the hearing.

Summary disposition is a significant procedural tool to eliminate unnecessary hearing time spent on testimony and cross-examination where no material issues of fact remain in dispute. The Commission has evaluated the comments on summary disposition and continues to believe that the advantages for streamlining the hearing process by explicitly permitting summary disposition motions to be filed at any time during the proceeding outweigh the potential disadvantages for the process. The Commission's regulations in 10 CFR 2.749(c) provide safeguards against potential abuses of the summary disposition procedures. A party who is unable to respond to such a motion because discovery is incomplete may state his or her reasons in a response to the motion and the presiding officer may refuse to grant summary disposition or take other appropriate action. The Commission believes that this provision provides sufficient protection in those instances where a party opposing a motion for summary disposition is unable to respond. However, the Commission recognizes the validity of the concern expressed by several commenters that summary disposition motions filed close to the start of or during a hearing have the potential for prolonging the hearing. Therefore, a sentence has been added to 10 CFR 2.749(a) to give the presiding officer the discretion to dismiss or hold in abeyance summary disposition motions which could divert

substantial resources from the hearing and thereby prolong the hearing process.

5. Proposed Findings and Conclusions (10 CFR 2.754) and Appeals to the Commission From Initial Decisions (10 CFR 2.762) Limitations

The proposed amendment to 10 CFR 2.754(c) would limit an intervenor's filings of proposed findings of fact and conclusions of law to issues which that party actually placed in controversy or sought to place in controversy in the proceeding. The proposed amendment to 10 CFR 2.762(d) would similarly limit the issues which an intervenor could raise in an appellate brief. Under current practice, a party may file proposed findings and conclusions of law on any issue in the proceeding and may also appeal on all issues in the proceeding. The only limitation is that a party must have a discernible interest in the outcome of the particular issue being considered. The purpose of the proposed change is to ensure that presiding officers and agency appellate tribunals will be able to focus on disputed issues in a proceeding as presented and argued by parties with a primary interest in the issue. The change would also avoid having these officials inundated with filings from persons with little or no stake in the resolution of a particular issue.

The proposed amendments did not apply to the license applicant or the NRC staff. Applicants have the burden of proof to demonstrate that the action should be taken and thus should be free to submit findings on all issues which could affect the Commission's decision to grant a license or to take an appeal

from an adverse decision. The NRC staff has an overall interest in the proceeding to assure that the public health and safety and environmental values are protected.

Commenters supporting the change agreed that it would improve the hearing process and would contribute to the overall effort to streamline and make the hearing process more efficient. Several indicated they felt this change had considerable merit and would ensure that filings are submitted by parties who have a real concern and interest in resolution of issues. One supporter of the proposal suggested that the current policy which permits appeals by a party on any issue whether they have litigated it or not is inconsistent with the basic tenet of hearings to resolve disputes between specific parties. Redundant filings are unnecessary and generally not helpful.

One commenter suggested that the Commission go further and preclude an intervenor from pursuing issues in which it has no cognizable interest. If this were done, there would be no need to place limits on cross-examination or filings. Another suggested that the rule should also provide that an intervenor who fails to file proposed findings on an issue may not thereafter appeal the portion of the initial decision which deals with that issue.

Comments by opponents of the proposed change focused on three main points. The first area concerned the discriminatory impact on intervenors and an asserted misperception on the part of the NRC of the role of intervenors in NRC proceedings. Several asserted that the proposal was a denial of due

process and one commenter stated that the Administrative Procedure Act entitles all parties to a hearing to file proposed findings of fact and conclusions of law. 5 USC 557(c). Several argued that there was no logical explanation given for discriminating against intervenors. They called attention to the fact that in its proposed rule the Commission acknowledged that intervenors have broad, generalized interests in protecting the health and safety. This interest is akin to the same kind of interest which the Commission found to be justification for preserving the right of the NRC staff to file proposed findings and conclusions of law. One commenter asserted that the process of gaining admission as a party should be sufficient to dismiss any allegations of a lack of a discernible interest in the outcome of issues raised in the proceeding.

Several commenters described the proposal as "mysterious" and confounding. In their view, the goal of the agency should be to compile as full a record as possible for the decisionmakers; the NRC should not seek to limit the information it receives in any licensing proceeding. Findings and conclusions do not harm the decisionmaker and could be helpful. Another commenter noted that the NRC currently has less than a dozen proceedings underway, suggesting that the Hearing Boards are not overworked or overwhelmed by cases. Commenting specifically on the limitation of appeals to issues litigated by a party, one person noted that an erroneous initial decision should be identified and corrected no matter who initially raised the issue of concern.

A second focus of concerns was on the impact of such a change on NRC proceedings. A number of commenters suggested that the proposal would cause intervenors to adopt each other's contentions and assert all issues in order to preserve their rights. This could prolong the hearing and overwhelm hearings with the volume of participation on an issue. The proposal would also make it difficult for intervenors to work together, divide tasks and share the expense of litigating issues. Such coordination now makes it possible for intervenors to financially bear the cost of litigation and reduces redundancy in the proceeding. Currently, intervenors may share issues and an intervenor may not participate fully knowing another intervenor is raising the issue. Under this proposal if a party subsequently fails to pursue an issue, other intervenors would not have the opportunity to adopt the issue. Without this opportunity, further consideration of issues would be blocked regardless of how serious or meritorious they were. Also, because of the complex and technical nature of NRC's proceedings, an intervenor may discover it is interested in an issue it did not identify initially. The proposal also ignores the fact that each intervenor brings a different perspective to the proceeding and can make a unique contribution through their filings. Boards should be able to judge these filings and give them such consideration as their quality merits.

Finally, several commenters focused on the application of this proposal to an affected state. States bring a unique perspective to NRC proceedings and should have the opportunity to submit filings. Otherwise, NRC could be deprived of valuable input from the party with the most interest in a

particular issue. The State of Nevada indicated its view that under the Nuclear Waste Policy Act, a host state or Indian tribe is to be accorded the same status as the staff or an applicant. The proposed change would thus violate provisions of the NWPA.

Another group of commenters, while generally favoring the proposal, disagreed with the language which would permit filings and appeals on issues which intervenors "sought to place in controversy". If an issue has not been admitted into the proceeding then no record will have been developed and no basis for proposed findings will exist. It is appropriate to allow an appeal and briefs on the basis that a contention was erroneously rejected. But this proposal would appear to allow appeals on a much broader basis and permit filings on the merits of the contentions.

The Commission has reviewed the comments on the proposed changes to 10 CFR 2.754 and 2.762. After consideration of the various arguments put forth by the commenters, the Commission is persuaded that the proposed changes should be adopted. Limitations on proposed findings and appeals to issues that the intervenor actually placed in controversy or sought to place in controversy will ensure that the parties and the adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over, the issues. These sorts of limitations should also serve to reduce the paper burdens for the adjudicatory boards. We disagree with the suggestion that the proposed limitations will cause intervenors to raise a multitude of issues or

adopt each other's contentions in order to preserve their rights, and thus, will prolong and overwhelm the hearing process with the attendant high level of participation on all issues. The new standards for admission of contentions that we are adopting as part of this rulemaking should serve to limit the degree to which any party can gain admission of contentions that are frivolous or in which the party has little real interest. Moreover, existing sections 2.715a and 2.718 which authorize the presiding officer to consolidate parties, issues and adjudicatory presentations, can and should be used to limit unnecessary multi-party presentations and participation in the litigation of common contentions.

The Commission has also examined the assertion that the proposed rule could violate a provision of the Administrative Procedure Act, 5 U.S.C. 557(c). That section provides that:

> "Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--(1) proposed findings or conclusions; or (2) exceptions to the decision or recommended decisions of subordinate employees or to tentative agency decisions; and (3) supporting reasons for the exception or proposed findings or conclusions."

There has been little analysis of this aspect of the APA in the case law; see, e.g., Klingstiver v. DEA, 606 F2d. 1182 (D.C. Cir. 1979). While we recognize there may be some uncertainty about the appropriate reading of section 557(c), we believe that the rule is in accord with the Administrative Procedure Act because it preserves the opportunity for parties to file findings of fact, conclusions of law, and exceptions to initial decisions with respect to those issues which the party has specifically raised as concerns in the proceeding. Practice under the Commission's existing regulations has been moving in the direction of a more carefully circumscribed appeals process. In Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220 (1986), the Appeal Board concluded that an intervenor which had limited its participation to certain technical issues and had not participated in any aspect of litigation of emergency planning contentions did not have a right to appeal the Licensing Board's decision in connection with the applicant's emergency plan. "Whether an intervenor has the right to pursue a particular issue on appeal is a function of the level of interest expressed by the intervenor in such issue throughout the course of the proceeding." Id. at 253.

We also note that the phrase "sought to place in controversy" was intended to recognize that an appeal and briefs are permissible on the basis that a contention was erroneously rejected. The language was not intended to allow appeals on a broader basis or on the merits of the contentions not admitted.

In view of all of the above, the proposed amendment has been adopted.

Miscellaneous Issues

Several commenters included their views on other possible rule changes discussed by the Commission in its 1984 Request for Public Comment on Regulatory Reform Proposals (49 FR 14698, April 12, 1984) which preceded this proposed rule. Those proposals are not a part of this rulemaking. The Commission evaluated comments on the 1984 proposals as part of the decision-making process which led to the choice of the five proposed changes which constitute this rulemaking. No further discussion of those initial proposals is necessary.

Some commenters objected to the application of these changes to High Level Waste (HLW) Licensing proceedings. The Commission has established the procedures for the HLW licensing proceeding in a final LSS rule which added a new Subpart J to 10 CFR Part 2 (50 FR 14925, April 14, 1989). However, the Commission is now in the process of evaluating whether any additional modifications are needed to these provisions. As part of its evaluation, the Commission is considering whether any of the provisions in the final amendments on regulatory reform that would not already be included in Subpart J by cross-reference, should be added to Subpart J. Section 2.1000 of Subpart J cross-references any sections of general applicability in Subpart G of Part 2 that will continue to apply to the HLW licensing proceeding. As such, all

but one of the provisions in the final regulatory reform rule (§ 2.714, which requires contentions to show that a genuine dispute exists on an issue of law or fact) will apply to the HLW proceeding. However, Subpart J contains a new provision on contentions, § 2.1014, and consequently § 2.714 would no longer apply to the HLW proceeding. The Commission intends to evaluate the need to extend the "genuine issue of fact" standard to the HLW proceeding. A determination of such a need would result in the Commission proposing a rule amending 10 CFR 2.1014. As the Commission noted in the Supplementary Information to the final LSS rule --

> . . . the Commission is committed to do everything it can to streamline its licensing process and at the same time conduct a thorough safety review of the Department of Energy's application to construct a high-level waste repository. The negotiators to this rulemaking have made a number of improvements to our existing procedures. However, more improvements may be necessary if the Commission is to meet the tight licensing deadline established by the Nuclear Waste Policy Act of 1982, as amended. By publishing this rule, the Commission is not ruling out further changes to its rules of practice, including further changes to the rules contained in the negotiated rulemaking. (50 FR 14925, 14930, April 14, 1989).

The revised rules do not apply to civil penalty proceedings conducted under 10 CFR 2.205. Section 189a. of the Atomic Energy Act does not provide for third parties to participate as "interested persons" in such proceedings.

These amendments will take effect thirty days after publication in the Federal Register. The amendments will apply only to contentions in proceedings initiated after that date. The Commission's rules and administrative decisions interpreting those rules in existence prior to that date will be applied to contentions filed in proceedings initiated prior to that date.

Withdrawal of Earlier Rulemaking

The Commission published for public comment on June 8, 1981 (46 FR 30349) a proposed rule to make changes to elements of its Rules of Practice, including several of the sections amended by this proceeding. Because the Commission has chosen to proceed with adoption of the changes to its Rules of Practice included in this rulemaking, the earlier proposal is withdrawn.

Environmental Impact: Categorical Exclusion

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

Paperwork Reduction Act Statement

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

Regulatory Analysis

The revisions to the Commission's Rules of Practice in 10 CFR Part 2 improve the effectiveness and efficiency of NRC proceedings with due consideration for the rights of all participants. The changes to 10 CFR 2.714 require the proponent of a contention to submit sufficient factual information to demonstrate the existence of a genuine dispute with the applicant or the licensee or the NRC staff regarding a material issue of law or fact. This amendment ensures that the resources of all participants in NRC proceedings are focused on real issues and disputes among the parties and thus it is preferable to existing requirements. The revisions to 10 CFR 2.720 clarify existing practice that the staff may not be required: (1) to perform additional research or analytical work beyond that required to support its position, or (2) to explain why it did not use alternative data, assumptions, or analyses in its reviews. Codification of this requirement is preferable to relying on existing case law because it conserves resources that would otherwise have to be expended in opposing such discovery requests. The final rule's provisions in 10 CFR 2.743 on cross-examination plans require a party to obtain the permission of the presiding officer in order to conduct

cross-examination and bar the presiding officer from considering any such request unless it is accompanied by a plan containing specific information about the nature and purpose of the proposed line of questioning. While the use of cross-examination plans could have been left as a matter of discretion for the presiding officer, the benefits from the use of such plans, i.e., more focused and controlled hearings, favor making use of such plans standard practice in NRC proceedings. The revision of 10 CFR 2.749 permits the filing of motions for summary disposition at any time during a proceeding. The current practice leaves the timing for filing of such motions wholly within the discretion of the presiding officer. The final rule is preferable to continuing the present practice because making it explicit that summary disposition motions may be filed at any time during the proceeding encourages the use of such procedures whenever an issue can be disposed of without a hearing.

Since November 1981 a number of alternative changes to improve the hearing process have been evaluated by the Regulatory Reform Task Force, the Senior Advisory Group (NRC personnel), the Ad Hoc Committee for the Review of Nuclear Reactor Licensing Reform Proposals (non-NRC persons with experience in the licensing process) and through the Request for Public Comment on Regulatory Reform Proposal published in the Federal Register on April 12, 1984 (49 FR 14698). This final rule improves the efficiency and effectiveness of NRC's hearing process while maintaining due regard for the rights of affected parties and thus is the preferred alternative. This rule does not have a significant impact on State and local governments and geographical regions,

public health and safety, or the environment; nor does it represent substantial costs to licensees, the NRC, or other Federal agencies. This constitutes the regulatory analysis for this rule.

Regulatory Flexibility Certification

This final rule does not have a significant economic impact upon a substantial number of small entities. The amendments modify the Commission's rules of practice and procedure. Most entities seeking or holding construction permits or Commission licenses that would be subject to the revised provisions would not fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, in the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or in the NRC's size standards published December 9, 1985 (50 FR 50241). Although intervenors subject to the provisions likely would fall within the pertinent Small Business Act definition, the impact on intervenors or potential intervenors will be neutral. While intervenors or potential intervenors will have to meet a higher threshold to gain admission to NRC proceedings and, thereby incur some additional economic costs in preparing requests for hearing or requests to intervene, these costs should be offset by a reduction in intervenors' costs once the hearing commences because information developed to support admission to the proceeding will be used during the conduct of the proceeding. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that

this rule does not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

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

List of Subjects

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

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

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

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

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

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 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, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L.

97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In § 2.714, paragraphs (e) through (h) are redesignated as paragraphs (f) through (i). In paragraphs (a) and (g) of § 2.714, the words "paragraph (d) of this section" which appear in the fourth sentence of paragraph (a)(1), in the single sentence in paragraph (a)(2) and in the single sentence in paragraph (g) are revised to read "paragraph (d)(1) of this section." Paragraphs (b), (c), and (d) of § 2.714 are also revised and a new paragraph (e) is added to read as follows:

2.714 Intervention.

* * * * *

(b)(1) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or if 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 or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section 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.

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment,

or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

(c) Any party to a proceeding may file an answer to a petition for leave to intervene or a supplement thereto within ten (10) days after service of the petition or supplement, with particular attention to the factors set forth in paragraph (d)(1) of this section. The staff may file such an answer within fifteen (15) days after service of the petition or supplement.

(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 permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by the State in which such area is located and by any affected Indian Tribe as defined in Part 60 of this chapter. In all other circumstances, such ruling body or officer shall, in ruling on--

(1) A petition for leave to intervene or a request for a hearing, consider the following factors, among other things:

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

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

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

(2) The admissibility of a contention, refuse to admit a contention if:

(i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

(e) If the Commission or the presiding officer determines that any of the admitted contentions constitute pure issues of law, those contentions must be decided on the basis of briefs or oral argument according to a schedule determined by the Commission or presiding officer.

3. In §2.740, paragraph (b)(1) is revised and a new paragraph (b)(3) is added to read as follows:

* * * * *

(b)(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 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. Where any book, document or other tangible thing sought is reasonably available from another source, such as from the Commission's Public Document Room or local Public Document Room, a sufficient response to an interrogatory involving such

materials would be the location, the title and a page reference to the relevant book, document or tangible thing. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery 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.

* * * * *

(b)(3) While interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party, such interrogatories may not be addressed to, or be construed to require: (A) Reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position; or (B) Performance of additional research or analytical work beyond that which is needed to support the party's position on any particular matter.

4. In § 2.743, paragraphs (a) and (b) are revised to read as follows:

2.743 Evidence.

(a) General. Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and to conduct, in accordance with an approved cross-examination plan that contains the information specified in paragraph (b)(2) of this section if so directed by the presiding officer, such cross-examination as may be required for full and true disclosure of the facts.

(b)(1) Testimony and cross-examination. 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 must be incorporated into the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit.

(2) The presiding officer may require a party seeking an opportunity to cross-examine to request permission to do so in accordance with a schedule established by the presiding officer. A request to conduct cross-examination shall be accompanied by a cross-examination plan that contains the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(3) Paragraphs (b)(1) and (2) of this section do not apply to proceedings under Subpart B of this part for modification, suspension, or revocation of a license or to proceedings for imposition of a civil penalty.

* * * * *

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

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

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as

to all or any part of the matters involved in the proceeding. The moving party shall annex 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 may be filed at any time. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within twenty (20) days after service of the motion. The party shall annex to any answer opposing the motion a separate, short, and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto may be entertained. The presiding officer may dismiss summarily or hold in abeyance motions filed shortly before the hearing commences or during the hearing if the other parties or the presiding officer would be required to divert substantial resources from the hearing in order to respond adequately to the motion and thereby extend the proceeding.

* * * * *

6. In §2.754, paragraph (c) is revised to read as follows:

§2.754 Proposed findings and conclusions.

* * * * *

(c) Proposed findings of fact must be clearly and concisely set forth in numbered paragraphs and must be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law must be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. An intervenor's proposed findings of fact and conclusions of law must be confined to issues which that party placed in controversy or sought to place in controversy in the proceeding.

7. In §2.762, paragraph (a) is revised to read as follows:

§2.762 Appeals to the Commission from initial decisions.

* * * * *

(a) Brief Content. A brief in excess of ten (10) pages must 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.

(1) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. An intervenor-appellant's brief must be confined to issues which the intervenor-appellant placed in controversy or sought to place in controversy in the proceeding. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

(2) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.

* * * * *

Dated at Rockville, Maryland, this day of 1979.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.