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RELATED CORRESPONDENCE

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

DOCKETED
USNRC

'89 SEP 26 P3:54

August 23, 1989

MEMORANDUM FOR: Jon Scott
6 Roundup Road
Bell Canyon, CA 91307

Estelle Lit
18233 Bermuda Street
Northridge, CA 91326

Jerome E. Raskins
18350 Los Alimos Street
Northridge, CA 91326

FROM: Peter B. Bloch, Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: SUBPART L OF OUR PROCEDURAL RULES

I am enclosing for your convenience a copy of the applicable procedural rules, Subpart L. I am also enclosing the "Statements of Consideration", which may help you to understand the background of Subpart L. If there is ambiguity in Subpart L, you may use the Statements of Consideration as an aid in interpretation. Consideration which covers Informal Hearing Procedures for Materials Licensing Adjudications, and Subpart L.

Enclosures:
As stated

cc: R. T. Lancet, Director
Nuclear Safety and Licensing
Rockwell International Corporation
6633 Canoga Avenue
Canoga Park, California 91304,
w/copy encl.

bcc: Office of the Secretary,
w/copy of encls.

Note: Express Mailed to Addressee and cc 8/24/89, 10:35 AM.

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considered.

(d) The provisions of paragraph (c) of this section shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations applied for under the Atomic Energy Act of 1954, as amended, before December 31, 2005.

(e) Unless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's order disposing of issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding.

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§ 2.1117 Applicability of other sections.

In proceedings subject to this subpart, the provisions of Subparts A and C of 10 CFR Part 2 are also applicable, except where inconsistent with the provisions of this subpart.

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

§ 2.1201 Scope of subpart.

The general rules in this subpart govern procedure in any adjudication initiated by a request for a hearing in a proceeding for the grant, transfer, renewal, or licensee-initiated amendment of a material license subject to Parts 30, 32 through 35, 39, 40, or 70 of this chapter. Any adjudication regarding a materials license subject to Parts 30, 32 through 35, 39, 40, or 70 that is initiated by a notice of hearing issued under § 2.104, a notice of proposed action under § 2.105, or a request for hearing under Subpart B of 10 CFR Part 2 on an order to show cause, an order for modification of license, or a civil penalty, is to be conducted in accordance with the procedures set forth in Subpart G of 10 CFR Part 2.

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§ 2.1203 Docket; filing; service.

(a) The Secretary shall maintain a docket for each adjudication subject to this subpart, commencing with the filing of a request for a hearing. All papers, including any request for a hearing, petition for leave to intervene, correspondence, exhibits, decisions, and orders, submitted or issued in the proceeding; the hearing file compiled in accordance with § 2.1231; and the transcripts of any oral presentations or oral questioning made in accordance with § 2.1235 or in connection with any appeal under this subpart must be filed with the Office of the Secretary and must be included in the docket. The public availability of official records relating to the proceeding is governed by § 2.790.

(b) Documents are filed with the Office of the Secretary in adjudications subject to this subpart either—

(1) By delivery to the Docketing and Service Branch of the Office of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852; or

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

Filing by mail or telegram is complete as of the time of deposit in the mail or with the telegraph company. Filing by other means is complete as of the time of delivery to the Docketing and Service Branch of the Office of the Secretary.

(c) Each document submitted for filing in an adjudication subject to this part, other than an exhibit, must be legibly typed, must bear the docket number and the title of the proceeding, and, if it is the first document filed by that participant, must designate the name and address of a person upon whom service can be made. The document also must be signed in accordance with § 2.708(c). A document, other than correspondence, must be filed in an original and two conforming copies. Documents filed by telegram are governed by § 2.708(f). A document that fails to conform to these requirements may be refused acceptance for filing and may be returned with an indication of the reason for nonacceptance. Any document tendered but not accepted for filing may not be entered in the docket.

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(d) Computation of time and extension and reduction of time limits is done in accordance with §§ 2.710–2.711.

(e) A request for a hearing or a petition for leave to intervene must be served in accordance with § 2.712 and § 2.1205(e), (j). All other documents issued by the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission or offered for filing are served in accordance with § 2.712.

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

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

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

(c) A person other than an applicant shall file a request for a hearing within—

(1) Thirty (30) days of the agency's publication of the initial **Federal Register** notice referring or relating to an application or the licensing action requested by an application, which must include a reference to the opportunity for a hearing under the procedures set forth in this subpart; or

(2) If a **Federal Register** notice is not published in accordance with paragraph (c)(1), the earlier of—

(i) Thirty (30) days after the requestor receives actual notice of a pending application or an agency action granting an application; or

(ii) One hundred and eighty (180) days after agency action granting an application.

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

(1) The interest of the requestor in the proceeding;

(2) How that interest may be affected by the results of the proceeding, including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in paragraph (g) of this section;

(3) The requestor's areas of concern about the licensing activity that is the subject matter of the proceeding; and

(4) The circumstances establishing that the request for a hearing is timely in accordance with paragraph (c) of this section.

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

(1) The applicant (unless the requestor is the applicant); and

(2) The NRC staff, by delivery to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, or by mail addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(f) Within ten (10) days of service of a request for a hearing filed under paragraph (c) of this section, the applicant may file an answer. The NRC staff, if it chooses or is ordered to participate as a party in accordance with § 2.1213, may file an answer to a request for a hearing within ten (10) days of the designation of the presiding officer.

(g) In ruling on a request for a hearing filed under paragraph (c) of this section, the presiding officer shall determine that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely. The presiding officer also shall determine that the requestor meets the

judicial standards for standing and shall consider, among other factors—

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

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

(3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

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

(i) If a request for a hearing is granted and a notice of the kind described in paragraph (c)(1) previously has not been published in the **Federal Register**, a notice of hearing must be published in the Federal Register stating—

(1) The time, place, and nature of the hearing;

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

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

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

(5) The time within which a request to participate under § 2.1211(b) must be filed.

(j) Any petition for leave to intervene must be filed within thirty (30) days of the date of publication of the notice of hearing. The petition must set forth the information required under paragraph (d) of this section.

(1) A petition for leave to intervene must be served upon the applicant. The petition also must be served upon the NRC staff—

(i) By delivery to the Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852; or

(ii) By mail addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

(2) Within ten (10) days of service of a petition for leave to intervene, the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213, may file an answer.

(3) Thereafter, the petition for leave to intervene must be ruled upon by the presiding officer, taking into account the matters set forth in paragraph (g) of this section.

(4) If the petition is granted, the petitioner becomes a party to the proceeding.

(k)(1) A request for a hearing or a petition for leave to intervene found by the presiding officer to be untimely under paragraph (c) or (j) will be entertained only upon determination by the Commission or the presiding officer that the requestor or petitioner has established that—

(i) The delay in filing the request for a hearing or the petition for leave to intervene was excusable; and

(ii) The grant of the request for a hearing or the petition for leave to intervene will not result in undue prejudice or undue injury to any other participant in the proceeding, including the applicant and the NRC staff, if the staff chooses or is ordered to participate as a party in accordance with § 2.1213.

(2) If the request for a hearing on the petition for leave to intervene is found to be untimely and the requestor or petitioner fails to establish that it otherwise should be entertained under paragraph (k)(1) of this section, the request or petition will be treated as a petition under § 2.206 and referred for appropriate disposition.

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

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

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

§ 2.1207 Designation of presiding officer.

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

(b) For any request for hearing relating to an application under 10 CFR Part 70 to receive and store unirradiated fuel at the site of a production or utilization facility that also is the subject of a proceeding under Subpart G of this Part for the issuance of an operating license, within ten (10) days of receiving from the Office of the Secretary a request for a hearing the Chairman of the Atomic Safety and Licensing Board Panel shall issue an order designating a Licensing Board conducting the operating license proceeding to rule on the request for a hearing and, if necessary, to conduct the hearing in accordance with this Subpart. Upon certification to the Commission by the Licensing Board designated to conduct the hearing that the matters presented for adjudication by the parties with respect to the Part 70 application are substantially the same as those being heard in the pending proceeding under 10 CFR Part 50, the Licensing Board may conduct the hearing in accordance with the procedures in Subpart G.

§ 2.1209 Power of presiding officer.

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

(a) Regulate the course of the hearing and the conduct of the participants;

(b) Dispose of procedural requests or similar matters;

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

(d) Certify questions to the Atomic Safety and Licensing Appeal Board for determination, either in the presiding officer's discretion or on direction of the Commission or the Atomic Safety and Licensing Appeal Board;

(e) Reopen a closed record for the reception of further information at any time prior to initial decision in accordance with § 2.734;

(f) Administer oaths and affirmations;

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(g) Issue initial decisions;
(h) Issue subpoenas requiring the attendance and testimony of witnesses at the hearing or the production of documents for the hearing;
(i) Receive written or oral evidence and take official notice of any fact in accordance with § 2.743(i);
(j) Appoint special assistants from the Atomic Safety and Licensing Board Panel in accordance with § 2.722;
(k) Recommend to the Commission that procedures other than those authorized under this subpart be used in a particular proceeding; and
(l) Take any other action consistent with the Act and this chapter.

§ 2.1211 Participation by a person not a party.

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

(b) Within thirty days of an order granting a request for a hearing made under § 2.1205(b)–(c) or, in instances when it is published, within thirty days of a notice of hearing issued under § 2.1205(i), the representative of an interested State, county, municipality, or an agency thereof, may request an opportunity to participate in a proceeding under this subpart. The request for an opportunity to participate must state with reasonable specificity the requestor's areas of concern about the licensing activity that is the subject matter of the proceeding. Upon receipt of a request that is filed in accordance with these time limits and that specifies the requestor's areas of concern, the presiding officer shall afford the representative a reasonable opportunity to make written and oral presentations in accordance with §§ 2.1233 and 2.1235, without requiring the representative to take a position with respect to the issues. Participants under this subsection may notice an appeal of an initial decision in accordance with § 2.1253 with respect to any issue on which they participate.

§ 2.1213 Role of the NRC staff.

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

§ 2.1215 Appearance and practice.

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

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

Hearings

§ 2.1231 Hearing file; prohibition on discovery.

(a) Within thirty (30) days of the presiding officer's entry of an order granting a request for a hearing, the NRC staff shall file in the docket, present to the presiding officer, and make available to the applicant and any other party to the proceeding a hearing file. Thereafter, within ten (10) days of the date a petition for leave to intervene or a request to participate under § 2.1211(b) is granted, the NRC staff shall make the hearing file available to the petitioner or the § 2.1211(b) participant.

(1) The hearing file must be made available to the applicant and any other party or § 2.1211(b) participant to the proceeding either by—

(i) Service in accordance with § 2.1203(e); or

(ii) Placing the file in an established local public document room in the vicinity of the principal location where nuclear material that is the subject of a proceeding under this subpart will be possessed, and informing the applicant, party, or § 2.1211(b) participant in writing of its action and the location of the file. If an established local public document room does not exist, the NRC staff will arrange for the documents contained in the hearing file, along with any other material docketed in accordance with § 2.1203, to be made available for public inspection and copying during the course of the adjudication in a library or other facility that is accessible to the general public during regular business hours and is in the vicinity of the principal location where the nuclear material that is the subject of the proceeding will be possessed.

(2) The hearing file also must be made available for public inspection and copying during regular business hours at the NRC Public Document Room in Washington, DC.

(b) The hearing file will consist of the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application. Hearing file documents already in an established local public document room or the NRC Public Document Room when the hearing request is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file.

(c) The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials for the docket, the presiding officer, and the applicant or any party or § 2.1211(b) participant in a manner consistent with the way the hearing file was made available initially under paragraph (a).

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

§ 2.1233 Written presentations; written questions.

(a) After publication of a notice of hearing in accordance with § 2.1205(i) and after the NRC staff has made the hearing file available in accordance with § 2.1231, the parties and § 2.1211(b) participants shall be afforded the opportunity to submit, under oath or affirmation, written presentations of their arguments and documentary data, informational material, and other supporting written evidence at the time

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or times and in the sequence the presiding officer establishes by appropriate order. The presiding officer also may, on his or her initiative, submit written questions to the parties to be answered in writing, under oath or affirmation, and supported by appropriate documentary data, informational material, or other written evidence.

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

(c) In a hearing initiated under § 2.1205(c), the initial written presentation of a party that requested a hearing or petitioned for leave to intervene must describe in detail any deficiency or omission in the license application, with references to any particular section or portion of the application considered deficient, give a detailed statement of reasons why any particular section or portion is deficient or why an omission is material, and describe in detail what relief is sought with respect to each deficiency or omission.

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

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

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§ 2.1235 Oral presentations; oral questions.

(a) Upon a determination that it is necessary to create an adequate record for decision, in his or her discretion the presiding officer may allow or require oral presentations by any party or § 2.1211(b) participant, including testimony by witnesses. Oral presentations are subject to any appropriate time limits the presiding officer imposes. Responsibility for the conduct of the examination of any witness rests with the presiding officer who may allow a party or § 2.1211(b) participant to propose questions for the presiding officer to pose a witness.

(b) Oral presentations and responses to oral questioning to be relief upon as oral evidence must be given under oath or affirmation. All oral presentations or oral questioning must be stenographically reported and, except as requested pursuant to section 181 of the Act, must be public unless otherwise ordered by the Commission.

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

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§ 2.1237 Motions; burden of proof.

(a) Motions presented in the proceeding must be presented and disposed of in accordance with §§ 2.730 (a)–(g).

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

§ 2.1239 Consideration of Commission rules and regulations in informal adjudications.

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

(b) A party to an adjudication subject to this subpart may petition that the application of a Commission regulation specified in paragraph (a) of this section be waived or an exception made for the particular proceeding. The sole ground for a request for waiver or exception must be that special circumstances exist so that application of the regulation to the subject matter of the proceeding would not serve the purposes for which the regulation was adopted. In the absence of a prima facie showing of special circumstances, the presiding officer may not further consider the matter. If the presiding officer determines that a prima facie showing has been made, he or she shall certify directly to the Commission itself for determination the matter of whether special circumstances support a waiver or an exception and whether a waiver or an exception should be granted. The Commission's determination shall be made after any further proceeding the Commission deems appropriate.

§ 2.1241 Settlement of proceedings.

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

Initial Decision, Commission Review, And Final Decision

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§ 2.1251 Initial decision and its effect.

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the presiding officer shall render an initial decision after completion of an informal hearing under this subpart. That initial decision constitutes the final action of the Commission thirty (30) days after the date of issuance, unless an appeal is taken in accordance with § 2.1253.

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

(c) An initial decision must be in writing and must be based only upon information in the record or facts officially noticed. The record must include all information submitted in the proceeding with respect to which all parties have been given reasonable prior notice and an opportunity to comment. The initial decision must include—

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

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

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

(d) Matters not put into controversy by the parties may not be examined and decided by the presiding officer or the Atomic Safety and Licensing Appeal Board. If the presiding officer or the Appeal Board believes that a serious

safety, environmental, or common defense and security matter exists that has not been placed in controversy, the presiding officer or the Appeal Board shall advise the Commission promptly of the basis for that view, and the Commission may take appropriate action.

(e) Pending review and final decision by the Commission, an initial decision resolving all issues before the presiding officer in favor of authorizing licensing action subject to this subpart is immediately effective upon issuance except—

(1) As provided in any order issued in accordance with § 2.1263 that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

(f) Following an initial decision resolving all issues in favor of the licensing action as specified in paragraph (e) of this section, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or pendency of an appeal pursuant to § 2.1253, shall take the appropriate licensing action upon making the appropriate licensing findings promptly, except as may be provided pursuant to paragraph (e)(1) or (2) of this section.

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§ 2.1253 Appeals from initial decisions.

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

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

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

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

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

§ 2.1259 Final decision; petition for reconsideration.

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

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

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

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

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

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

PART 2 STATEMENTS OF CONSIDERATION

≫ 54 FR 8269
Published 2/28/89
Effective 3/30/89

10 CFR Part 2

Informal Hearing Procedures for Materials Licensing Adjudications

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

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

EFFECTIVE DATE: March 30, 1989.

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Senior Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 492-1634.

SUPPLEMENTARY INFORMATION:

I. Background

On May 29, 1987 (52 FR 20089-20096), the Nuclear Regulatory Commission published in the **Federal Register** proposed amendments to its Rules of Practice (10 CFR Part 2) that would specify the particular procedures applicable to informal adjudicatory hearings. In accordance with section 189a of the Atomic Energy Act of 1954 (AEA) (42 U.S.C. 2239(a)), informal hearings are conducted upon the request of any person whose interest may be affected by a nuclear materials licensing proceeding. *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982), *aff'd sub nom. City of West Chicago v. NRC*, 701 F.2d 632 (7th Cir. 1983) [both hereinafter referred to as *West Chicago*]. On July 24, 1987, the date for submitting comments on the proposed rule was extended to August 28, 1987 (52 FR 27821).

As proposed, the informal hearing procedures differ substantially from the existing regulations in 10 CFR Part 2, Subpart G that govern the conduct of NRC formal, trial-type adjudications. Specifically, the presiding officer is to receive and to make his or her determination based solely upon a "hearing file" compiled by the NRC staff, which need not be a party to the proceeding, and written presentations by the parties. There would be no discovery. Only if the presiding officer found that the written presentations were insufficient to create an adequate record would oral presentations be permitted. Any examination of those making oral presentations would be limited strictly by the presiding officer. The type of cross-examination by the parties that generally is permitted in formal adjudications would be prohibited. Essentially, the informal hearing is designed to elicit information and resolve issues primarily through inquiry by the presiding officer rather than through an adversarial confrontation between the parties. As a consequence, the presiding officer has broad discretion in controlling the manner in which the issues raised by the parties are to be explored.

II. Comments and Commission Responses

The Commission received twelve letters of comment representing a broad spectrum of interested persons. Commenters included private corporations that hold NRC materials licenses, a trade association representing companies holding NRC materials licenses, private counsel that represent NRC reactor and materials licensees, public interest groups, a local governmental entity, and an individual member of the public. Seven of the commenters expressed general support for the proposed rules and provided specific comments and suggestions on particular provisions. Three commenters opposed the rules as providing insufficient procedural protections for intervening parties. Two other commenters opposed the rules as unnecessarily formalizing the hearing process for materials licensing adjudications. A review of the specific comments and the Commission's responses to those comments follows.

A. General Comments

1. Hearing Procedures Are Too Formal

Several commenters who are materials licensees or who represent materials licensees expressed concern that the proposed informal procedures were unnecessary or too formal. One commenter suggested that, given the small number of materials licensing hearing requests received by the Commission over the past several years, the Commission need only continue its present practice. That practice, which has been in effect since the first informal hearing in the 1982 *West Chicago* proceeding, is to issue an order in response to each materials licensing hearing request that establishes the procedures governing that informal hearing. The Commission disagrees. Its practice of issuing individual orders has allowed the agency to gain valuable practical experience in conducting informal adjudications, experience that is reflected in the provisions of this final rule. The small number of hearing requests explains in part the delay in the Commission's promulgation of this final rule in that it has taken longer to gain the relevant experience that has guided it in formulating appropriate procedures. However, it ultimately is not a sufficient counterweight to the prudent observation of the United States Court of Appeals for the Seventh Circuit in its *West Chicago* decision, 701 F.2d at 645, that the interests of all concerned in the hearing process are better served if the agency formulates regulations that make it clear what procedures will apply to all informal proceedings. This is particularly so given the large number of materials licensing actions the Commission takes each year that potentially are subject to hearing requests.

This commenter also asserted that the proposed informal procedures should not be adopted because the adjudicatory format is not suited to the resolution of technical questions and, in any vent, the existence of two sets of procedures, one for informal proceedings and one for formal proceedings, inevitably will lead intervenors to complain that their allegations require the use of the more extensive formal procedures. Regarding the issue of the suitability of "adjudicatory" procedures, the commenter appears to be questioning the advisability of using a trial-type, adversary format, as opposed to more legislative-type, informal procedures, to resolve technical disputes. In its

proposed rule, however, the Commission has sought to strike a necessary balance between these two poles. Recognizing that interested persons within the meaning of AEA section 189a are statutorily afforded the status of "parties" with an opportunity to participate in a hearing,[1] the rules allow participation though written and, in limited circumstances, oral submissions by which a challenged licensing action can be supported or opposed. On the other hand, cognizant that these materials licensing hearings need not adhere to the Administrative Procedure Act's (APA) adversary trial model set forth in the formal hearing provisions of 5 U.S.C. 556–557, the Commission has attempted to enhance the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties. Further, the Commission does not believe that the mere existence of a set of informal procedures will lead to an erosion of the distinction between formal and informal proceedings or lead to undue confusion about when the use of either type of proceeding is appropriate. *See generally Sequoyah Fuels Corp.* (Sequoyah UF6 to UF4 Facility), CLI–86–17, 24 NRC 489 (1986) (Commission declines to accept presiding officer's suggestion to convert informal hearing to formal proceeding).

2. Hearing Procedures are Too Informal

In contrast to the comments discussed above, several individuals and public interest groups asserted that the Commission's proposed informal procedures were too "informal." In particular, these commenters decried the failure of the rules to provide for discovery or for wide-ranging cross-examination by parties to the proceeding.

Parties generally have no right to discovery even in APA "on the record" hearings, unless discovery procedures are authorized by agency regulations. Further, because the Commission is not required to conduct an APA "on the record" hearing in a materials licensing case, the parties in these cases have no right to cross-examination under the Commission's "on the record" hearing procedures in 10 CFR Part 2, Subpart G. Nor does the Commission believe these measures are necessary to afford the parties a full and fair hearing. Although there is no discovery, the proposed rules do provide that the NRC staff is to create and update a hearing file consisting of the materials relevant to the licensing proceeding, including the application and any amendments to the application, any environmental assessment or impact statement, and any NRC report or correspondence between the NRC and the applicant relating to the application. In addition, if an oral presentation is found by the presiding officer to be an appropriate aid to fact-finding, the presiding officer is given the authority to pose to witnesses questions that have been suggested by the parties. This is not the type of cross-examination usually associated with formal adjudicatory proceedings, as is described in more detail in the discussion that follows; nonetheless, it still provides the parties in the context of this more informal proceeding with an opportunity to raise questions with the presiding officer about a witness' testimony.

B. Comments Relating to Specific Provisions of the Proposed Rule

1. Proposed § 2.1201—Scope of Proceeding

One Commenter has raised two concerns about § 2.1201 of the proposed rule, which describes those materials licensing actions for which informal hearings are provided. This commenter pointed out that in previous instances involving a request under 10 CFR 20.302 for agency approval of proposed procedures for the disposal of very low-level radioactive waste not covered by 10 CFR Part 61, the Commission has authorized the use of informal hearing procedures and suggested this does not appear to be covered by proposed § 2.1201. An authorization under § 20.302, which is not referred to specifically in § 2.1201, generally comes about as an amendment to an existing byproduct, source, or special nuclear material license issued under Part 30, 40, or 70. As an amendment for authorization to dispose of materials held under an existing materials licenses, rather than a request for a license to operate a waste disposal facility under 10 CFR Part 61, this authorization clearly falls within § 2.1201. The same would be true of various other Part 20 authorizations, which relate to a license issued under Part 30, 40, or 70. *E.g.*, 20.105(a). Accordingly, no specific reference is required in § 2.1201 to cover these authorizations.

This commenter also suggested this provision is too broad because it states that formal hearing procedures are applicable to those adjudications instituted in response to a notice of proposed action issued under 10 CFR 2.105(a)(7) for "any other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded." However, as the Commission's *West Chicago* decision makes clear, the notice of proposed hearing referenced in § 2.105(a)(7) is one that is issued when the Commission has determined the public interest requires a formal hearing. *West Chicago*, 15 NRC at 244–46. Accordingly, the provision correctly reflects that hearings commenced in response to a notice of proposed action issued under § 2.105(a)(7) will, in accordance with § 2.700, be conducted under the formal hearing procedures of Subpart G.

2. Proposed § 2.1203—Docket, Filing, and Service

Section 2.1203 establishes the administrative requirements for the docket and the filing and service of documents in each proceeding. One commenter recommended that the rule set out requirements for documents in terms of size, signatures, numbers of copies, etc. A new paragraph (c) implements this suggestion. The provisions of § 2.711 relating to the extension and reduction of time limits are referenced in paragraph (d).

This commenter also suggested that this section incorporate the requirements of § 2.712 relating to service of documents. The proposed § 2.1203(d), which leaves it up to the presiding officer in the first instance to set any rules for service of documents, was intended to add to the informality of the proceedings. After further consideration, however, the Commission concludes that establishing rules for routine matters such as document service contributes to the efficient conduct of the proceeding for both the parties and the presiding officer. Accordingly, the Commission has added language to that paragraph, which is now designated as (e), referencing the requirements of § 2.712.

3. Proposed § 2.1205—Request for a Hearing; Petition for Leave to Intervene

This provision, which describes how a request for a hearing or a petition to intervene is to be lodged and treated by the agency, was the subject of a number of comments that are discussed below according to subject matter.

a. Notice of materials licensing actions/timing of hearing requests. In the proposed rule, the Commission

[1] Because an interested person has a statutory right to request and receive a hearing on those materials licensing actions specified in AEA section 189a, the Commission cannot, as one licensee appeared to suggest, simply decline to convene any materials licensing hearings.

described its long-standing practice of limiting Federal Register notice for the thousands of material licensing applications it receives annually to those that are significant. For those applications for which no Federal Register notice is published, proposed § 2.1205(c) provided that a hearing petition would be considered timely if filed within thirty days after the petitioner receives actual notice of a licensing action or within one year after completion of the agency action, whichever occurs first. Section 2.1205(c) also declared any petition filed beyond this period would be considered timely only upon a showing of exceptional circumstances. In response, several commenters asserted that the agency's notice practice was improper and urged that Federal Register notice be given for each materials license application received. Other commenters, principally materials licensees or their legal counsel, challenged the provisions allowing timely hearing petitions to be filed up to one year after the licensing action and permitting subsequent petitions upon an "exceptional circumstances" showing. Allowing up to one year to file a challenge leaves licensed activities under an unnecessary cloud, they assert. Instead, the period for filing should be shortened to 120 days or less. Also, they contend, the exceptional circumstances provision should be deleted in favor of a provision that mandates that after the period for filing a petition expires the appropriate challenge to a licensing action is to file a petition for enforcement or other appropriate relief under 10 CFR 2.206.

The Commission continues to believe that its present practice regarding Federal Register notice for materials licensing applications comports with all applicable legal requirements and, under the circumstances, is appropriate in terms of the allocation of agency resources. As noted in the proposed rule, the Atomic Energy Act does not require that any notice be given of a materials licensing action. Given the lack of any constitutional right to a hearing in the usual materials licensing case, *see West Chicago* at 645, the Commission does not agree with the argument that there is a general constitutional right to notice of the opportunity for such a hearing.[8]

Further, the publication of notices for all materials licensing activities cannot be justified as a judicious use of limited agency resources. Under present practice, notice is given of significant materials licensing actions through a Federal Register notice relating to the receipt of the application or to NRC environmental findings relating to the licensing request (e.g., a negative declaration of the need to prepare an environmental impact statement). Also, those persons truly interested in a particular materials licensee's activities can keep abreast of pending matters by periodically contacting appropriate NRC headquarters or regional personnel for information concerning the license. With these vehicles in place for providing the public with information concerning materials licensing actions, the Commission does not believe it is necessary or prudent to expend the substantial additional agency resources that would be needed to publish notices in the Federal Register for each of the approximately five thousand materials licensing actions the agency takes on average every year. *See NRC 1987 Annual Report* at 73. In addition to the staff resources that would be required to prepare the notices, the NRC staff estimates that it would cost in excess of one hundred thousand dollars annually simply to pay the cost of publishing notices in the Federal Register for all these actions. The Commission also finds the alternative notice suggestion made by one commenter unacceptable. Similar or higher costs to the agency could be expected if the agency published notices in local newspapers.

On the related question of the timing of a hearing request when there is no Federal Register notice, the Commission agrees with the comments that a lesser period of time may be appropriate for accepting hearing requests as timely. Balancing the interests of materials licensees in prompt closure for potential licensing action challenges against the public interest in allowing a reasonable opportunity for "interested persons" to avail themselves of their section 189a hearing right, we find that allowing an initial hearing request to be filed for a period of six months after a materials licensing action not noticed in the Federal Register is appropriate.

The Commission does not agree with the comment that any hearing request or petition to intervene filed after the six-month period should be treated only as a petition under 10 CFR 2.206. In determining under what circumstances the agency will entertain a late-filed petition, consideration undoubtedly must be given to the fact that the hearing provisions in the Atomic Energy Act suggest a congressional policy fostering a degree of citizen participation in specified types of nuclear licensing proceedings. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983). On the other hand, it is apparent that whether to provide for further admission of late-filed petitions and the terms under which they will be admitted ultimately is a matter committed to the agency's discretion.

In most instances, materials licensing actions do not involve substantial hazards to public health and safety. After weighing the matter carefully, we have concluded that, in the context of materials licensing, considerations of regulatory finality counsel that the Commission place a heavy burden upon those who wish to institute a hearing proceeding more than six months after the agency has approved the applicant's request for licensing action. Therefore, to avoid the litigation of stale claims, in lieu of the reference in § 2.1205(c) to the grant of a late-filed initial hearing petition on a showing of "exceptional circumstances" and the language of § 2.1205(k) that provided for the use of the formal hearing late-filed petition factors in § 2.714(a)(1), the Commission has substituted new language in § 2.1205(k). The paragraph now states that to gain admission of a late-filed request, whether an initial request or a petition to intervene, the requestor or intervenor will have the heavier burden of establishing that (1) the delay in filing the hearing request or intervention petition was excusable; and (2) the grant of the hearing request or intervention petition, which institutes a hearing proceeding to explore the efficacy of the agency's licensing action, will not cause undue prejudice or injury to any participant to the proceeding, including the applicant and the NRC staff if the staff chooses to be a party. Essentially, the paragraph requires that the requestor or petitioner demonstrate that the well-established doctrine of "laches" would not bar the institution of a proceeding. Additionally, this provision has been revised to state that any untimely hearing request or intervention petition that cannot overcome this laches bar will be referred for disposition in accordance with 10 CFR 2.206.

Also on the subject of notice, one commenter suggested that the Commission clarify the meaning of § 2.1205(c)(1) to make it clear that the first Federal Register notice relating to a materials licensing application, including a notice about activities under the National Environmental Policy Act, triggers the thirty-day period within which a hearing request must be filed in order to be timely. The Commission has

[8] As explained below, notice is given of those particular materials licensing actions that are more significant.

done so. The Commission would add that, in response to the suggestion of one commenter, it has revised the rule to state that for an initial Federal Register notice regarding a particular application or licensing action, the notice must include a statement that the opportunity for a hearing exists under the procedures set forth in Subpart L.

In addition, this commenter requested that the provisions of § 2.1205(c)(2) concerning "actual notice" be changed to indicate that timeliness determinations will be based on whether the petitioner either knew or should have known of the pending licensing application or action. A finding that the petitioner should have known would be based upon such factors as newspaper accounts. The Commission declines to adopt this suggestion. If a Federal Register notice has not been published, a determination about whether and when a petitioner otherwise had actual notice should be based upon the petitioner's particular factual situation rather than presumptions about what other than Federal Register publication provides constructive notice, as the commenter seems to contemplate. Moreover, to aid in making that determination the Commission has, as the same commenter suggested, provided in paragraph (d) to this section that the request for a hearing should detail the circumstances that establish, in accordance with paragraph (c), that the request is timely. With that information, as well as any answer from the applicant or the NRC staff (if it participates as a party), and any additional information requested from the participants, a presiding officer should be able to make an informed determination about when a petitioner (which in the case of partnership, corporation, or unincorporated association would include its directors, officers, and any members duly authorized to represent it) had actual notice. We note that under § 2.1205(j) the additional requirement of a showing of timeliness also would ordinarily apply to those seeking to intervene pursuant to a Federal Register notice of hearing. These intervenors would ordinarily have to show that they did not have actual notice of the licensing action prior to the notice of hearing.

b. Standing. Paragraph (g) of proposed § 2.1205 states that in determining whether a particular petitioner has standing to participate in an informal adjudication, the presiding officer is to consider whether the judicial standard for standing is met. The presiding officer's determination is to be based upon the standards that are enunciated in § 2.714 for formal adjudications. The Commission indicated that the standing decision should be based upon an analysis of the particular material that was the subject of the licensing action and not the "fifty-mile radius" rule that had developed with respect to power reactor licensing proceedings. (52 FR at 20090). Several commenters agreed with the Commission's rejection of the fifty-mile standard for materials licensing. One commenter went on to suggest that instead the Commission should create a presumption that anyone residing (and presumably working) outside of a five-mile radius of the site where the nuclear materials in question are possessed does not have standing. The Commission rejects this suggestion. The standing of a petitioner in each case should be determined based upon the circumstances of that case as they relate to the factors set forth in paragraph (g).

c. Litigation subject matter. At the suggestion of a commenter, the Commission has added language to paragraph (g) indicating that in addition to making a standing determination with respect to granting a hearing petition, or, by reason of its incorporation in paragraph (j), an intervention petition, the presiding officer should rule upon whether the petitioner desires to litigate matters that are germane to the proceeding and whether the hearing request is timely. Further in this regard, to clarify exactly what information a petitioner must supply in its hearing or intervention request, the Commission has revised paragraph (d) to state that the petitioner must provide a concise statement of the areas of concern the requestor desires to raise at the hearing. This statement of concerns need not be extensive, but it must be sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding. It should be added that a similar requirement has been provided for those who wish to request nonparty participation status under § 2.1211(b).

d. Intervention. Section 2.1205(i) of the proposed rule states that if a request for a hearing was granted and no previous Federal Register notice has been published, a notice of hearing is to be put in the Federal Register that, among other things, will indicate that any additional hearing requests relating to the licensing proceeding should be filed within thirty days. One commenter has suggested that this should be changed simply to a reference to paragraph (c) of the same section, which provides for the filing of hearing requests, so as not to "encourage" additional hearing demands. The Commission disagrees with this comment because it misconstrues the purpose of this provision. In instances when a Federal Register notice previously has not been issued relating to a materials licensing action, once a hearing request regarding that action has been received and granted, it is in the agency's interest to ensure that only one proceeding need be conducted. The purpose of this provision is to provide constructive notice to all interested persons of the date by which any further hearing requests must be filed, thereby cutting off any intervenor's later assertion of timeliness based upon lack of actual notice.

Citing previous Licensing Board practice in individual informal proceedings, *see, e.g.*, 51 FR 8920: March 14, 1988, one commenter also suggested that the rules provide the presiding officer with the authority to require that a petition to intervene must include particular information on the intervenor's concerns about the materials licensing action, like that required by § 2.1233 for the intervenor's written presentation. This type of requirement likely is not practicable under the present regulatory scheme. Under the Licensing Board's practice (which the comments of this and other commenters regarding the creation of a hearing file make it apparent they disliked), the applicant was responsible for assembling a hearing file and making it available to potential intervenors "immediately" upon the receipt of the notice granting an initial hearing request. As the Licensing Board's notices make clear, immediate action was necessary to allow additional intervenors to file a detailed petition/initial written presentation within thirty days. 51 FR at 8921, March 14, 1988. As is discussed *infra*, the present scheme gives the NRC staff the duty of compiling the hearing file within thirty days of the grant of an initial hearing request, the same period of time within which any intervenor must file a petition. It would not be equitable to require an intervenor to file its written presentation setting forth all its concerns without access to the hearing file. Of course, the intervenor is required to identify the areas of concern it wishes to raise in the proceeding, which will provide the presiding officer with the minimal information needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding and therefore should be allowed to take the additional step of making a full written presentation under § 2.1233.

e. Staff licensing action during pendency of a hearing. In explaining its proposed rule, the Commission declared that after weighing the private and governmental rights involved, it concluded it would not require the completion of any requested hearing before the NRC staff could take the licensing action requested by the applicant. Section 2.1205(1) memorializes this determination. Although one commenter questioned this conclusion, the Commission continues to believe that it has struck the appropriate balance, particularly since a process has been provided in § 2.1203 whereby the staff's action can be stayed, if appropriate.

Another commenter declared that the Commission should revise the language of paragraph (1) to indicate that the staff, rather than "need not" delay in issuing the license, is obligated to proceed in the absence of a stay. The Commission declines to adopt this suggestion. The purpose of this provision is to indicate that in the face of a hearing request it was permissible for the staff to proceed to act in a particular proceeding if, in its judgment, the action was appropriate. As indicated previously, the Commission certainly contemplates that when the staff is able to reach a positive conclusion about the safety and environmental consequences of a proposed licensing request, it will take action despite a pending hearing request. The determination about whether or not it is appropriate to proceed with a particular licensing action prior to the conclusion of the proceeding before the presiding officer is left to the NRC staff, based on its technical and administrative judgment.

4. Proposed § 2.1209—Presiding Officer's Powers

One commenter questioned whether two of the powers afforded presiding officers by § 2.1209 are appropriate. The first of these is the power under paragraph (d) to certify issues to the Appeal Board. We have concluded it is, for the reasons discussed more fully *infra*. The other is the power to subpoena documents or witnesses afforded by paragraph (h). This is improper, the commenter declares, because it would invite discovery requests. The Commission does not agree. The purpose of this provision is to make it clear that the presiding officer has the authority under AEA section 161c, 42 U.S.C. 2201(c), to issue a subpoena for documents or witnesses if, in the course of conducting the proceeding, he or she determines that the information is necessary for the full and fair exploration of the issues involved and finds that the information will not be supplied voluntarily. The issuance of such an order is solely within the power and discretion of the presiding officer. Therefore, contrary to the commenter's suggestion, there is no need for the procedures that govern subpoena requests as in formal hearings.

5. Proposed § 2.1211—Nonparty Participation

As in formal hearings, the Commission has provided for nonparty participation in informal adjudications by "interested" state and local governments and by limited appearance statements for interested groups and individuals. One commenter protested that the statement in § 2.1211(a) that "[a] limited appearance statement is not to be considered part of the decisional record" is evidence of the undue restraints being placed upon public participation in informal adjudications compared to formal hearings. This language, however, is merely a restatement of the practice followed in formal proceedings with respect to limited appearance statements.

Other commenters suggested that paragraph (b) concerning participation by interested state and local governments be revised to include a standing requirement and to mandate that these entities request permission to participate within thirty days of the grant of a hearing request. The Commission declines to adopt the first suggestion. As in formal adjudications under § 2.715(c), there is no formal "standing" requirement for "interested state" participation in informal hearings; those state and local governmental entities that can demonstrate a cognizable interest in the licensing proceeding should be allowed to participate under § 2.1211(b). *See Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873 (1977).

On the other hand, as Commission precedent relating to formal proceedings suggests, interested governmental entities that do seek to come into a proceeding generally must comply with any rules relating to timely intervention. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-20, 24 NRC 518 (1986). As a consequence, the Commission has added language to § 2.1211(b) declaring that in instances in which Federal Register notice has been given under § 2.1205(c)(1), a request for § 2.1211(b) participation must be filed within thirty days of an order granting a request for a hearing. Alternatively, if no notice has been issued, the request for participation must be filed within thirty days of the notice of hearing issued under § 2.1205(i). By adding these specific provisions relating to the time of § 2.1211(b) participation requests, the Commission intends to ensure that all § 2.1211(b) participants become involved in the proceeding from its inception, thereby maximizing their participation while minimizing the possibility for later delay.

6. Proposed § 2.1231—Hearing File

Unique to the informal proceeding is the hearing file that is required by § 2.1231. That file is to be compiled by the NRC staff and provided to the presiding officer, the applicant, and all parties and § 2.1211(b) participants to the proceeding. It is to consist of the application for licensing action and any amendment to the application; any NRC safety, environmental, or other reports relating to the application; and any relevant correspondence between the NRC and the applicant. Commenters raised questions about how and when the file is to be made available to those involved in the proceeding and about the protections that would be afforded to proprietary and other sensitive information that documents in the file might contain.

The Commission previously has addressed one commenter's observation that providing the NRC staff thirty days to prepare and make the file available will impinge on the existing Licensing Board practice of requiring a joint intervention petition/initial written presentation. See II.B.3.d. *supra*. The thirty-day period is retained, subject to adjustment by the presiding officer as the circumstances of a particular case may require.

This commenter also questioned whether the requirement to make the hearing file "available" to parties and § 2.1211(b) participants would mandate that the NRC staff serve the file upon them, with the attendant costs in instances when the file is large. The proposed rule did envision that service of the file might be one way to make it available, depending on the size of the file. As the commenter points out, another way would be to make it available locally. To clarify what is meant by "available," we have revised paragraph (a) to make it clear that service upon the parties and § 2.1211(b) participants and local availability are alternative means of fulfilling this requirement. Which method the NRC staff chooses undoubtedly will depend on the circumstances of the proceeding.

This commenter also expressed strong reservations about the proposed rule's requirement that the applicant would be

responsible for making the file publicly available locally. After careful consideration we have decided to shift this responsibility to the NRC staff, with the understanding that if this "availability" option is chosen, the file need be maintained only through the end of the licensing proceeding. And, if the staff chooses to use service as the means of making the file available to participants in the proceeding, requests for the file by other members of the public do not require that arrangements for local availability must be made. Instead, these requests can be handled through the usual NRC process for making public documents available.

The matter of protecting proprietary and other sensitive information relating to a licensing action was raised by another commenter. Although the plain language of § 2.790 appears to cover this issue for materials licensing proceedings, to eliminate any ambiguity in this regard we have included a reference to that provision in § 2.1203(a).

7. Proposed § 2.1233—Written Presentations

An important difference between the informal hearing provided for in Subpart L and the formal proceeding conducted under Subpart G is the written presentation outlined in § 2.1233. The Commission contemplates that in the vast majority of cases these presentations and follow-up written questions, rather than an oral hearing before the presiding officer, will be the vehicle by which the parties and any § 2.1211(b) participants are heard and the issues resolved.

Commenter concerns about this provision centered on issues of timing, that is, when will written presentations be required to be submitted. Section 2.1233 as proposed stated that the timing and sequence of these presentations is to be set by the presiding officer after any notice of hearing and after the NRC staff has made the hearing file available to the parties. One commenter suggests that the provision be reworded to make it clear that an order establishing the schedule for written submissions may be issued before the end of the thirty-day period that the staff has to make the hearing file available. The commenter repeats its plea that this is necessary to allow for the continuation of the Licensing Board practice of having intervention petitions include the information required for the initial written presentation. The Commission adopts the suggested wording change. As indicated previously, however, because the NRC staff rather than the applicant is now responsible for compiling and making available the hearing file, the Commission doubts that a joint intervention/written presentation filing will be appropriate in most instances. *See* II.B.3.d. *supra*.

In this regard, the Commission has not adopted the suggestion of another commenter that the rule contain language setting specific time frames within which an initial presentation and any reply thereto must be filed after the date the hearing file is made available. While the Commission endorses the concept that written presentations should be made as promptly as possible, the Commission continues to believe that the presiding officer will be in the best position to set a schedule based upon his or her review of the issues raised in each hearing petition. The Commission also cannot endorse this commenter's suggestion that language should be added that would direct that the submission of written presentations should not await the completion of any NRC staff safety or environmental analysis that is being prepared relative to the licensing application. Again, this is an issue best left to the discretion of the presiding officer. The Commission notes, however, that because the NRC staff can take a licensing action prior to the completion of a hearing on the application, any delay in the hearing that might be caused by awaiting a staff safety or environmental evaluation would not necessarily translate into a delay in license issuance.

Finally, one commenter suggested that specific language be added to paragraph (c) to indicate that applicants have the right to file a reply to the written presentation of those parties who challenge the requested licensing action. While the right of an applicant, as a party to the proceeding, to file a written presentation is implicit in the language of paragraph (a), the Commission has added additional language to that paragraph clarifying any ambiguity. The sequence and timing of that submission remains in the discretion of the presiding officer.

8. Proposed § 2.1235—Oral presentations

In the event that the written presentations afforded by § 2.1233 and the responses to written questions posed by the presiding officer prove to be inadequate to resolve the issues raised, the presiding officer is given the discretion to allow or require the parties to make oral presentations. These presentations may include the testimony of witnesses. Commenters expressed concern that the language of § 2.1235 did not make clear the parameters under which oral presentations were to be allowed, particularly with respect to examination of witnesses by nonsponsoring parties. To clarify this matter, the Commission has included language in paragraph (a) stating that the responsibility for the examination of all witnesses rests with the presiding officer, who may allow parties to propose questions for the witness that the presiding officer can pose if the questions are found appropriate. The Commission recognizes that by requiring the presiding officer to make determinations about the propriety of each question for a witness, an additional burden is being imposed that could involve delay in the proceeding while the parties compose and the presiding officer decides the propriety of questions for each witness. Nonetheless, because oral presentations should be necessary only in those rare instances in which the written presentations leave unresolved issues that the presiding officer finds can be decided only after having oral presentations, and because proposed questions undoubtedly can be prefiled in many instances, the Commission expects these procedural requirements to be manageable.

One other commenter questioned whether the language in paragraph (b) stating that "[a]ll oral presentations * * *, unless the presiding officer orders otherwise, must be public," is designed to give a presiding officer more latitude to hold nonpublic informal hearings than is provided for formal adjudications under Subpart G. In fact, there was no intention that this provision be substantively different from § 2.751, which governs formal hearings. To avoid any ambiguity, the Commission has added language to paragraph (b) to make it clear that this section parallels § 2.751.

9. Proposed § 2.1251—Initial decision

Two commenters raised questions about § 2.1251, which specifies that after completion of the informal written and, if necessary, oral presentations, a presiding officer must render an initial decision, unless the Commission chooses to undertake that task itself by having the record certified to it. One commenter suggested that, as with § 2.764, there should be language making the initial decision immediately effective so as to authorize the NRC staff to take the appropriate licensing action. Section 2.1205(1), which authorizes the NRC staff to take a requested licensing action without regard to any pending hearing request, undoubtedly will provide the functional equivalent of an effectiveness provision in many instances. The possibility exists, however, that the staff will not yet have taken any action or, if

the staff has acted, the presiding officer's determination may include license conditions that were not imposed by the staff. In these instances, it would be appropriate for the presiding officer's decision to become immediately effective so as to authorize the staff to take the appropriate licensing action promptly. Accordingly, the Commission has added paragraphs (e) and (f) to § 2.1251 to indicate that the presiding officer's decision will be immediately effective, subject to any stay that might be sought and granted in accordance with § 2.1263.

A second commenter suggested that the time within which an initial decision will become final agency action, absent an appeal, should be thirty days rather than the forty-five days specified in the proposed rule. The Commission agrees with this proposal and paragraph (a) has been revised accordingly.

10. Proposed §§ 2.1253–.1257—Agency Appellate Review of a Presiding Officer's Determination

Under §§ 2.1253–.1257 of the proposed rule, parties and § 2.1211(b) participants to an informal adjudication would have an appeal as of right to the Atomic Safety and Licensing Appeal Board, as they do under the existing practice for formal adjudications. Several commenters criticized this provision as bringing an unnecessary and overly formal step into the informal hearing process. One commenter recommended that any review be limited to Commission-conducted sua sponte consideration of the presiding officer's decision to determine whether there were any errors that require correction.

For those informal materials licensing hearing proceedings convened since the *West Chicago* proceeding, the only appellate review provided has been a Commission sua sponte review of the presiding officer's decision, such as is suggested by the commenter. As a result of its experience in those proceedings, the Commission has concluded that the interest of all parties is better served if the Appeal Board is given the initial opportunity to consider any arguments concerning errors in a presiding officer's legal or factual findings relating to a particular licensing action. The Appeal Board, whose principal function is the review of adjudicatory records in formal licensing matters, generally is in as good a position as the Commission to provide a thorough, prompt, initial appellate review of individual informal adjudicatory decisions, as well as interlocutory certified questions, thereby freeing Commission resources for the consideration of broader policy matters relating to reactor facilities and materials licensees. As a result, the Commission has decided to retain Appeal Board initial review of presiding officer decision, subject thereafter to sua sponte Commission review.

C. Additional Comments

One commenter made two additional suggestions. The commenter suggested that the materials licensing rule contain a provision regarding burden of proof in the proceeding and a provision on motions procedures. The Commission has included a new § 2.1237 that would incorporate the appropriate provisions of Subpart G relating to these matters.

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 final rule.

Paperwork Reduction Review

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 Atomic Energy Act affords interested persons the right to a hearing regarding a materials licensing proceeding. As the Commission previously indicated in its *West Chicago* decision, 15 NRC at 241, the use of informal procedures involves less cost and delay for parties and the Commission than the use of formal, trial-type procedures, the only other procedural alternative. Also, procedures must be in place to allow for orderly conduct of those adjudications. Codifying the informal hearing procedures for materials licensing proceedings in preferable to the only other alternative, which is the present practice of establishing the procedures to be followed on a case-by-case basis. By codifying the procedures, the Commission will avoid the expenditure of time and resources necessary to prepare the individual orders that previously have been used to designate those procedures. It thus is apparent that this final rule is the preferred alternative and the cost entailed in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this final rule.

Regulatory Flexibility Certification

The final rule will not have a significant economic impact upon a substantial number of small entities. Many materials licensees or intervenors fall within the definition of small businesses found in section 34 of the Small Business Act, 15 U.S.C. 632, or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or the NRC's size standards published December 9, 1985 (50 FR 50241). While the final rule would reduce the litigation cost burden upon licensees or intervenors because of the informal nature of the hearing, the requirement that they submit filings and documentary information detailing contested legal and factual issues is still required. Some cost reduction in comparison to the cost of participating in a formal adjudicatory hearing can be anticipated, although it is problematic whether that reduction as a whole will be significant. Certainly, the use of informal procedures will not increase significantly the burden upon licensees to respond to hearing requests. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC certifies that this rule does not have a significant economic impact upon a substantial number of small entities.

Backfit Analysis

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

List of Subjects in 10 CFR Part 2

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

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 2: