ADAMS Template: SECY-067

DOCUMENT DATE: 01/13/1962

TITLE: PR-002 - LEGACY - RULES OF PRACTICE

CASE REFERENCE: PR-002

LEGACY

KEY WORD: RULEMAKING COMMENTS

Document Sensitivity: Non-sensitive - SUNSI Review Complete

Part 2
Rules of Practice

North American Aviation, Inc. General Offices

INTERNATIONAL AIRPORT, LOS ANGELES 45, CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

February 26, 1962

Secretary
United States Atomic Energy Commission
Washington 25, D.C.

Reference: Revised 10 CFR Part 2, "Rules of Practice"

Dear Sir:

We have reviewed with interest the revised rules of practice published in the Federal Register pursuant to notice dated January 8, 1962.

Although we continue to believe that a public hearing such as that contemplated by the rules set forth in Subpart G--Rules of General Applicability is unnecessary and inappropriate in uncontested licensing or authorization proceedings which could better be handled administratively by technically qualified Commission personnel (see our letter to the Honorable Chet Hollifield, Chairman of the Joint Committee on Atomic Energy dated April 18, 1961, copy of which is attached), we find these regulations otherwise acceptable subject to the following comments.

We are concerned that the expedited decisional procedure provided by Section 2.761 requires all parties to waive their rights to file a petition for review. To us the right of review is so basic and necessary, it should not be forfeit for the sake of expedition. We perceive if such right must be waived, that parties not having an economic interest in a prompt determination will never stipulate with the party or parties having such an interest that an initial decision may be omitted or made effective immediately. Even the moving party in our opinion, may find it absolutely necessary to challenge the order or decision he solicited promptly. We would, therefore, amend Section 2.761 to delete "and waive their rights to file a petition for review, to request oral argument, and to seek judicial review" from sub-paragraph 1 of paragraphs (a) and (c).

We also question the requirement, if an order is to be made without an initial decision, or an initial decision made effective immediately, that "no unresolved substantial issue of fact, law or discretion remain." It appears to us that none of the issues noticed and as to

which a finding is required (see e.g. Sections 50.57 and 115.45) will ever be resolved or determined, until the Presiding Officer makes his decision or an order without a decision. Similarly, if there is a matter of discretion involved, until exercised by the Presiding Officer in his decision or by order, can said discretion be other than unresolved and unexercised? We believe "uncontested" must be the sense in which the term "unresolved" is intended. If so, for clarity we suggest it be substituted for the latter in sub-paragraph 1 of paragraphs (a) and (c)

We appreciate the opportunity to comment on the revised rules of practice.

Respectfully submitted,

John J. Roscia

John J. Roscia
Vice President and
General Counsel

JJR:jc
Enclosure

North American Aviation, Inc. General Offices

INTERNATIONAL AIRPORT, LOS ANGELES 9, CALIFORNIA

OFFICE OF THE GENERAL COUNSEL

April 18, 1961

The Honorable Chet Holifield, Chairman
Joint Committee on Atomic Energy
The Congress of the United States
Washington, D. C.

Dear Chairman Holifield:

We have reviewed with interest the volumes furnished with your letter of March 18, 1961, relating to the AEC regulatory process including the Joint Committee Staff study of such process. We appreciate the opportunity afforded us to comment on the various proposals for improving such process suggested by the Staff, by the Commission and by others.

As you request, we will direct our comments to the Commission's proposal for a Director of Regulation reporting directly to the Commission, which position, we understand, has been established by the Commission since receipt of your letter; the proposal for the creation of an agency separate from the Commission to assume the regulatory responsibility; your Staff's proposal for the creation of a licensing board within the Commission; and the suggestions for changes in Commission procedures proffered by the Staff and others.

Initially, we favor gradual not precipitant changes in the organizational structure of the Atomic Energy Commission. In terms of experience with the regulatory process, particularly in the matter of facility licenses, we do not believe the Commission's organizational structure has been sufficiently tested to justify the separation of functions proposed by the University of Michigan Law School study. In a field as advanced and changing as atomic energy, more time is required for the Commission to develop internally procedures and criteria to assure that the regulatory responsibility is exercised rationally, expeditiously, judiciously and with proper regard for the Commission's development and promotion responsibilities.

The requirement of a hearing in uncontested licensing proceedings hinders, in our opinion, the development of a sound regulatory process. Lacking a contest, the hearing examiners have assumed the role of public defender and tended to draw out beyond reason the length and number of successive hearings. Yet we do not

believe it follows that the safety of a nuclear reactor is proportionate to the number of hearings that are held.

The separate agency proposed by the Michigan study and to a lesser extent the separate but equal licensing board within the Commission, as proposed by the Committee's Staff, might affirm public hearings as the instrument to evaluate reactor safety. Such evaluation, in all but contested proceedings, is best determined solely by technically-qualified personnel, advised when there are questions they cannot resolve, by those most knowledgeable in the field. This is now possible by strengthening the personnel and stature of the hazards staff, to which end the new Director of Regulation might well apply himself, and by properly utilizing the Advisory Committee on Reactor Safeguards without, we believe, undue burden on that body.

The Commission itself or a panel of commissioners should, in our opinion, preside in contested licensing cases. As the Committee's Staff points out in its excellent study, the Commission's safety responsibility cannot be separated from operation and development--the two are but "aspects of a single undertaking: making atomic energy available for peaceful purposes". Who but the Commission, the responsible agency, should be entrusted to make the proper evaluation. To say that it cannot do so, that the two functions are irreconcilable oppositives, is to say that no judicial, executive or legislative body can act or decide in the face of more than one interest. If the peaceful use of atomic energy is to become a reality, then responsibility for its development with adequate safeguards for the public must ultimately be assumed by one body and not diffused amid multiple agencies, boards, committees, examiners, consultants and staffs.

We also suggest that the Commission should preside in uncontested proceedings if there is a conflict between the applicant and the licensing office of the Commission over the grant of a license or the conditions therefor and the applicant appeals. Such appeal proceedings before the Commission should, we believe, be noticed to the public, just as there should be public notice in all cases before issuance of licenses to construct or operate or an amendment to a license; thereby an opportunity to request a public hearing would be afforded all who could show a valid interest. We believe legislation requiring such prior notice should establish classes and criteria respecting who has such an "interest". State and local governments, e.g., obviously should be permitted to request a hearing.

We can appreciate, considering the present state of reactor technology and the magnitude of the risks involved, the view that there should be a mandatory hearing before issuance of a construction permit. If the law continues to require mandatory hearings it may also be well, to lessen the burden on the Commission, to having hearing examiners accept testimony and make recommendations, as in most federal agencies. The decision, however, should be the Commissioners' not the examiner's, as is now usually the case. We agree with the Michigan study that any statutory provision for mandatory hearings should be limited to three to five years so that Congress may reconsider if the requirement has outlived its usefulness.

In view of the foregoing, we support the Commission's internal reorganization separating the regulatory functions from the promotional and developmental functions at the General Manager level by creation of a Director of Regulation with authority over the regulatory staff, including field inspection personnel, and reporting directly to the Commission. We would hope that this reorganization would promote greater participation by the Commissioners in the regulatory function and would lead to greater emphasis on technical evaluation of license applications. If the promotional and regulating staffs of the Commission are kept sufficiently distinct and equal and both answerable direct to the Commission, we believe adequate division of the two functions can be achieved to assure the public that its interests, which cannot be in safety alone, are paramount. Assuredly, the public's interest in safety is best entrusted to those trained to evaluate such matters, so long as the avenue of the due process and public hearing remains open to challenge the technical decision.

We would also like to add our support to the suggested changes in procedures listed on page 64 of the Staff's study; and to the extent they suggest additional changes, the recommendations in Part A of the summary of the Michigan study (Volume II at pages 555 and 556). In particular, we believe that public hearings, if mandatory at all, should be so only before the issuance of a construction permit. Also the Commissioners should preside over all uncontested and contested hearings to the extent time permits. In any event, even if hearing examiners are employed to take testimony and make recommendations, the decision should be the Commissioners'.

Time should be granted the Commission to see what improvement flows from its internal reorganization and the suggested procedural revisions before either a licensing board is set up within the agency or a separate regulatory agency established. Assuredly, both

the Staff's and the Michigan studies apprise the Commissioners of the deficiencies in the present processes. Particularly in the matter of the ever-formalizing and lengthening hearing process, the Commissioners must realize they should not require more than the law necessitates and Congressional intent indicates.

We are glad of this opportunity to express our views on so important a subject. We hope our comments may be of some small value to the Joint Committee's consideration.

Very truly yours,

John J. Roscia

John J. Roscia
Vice President and
General Counsel

Part 2
Rules of Practice

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February 26, 1962

Mr. Woodford B. McCool
Secretary
United States Atomic
Energy Commission
Washington 25, D. C.

Dear Sir:

This letter contains our comments on the Commission's Proposed Rules of Practice which were published in the Federal Register on January 13, 1962.

We are somewhat puzzled by the procedure of inviting comments on the proposed rules and, at the same time, making the rules effective before careful consideration can be given to the comments received. Such study is certainly desirable as the proposed rules are in several respects incomplete, ambiguous and conflict with other portions of the procedural rules and with some of the Commission's substantive regulations.

We urge that the effective date of the proposed regulations be postponed until these proposed regulations can be revised. To expedite this end, it might be worthwhile for the Commission's General Counsel to establish an advisory group which could examine the comments received and pool suggestions.

In addition to the observations made above, we have the following general comments on the proposed rules:

1. Dividing the rules into various subparts is convenient and appropriate. Subpart G - Rules of General Applicability - could more logically be made Subpart A. In addition, the scope of this subpart should be expanded. For example, rules governing the filing and docketing of material are not covered elsewhere in the proposed rules, yet, as presently drafted, the scope of this subpart is limited to adjudications initiated by an issuance of order to show cause, a notice of hearing or a notice of appeal. We believe it would be appropriate to expand the scope of this subpart to include all filings from the time an application is made to the Commission.

2. Throughout the proposed rules, there are numerous instances--a few of which are given below--where there is confusion in the use of the verbs "may," "shall" and "will." Each of the rules should be examined to ascertain whether the action characterized is mandatory, permissive or descriptive.

3. There is an omission of several important procedural matters such as (a) the form and content of briefs and the propriety of their incorporation in proposed findings; and (b) procedure for incorporation of relevant portions of the record in other proceedings.

4. There are several terms used which are imprecise in context and should either be defined (e.g. "AEC", Sec. 2.780) or changed (e.g. "limited interest", Sec. 2.754).

The following are our comments on specific sections of the proposed rules:

§2.4 - Definitions

f. Director of Regulation is defined as "the Director of Regulation or any officer to whom he has delegated authority to act." Only a few individuals qualify as officers under the Act (Secs. 24 and 25). The words "or employee" should be added. This change would also conform to Part 1 of the Commission's Regulations (Sec. 1.25 (6)).

1. Secretary "means the Secretary of the Commission." This definition should be enlarged to include "the Acting Secretary" and the "Office of the Secretary of the Commission."

Subpart A

§2.102 (a). If the applicant is required to submit additional information: (1) the request for the information should be in writing; and (2) should set forth specifically the additional information needed.

§2.102 (c). There is here an example of the use of the permissive verb "will", whereas the mandatory form "shall" was probably intended.

§2.103

This section is awkwardly worded. Why should local officials know about every curie in a license for by-product material? The burden on the Director could be substantial. Paragraph (b) of this proposed section states that:

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

(1) The information, if any, which is deficient;

(2) Other reasons, if any, for the proposed denial or denial;

(3) If a notice of proposed denial, the time within which the applicant must supply the additional information; and

(4) If a notice of denial, the right of the applicant to request a hearing within thirty (30) days from the date of the denial."

A literal interpretation of this section is that the Director need do nothing. Is a notice of denial the same as a denial? It would seem so in this case when read in conjunction with the notice of proposed denial. Perhaps the phrase "notification of denial" would be better. Is information deficient? Or is the application deficient because the information is missing, incorrect, or fails to give the Director the proper assurances regarding the applicant's qualifications?

§2.105 (a). The word "facility" has not been defined. It should be defined, or the type of facilities which have been defined should be listed. (This comment is also applicable to Sec. 2.106.)

§2.105 (c). One is not an applicant for a construction permit but for a license.

§2.105 (e). Why is the Secretary issuing the notice of hearing? In Sec. 2.704 the implication is that the Commission does so. In Sec. 2.106 it is clear the Commission issues the notice of hearing or the appropriate order. The language should be consistent.

§2.107

The first paragraph of this section implies that once a hearing has been ordered, the applicant must proceed. In other words, he has no legal right to change his mind. The Commission has no power to require an applicant to proceed. What the Commission

could do is to provide that if an applicant decides to withdraw his application, the Commission may deny the application or dismiss it with prejudice. There should also be certain formal requirements added regarding this notice--namely, it should be under oath, served upon parties, etc.

§2.108

This section should have a concluding paragraph similar to paragraph (e) of Sec. 2.106 in order to complete the Commission's procedural requirements in connection with the request.

§2.109

The use of the phrase "a new license" is questionable. There should be some language inserted which has the effect of relating this application for a "new license" to the fact that it involves some type of license previously granted.

Subpart B

§2.201

This section, in general, needs considerable editing. Among the changes which could improve this are the following: (1) the last clause (or perhaps even paragraph (c) should be the first paragraph) of the first sentence should be transposed to the first part of this sentence; (2) "will" should be changed to "shall"; (3) "reply" should be "answer." While not strictly a pleading, this would be more in line with the language of the following section; and (4) the Director should have discretion to extend the time for filing the reply. No such discretion is granted in the present version.

§2.202

There should be some correlation between this section and the prior section. The prior section requires the Director of Regulation to issue a notice of violation before a show cause order is issued except in cases of willful violation or where public health, safety or interest demand that such notice be omitted and the show cause order is issued. Language in the present regulation (2.202) would satisfy this. It states: "In any case described in 2.200, and after notice, if any as required by section 2.201."

Paragraph (d) states that the "answer may consent to the entry of an order in substantially the form proposed in the order to show cause." Yet there is no requirement that the Director attach such a form of proposed order. The use of the word "substantially" is questionable. This gives the Director a certain latitude which

is perhaps too great in view of the fact the consent waives licensee's rights to hearing, judicial review, etc. Quaere: Would the licensee be precluded from a hearing on whether or not the order was "substantially" in the form agreed to?

In paragraph (e) the inclusion of the phrase "findings of fact and conclusions of law" seems unnecessary.

§2.203

Although probably implied, the following sentence, inserted between the first and second sentences, would make this section more forceful: "Such stipulation shall be received in evidence at the hearing, and when so received shall be binding on the parties with respect to the matters therein stipulated." The section does not state there will be a hearing but how else will the stipulation, the decision of the Presiding Officer be made and an order issued without at least a pro forma proceeding?

Subpart D

§2.413 (a). The AEC's proposed rules provide that a notice of appeal may or may not be accompanied by a complaint. If the complaint accompanies the notice of appeal, it is "served" with the notice of appeal, but there is no procedure for its filing. It would be a better choice of words to use the word "filing" as is done in the ABCA rules.

§2.413 (b). The requirements in the complaint do not require that a dollar amount be specified. This should be included.

§2.414 (a) (2). The proposed rules require that the contract be forwarded with the notice of appeal. Does this mean only the contract itself or does it include pertinent plans, specifications, change orders, etc.? It would be preferable to include these pertinent documents to remove any ambiguity.

Subpart G

§2.701

For orderly procedure, filings should be deemed complete only when received, within the specified time limits, if any, at the Commission's Headquarters in Germantown or at the Public Document Room. A literal interpretation is that there would be compliance with the AEC's rules even though documents were never received. A more practical problem is that the time for filing a responsive pleading runs from the time of filing. This could be a burden, either because not timely received, or because an extension was necessary to give the necessary time in which to file a responsive pleading.

§2.704

In the proposed regulation, a party "may file an answer." Should he not be required to do so? The remaining paragraphs of this section, as well as Sec. 2.707, imply that an answer "shall" be filed.

§2.708

Paragraph (c) implies that counsel signs all documents if a party is represented by counsel in an adjudication as that term is defined in the introductory section of these proposed rules. This language problem could be avoided by using the following:

> "The original *** shall be signed *** by the party in interest, his attorney or his authorized representative."

§2.710

This section fails to note which jurisdiction controls as to a legal holiday. The jurisdiction should be so designated and probably should be the District of Columbia.

§2.714

"Standards of interest" required for intervention is very broad. The interest required for intervention could be narrowed by inserting the word "directly" before the word "affected."

§2.715

If a State is going to participate in a proceeding it should first be required to file and serve a notice of participation at a certain time before the hearing begins. As now drafted, the State's representatives could show up at the hearing, without advance notice, and participate.

§2.720

Parts of this section are awkwardly worded. For example, the subpoena can direct someone to produce "specified documents and other things." (Emphasis supplied.) This is odd phraseology for a subpoena duces tecum.

Usually U.S. Marshals serve subpoenas for the U.S. Courts and the administrative agencies. The rule should recognize this.

§2.730

This section is somewhat confusing.

Paragraph (a) implies that except in one instance the Commission will act on motions. The remaining paragraphs indicate that either the Commission or the Presiding Officer may issue them. In paragraph (a) does pending "before the Commission" mean (a) after the Examiner's decision, or (b) when in the process of adjudication at any level? If the former, the Examiner has no jurisdiction (see §2.718 supra). A number of motions (e.g. pre-hearing conference, correction of transcript, conforming pleadings to the evidence) are ruled upon by the Examiner. Therefore, paragraph (a) should be revised to reflect this fact.

Paragraphs (f) and (g) are confusing. Interlocutory appeals are not permitted. What the procedural device used is, is a certification or referral by the Examiner (not the parties) to the Commission so there is no allowance of an interlocutory appeal.

§2.740

Paragraph (a) implies that only the Commission may order the taking of depositions. Yet in Sec. 2.733 this is one of the powers of the Presiding Officer.

§2.741

In paragraph (a), the Presiding Officer should also have the power to rule on motions regarding discovery and related procedures. He is presumably more familiar with the needs and purposes for the utilization of such procedure.

In paragraph (a) (1) the term "pending action" is used. This is a new expression not elsewhere defined.

§2.754

In paragraph (b) (3) the wording should be changed as "service" by various parties could be at various times.

In paragraph (c) what is the significance of the use of the word "person" with a "limited interest"? Who is this individual? It cannot be one who makes a limited appearance as, by virtue of Sec. 2.715, he can only make a statement and cannot "otherwise participate in the proceeding."

§2.760

Paragraph (a) is in conflict with Sec. 50.57 of the Commission's Regulations on provisional operating licenses. Under Sec. 50.57 the decision does not become final until 45 days after its issuance (assuming no exceptions, etc.).

Paragraph (c) (3) implies that the initial decision will establish the time in which to file a petition for review. Yet Sec. 2.762 (a) categorically states this time will be 20 days. It is better to have it established in the rules.

§2.761

Certain parts of this section are also in conflict with Sec. 50.57.

§2.762

Here again the due date of certain pleadings seems from time of service not the time of filing.

What is the meaning of "governing precedent"?

In paragraph (g) it states that only exceptions to "important procedural or substantive matter" shall be taken. Later in the same paragraph it states "any objection to a ruling, finding *** not made a part of the exceptions will be deemed to be waived." (Emphasis supplied). This seems inconsistent.

§2.780

"AEC" is not defined in the definition section and here in the proposed regulations is used for the first time.

Subpart H

§2.810

This section has nothing to do with rule making. It should be a part of Subpart G.

Very truly yours,

LeBOEUF, LAMB & LEIBY

By _____
Partner

Ex Parte Communications

1. Briefing for Commissioners and Hearing Examiner

2. Briefing for Commissioners Staff and Secretariat

3. Written instructions for all counsel.

Howard K. Shapar February 14, 1962

Troy B. Conner, Jr.

COMMENTS ON PROPOSED PART 2

Here is an informal listing of the points which I feel we should discuss with Sid Kingsley at our meeting on Part 2. Most of the items are important although some nit-picks are included.

1. § 2.1 (a). Add "modifying" to (1).

2. § 2.1. It is recommended that the scope of Part 2 be extended to include new licensees. Specifically, such words as "or with respect to any person possessing source, byproduct or special nuclear material without a license" should be added at the end of (1).

3. § 2.3. It is suggested that this section deal with any conflicts between Subpart G and "special rules" in other Parts of the regulations.

4. § 2.4. It is suggested that subsection (h) be amended to state ". . . construction permit as defined in Part 50 . . ."

5. Subpart A. The title should be amended to include the term "modification". Subpart B presently contemplates that modifications of licenses can only be made by the issuance of an order. It is suggested that Subpart A be amended to provide that upon proper finding the Staff may institute action to modify a license by notice of proposed issuance of an amendment to a licensee that the license should be modified. I believe this approach to be consonant with the former rules which permit the applicant or licensee to request a hearing if he does not agree with the proposed action.

6. § 2.101. If the applicant is required to serve a copy of the application on the local Chief Executive, wouldn't it be simpler to have him also serve the Governor, without imposing that burden upon the Director of Regulation?

7. § 2.103, § 2.105 and § 2.106 seem to overlap. Unless § 2.103 is read in conjunction with § 2.105 it appears that an applicant may not request a hearing on a notice of proposed denial but must wait until the Staff elects to issue a notice of denial. I would suggest that § 2.105 be amended to include the procedures for both proposed denials and denials and that the procedures be deleted from § 2.103 (b) and that the words "in accordance with the provisions of § 2.105" be added.

8. § 2.104 (a) is incorrect as written in stating that "The Secretary will issue a notice of hearing . . ." As I have mentioned on previous occasions, the Secretary does not have legal competency to determine the issues which must be included in a notice of hearing and the Staff should not be compelled to defend the legal sufficiency of any notice of hearing issued by the Secretary. Moreover, § 2.104, § 2.105 and § 2.106 are somewhat inconsistent as to the responsibilities of the "Commission", the "Director of Regulation" and the "Secretary" with respect to issuing of notices of hearing, Federal Register notices and notices to state and local officials. I suggest that these sections be amended to follow the approach that the Regulatory Staff will issue any notices of hearing and will transmit them to the Federal Register and to the appropriate State and local officials. Another alternative would be to reduce the notice of hearing to a mere form, in which the single issue would be whether or not the action proposed by the Staff should be granted. Under this approach the issuance of the notice of hearing would be merely a ministerial act. This change would require revision of § 2.703 (cf. Regulatory Report).

9. § 2.104 (a) (4). I suggest that the words ". . . pursuant to § 2.705" be added (see comments on that section infra).

10. § 2.105 (a) (1). I suggest that the words "utilization or production" . . ." be added before the word "facility" since the word "facility" is used frequently to describe the various types of licensed installations.

11. § 2.105 (a) (3). I suggest the last clause be amended to read as follows: ". . . which involves significant hazards considerations different from those previously evaluated" in order to be more nearly consistent with the present proposed change procedures.

12. § 2.105 (b). Subsection (4) is organizationally inconsistent with the other three subsections. Perhaps the simplest amendment would be to delete the words ". . . concisely state . . ." and substitute in lieu thereof "contain". Subsection (4) in any event should be amended to include the words "or amendment".

13. As written there appears to be confusion as to whether or not § 2.103 and § 2.106 provide alternative or complementary procedures. Perhaps the simplest solution would be to delete subsection (a) of § 2.106 since the matter of publishing notice of issuance where a notice of proposed action has been previously published is already covered in § 2.105 (a).

14. § 2.105 provides a "change procedures" test on amendments to a license for a facility. However, § 2.106 provides no such test with respect to a facility, although such test is provided with respect to waste disposal licenses.

15. § 2.106 (b) (2) should be amended as recommended for § 2.105 (a) (3) in Item 11 above.

16. § 2.107 (a). In order to eliminate any possible confusion because of the use of the verb "withdraw", it is suggested that this subsection be amended to read as follows: ". . . An applicant may withdraw an application from consideration by the Commission . . ."

17. § 2.201. This section as written appears to contemplate that modification of a license, as well as suspension and revocation, can only be based on violations. It does not contemplate that modifications need be made because of the existence of "unsafe conditions" which are not violations of any regulation. (e. g., in the Volk case the health and safety questions requiring the issuance of an order were neither violations of the regulations or of conditions of the license). I suggest that § 2.201 be modified to incorporate provision for notifying the licensee of the need for modification of the license to cover "unsafe conditions" which are not related to violations.

18. § 2.201 (a) (1) (2). The requirement that a licensee admit or deny a violation under the notice has a more punitive flavor than § 9 (b) of the Administrative Procedure Act. From experience with licensees' replies to notices of violation show that they rarely deny that the fact occurred.

19. § 2.201 (a) now provides a flat twenty days for replying to a notice of violation. The former rule, which I consider more desirable, provided a fifteen day period "or such other reasonable period as may be specified in the notice . . ." This provision on one hand provided sufficient time in most cases and on the other hand provided sufficient flexibility to permit a longer period for reply in cases where we knew the licensee would be unable to develop corrective measures and report them to us within the minimum period (e. g., mill cases).

20. § 2.202 (a). Change "Commission" to "Regulatory Staff".

21. § 2.202 and/or § 2.206. Should these provisions recognize the use of "punitive suspensions" in appropriate cases? Consideration was given to seeking authority to impose "administrative fines" but ruled out in preference to "suspension of licenses for brief periods" (see a Report on the Regulatory Program of the Atomic Energy Commission, February 1961, pages 36-37). For example, a sentence could be added to § 2.206 which would state "All or any part of the authority granted by a license may be suspended (1) until required remedial action is taken or (2) for a period of time to be determined by the Commission as a result of violations of the Act, the regulations or license conditions."

22. § 2.102 (b) requiring that the answer in an order to show cause be under oath or affirmation is a new requirement. Also this requirement for "a written answer under oath or affirmation" for a response to a staff order, is not consistent with § 2.705, which does not require that an answer to the notice of hearing be verified.

23. § 2.202 (a) (1) should be amended by adding "or such other grounds requiring the action proposed in the order".

24. § 2.202 (c). Provision should be made that a hearing may be scheduled within a reasonable period of time, not less than twenty days after the date of the demand for hearing.

25. § 2.203. Change the word "Order" to "Notice of Hearing" in the first line to avoid any confusion that examiner has jurisdiction prior to notice of hearing.

26. § 2.702. It should be noted that under the new system the Secretary will not include in the "docket" any letter it forwards to the Federal Register or to a State and local official prior to the notice of hearing.

27. § 2.705. This section should reflect that at least thirty days' notice in the Federal Register is required prior to reactor cases and provide a minimum period of time for issuing a notice of hearing in cases of orders to show cause.

28. § 2.703 (b). Who determines the time and place for hearing - the Staff, the Secretary or the Hearing Examiner?

29. § 2.705. I suggest the caption be amended to read "Answer to Notice of Hearing" to distinguish it from the answer to an order contemplated by § 2.202 (b).

30. § 2.705. I believe it would be desirable to provide greater flexibility for the period for filing of the answer. This flexibility is particularly needed if notices of hearing on orders to show cause are to be issued on less than thirty days' notice. A second problem is that the Staff might not receive an answer mailed by a licensee on the 20th day until just before a hearing. I suggest that half the notice period be allowed for the filing of answers so that in a licensee case the answer period would be fifteen days and in a complainee case ten days. In the event the present language stands, who determines "such other time as may be specified in the notice of hearing . . ." for filing the answer?

31. § 2.705 (b). This subsection has been amended to provide that only "material" allegations of fact not denied shall be deemed to be admitted. I suggest the word "material" be deleted. The purpose of this provision is to eliminate the need for proof. If a licensee need only respond to "material allegations" it would appear that the Staff would be required to prove all other allegations unless the licensee happened to admit them. While it may be somewhat academic, but providing that a licensee need answer only "material allegations" could

present a problem as to the responsiveness and adequacy of an answer in a given case.

32. § 2.706. While I assume the purpose of this section, which is similar to § 2.737 in the old Part 2, is to serve the function of the replication, rejoinder, etc. in common law pleadings to limit the issues, I do not believe that there is any real need for such a provision in administrative law practice. If the section remains, however, "served" should be changed to "filed" to be consistent with other sections. It is, of course, possible that the Staff would not receive an answer within five days after it was filed by deposit in the mail.

33. § 2.707. You will recall our discussion that this section could be interpreted as not permitting the entry of a default order until the licensee had failed to appear at a hearing irrespective of whether or not he had filed an answer. I understood that the section would be amended to read:

> "On failure of a party to file an answer . . . or having answered to appear at a hearing or pre-hearing conference . . ."

34. § 2.707. Some time in the future we might consider providing tests in this section to assist the hearing examiner to determine when he may enter a default without taking evidence.

35. § 2.708. This section is not consistent with § 2.701, which permits filing by telegraph. Construed with § 2.709, it would appear that the Secretary could refuse to accept telegraphic pleadings both because the document would not meet the form requirements or contain signature of the party or his attorney.

36. § 2.708 (a). This subsection provides the document may be stricken if it "is signed with intent to defeat the purpose of this section." Construing this language with § 2.709, it appears that duty is imposed upon the Secretary to make a genuine determination in each instance that the pleading is not signed with intent to defeat the purposes of the section. I do not see any useful purpose is served by this language and suggest that it be deleted.

37. § 2.708 (d). This provision imposes a requirement on the Staff, as well as other parties, to submit an original and fifteen conformed copies of all pleadings. This will require us either to make mate of all pleadings or to make two or three typewritten runs in each instance. I consider this requirement to impose an unnecessary hardship if the Secretariat still plans to reproduce all pleadings as it presently does. If the Secretariat plans to discontinue reproducing the pleadings I do not believe fifteen copies will meet its needs.

38. § 2.709. This section appears inconsistent with § 2.701 in defining when a filing actually takes place. Will a licensee who deposits a pleading in the mail within the prescribed time be deemed in default if the Secretariat subsequently returns the pleading?

39. § 2.711. The words "or the Presiding Officer" should be deleted for purposes of uniformity with other sections where the term "Commission" has been used as including the Presiding Officer.

40. § 2.714. This section provides the petition of intervention must be filed five days before a hearing and that any party may oppose an intervention by filing an answer within five days after the petition is filed. In the case where a petition for intervention is filed by mailing, the Staff may not receive the petition until five days after its filing and thus could not respond within the provided period. I suggest that § 2.714 be amended to provide that in any case where a hearing convenes before the parties have received a petition to intervene they may oppose intervention at the hearing. This procedure, of course, conforms to present practice.

41. § 2.715 (b). This subsection presently provides that "The Commission will give notice of a hearing to any person who requests it." I suggest it would be more accurate to state that "The Secretariat will furnish a copy of a notice of hearing to any person who requests it." This change would conform with the intention expressed for this section in Sid's memo stating the purpose of this subsection.

42. § 2.717. This very desirable section prescribes the commencement and termination of the jurisdiction of a Presiding Officer in any case. However, I think it is somewhat too strict . It also is intended to provide that MLSR may nevertheless issue an order or take other action with respect to a licensee involved in a pending proceeding if such action does not relate directly to the matters pending before the Hearing Examiner. I understand that subsection (b) as presently worded was changed at the request of the Hearing Examiner. However, the meaning of "administrative actions" is not clear. I propose that the section be amended to read somewhat as follows:

> "Nothing contained in this section shall be deemed to preclude the Regulatory Staff from issuing orders and taking such other action as it deems necessary with respect to a licensee who is in a pending proceeding which are not directly related to the issues under consideration in the pending procedure."

43. § 2.718 (or § 2.760 (c)). Either this section or the section on initial decisions should be amended to provide that the Presiding Officer should make such orders with respect to the disposition of radioactive material as may be necessary to implement his decision.

44. § 2.720 (d). This section provides that witnesses subpoenaed by the Commission "shall be paid . . .". As a practical matter to my knowledge, we have never paid any witness subpoenaed by the Staff for his appearance. The nature of our practice has been such that witnesses, including employees of licensees, pay their own expenses. I suggest that this subsection be modified to remove its mandatory flavor by adding the words "if they request payment," after the word "paid".

45. § 2.732. This section states that a Presiding Officer may determine which party bears the burden of proof. I suggest this concept be eliminated and that we continue to let applicable law determine upon whom the burden of proof rests in a given case. The provision in old Part 2 in § 2.733 (c) should be substituted for the new § 2.732.

46. § 2.732. This section adopts the existing practice of permitting technical personnel to participate in examination and cross-examination. While this approach has not been followed in any cases that I recall, it is on the whole a good provision. However, it points up a problem that has existed in the past where the Hearing Examiners had permitted (1) technically qualified persons who did not represent the parties and (2) totally unqualified persons to ask questions of the witnesses for the parties. I consider this practice to be incorrect and to conflict squarely with the provision regarding limited appearances which states that, except for their statement of position, such persons "may not otherwise participate in the hearing." The Staff has in the past not objected to this procedure by the Presiding Officers. I recommend that we reexamine our position in this matter and seek adherence to the rules in the future. This change would not require any modification of the regulation. If, on the other hand, it is found desirable that this practice continue, the rules regarding limited appearances and perhaps § 2.732 should be changed accordingly.

47. § 2.741. I do not believe discovery and inspection procedures are necessary for our licensing and compliance cases and their enactment would merely provide a means for delay in cases. In compliance cases because of the inspection system the Staff has already reviewed the documents which might be used in evidence and can obtain them by subpoena. From the licensee's point of view, the only documents involved are those already in his possession except for inspection reports. With respect to such things as photographs, the licensee is normally present when they are obtained. In licensing cases documents which would be used at any hearing are, of course, well known to both parties. A good defense counsel could require the Government to turn over all of its file in a given matter for his inspection. While the new § 2.741 provides that privilege may be asserted, it ignores the Jencks rule that the Government must abandon any charges if it chooses to assert privilege with respect to documents relating to the matter in issue. (Of course the Jencks rule can be asserted against us whether § 2.741 remains in effect or not. With respect to such matters as inspection reports, § 2.741 is not consistent with the spirit of Part 9, although the obvious interpretation is that documents otherwise protected by § 9.5 must be produced on proper motion under § 2.741.

OFFICE ▶

48. § 2.743 (b). This subsection implies that each party is expected to submit its evidence in-chief in written form unless it would be prejudiced. In reactor cases this is an advantage to both parties (although the five day requirement seems unnecessarily rigid). In compliance cases, however, the preparation of final written testimony in advance imposes a hardship on the staff and would incur a great deal of additional expense to the Government in man days and travel expense. From the licensee's point of view in compliance cases the requirement is prejudicial as no intelligent defense testimony (except possibly affirmative defenses) should be offered until after the Staff's testimony is in. I mentioned this to Sid and he agrees that there was no intention to apply this section to compliance cases. Accordingly, I suggest that this subsection be amended by adding the following words at the beginning thereof: "in non-contested cases . . ."

49. § 2.743 (b). The subsection is silent as to the technique for placing such evidence into the record. At present Mr. Jensch prefers the testimony to be inserted into the record as if read. Mr. Bond prefers that the written testimony be admitted as an exhibit with only additional testimony and cross-examination contained in the transcript. The Staff has indicated its preference for the latter system for some time. This technique reduces transcript costs substantially and eliminates errors in the official record. We may wish to explore in obtaining conformity in this respect unless it has been decided to leave this matter to the discretion of the Hearing Examiner.

50. § 2.750 (b). This section provides that the reporter shall not be responsible for transcript corrections and that the Secretary shall conform the official transcript. This is a break for the reporting company and will release them of what I believe is the subsequent contract requirement; secondly, this provision might have a tendency to induce further carelessness on the part of the reporters.

51. § 2.751 - § 2.752. Read together these sections say that prehearing conferences will be public. I recognize that this procedure would follow that preferred by the Presiding Officers and may stand as an ultimate decision by the Commission. However, if the subject is still open for

discussion, there is a great deal to be said for in camera discussions, such as are had between the judge and counsel in all judicial jurisdictions with which I am familiar. Our prehearing conferences have usually been far longer than necessary and I believe that any relief from formality that may be used to expedite them is desirable. In some cases, particularly compliance cases, all dealings with a licensee should be on the record. Accordingly, I believe § 2.752 (b) should be amended by adding at the end thereof: ". . . and it may be held publicly in the discretion of the Presiding Officer."

52. § 2.752 and § 2.753. With respect to the discussion of stipulations and admissions of fact to "avoid unnecessary proof", it may be noted that attempts to obtain such stipulations in compliance cases in the past have taken far more time than is required for simply introducing the evidence into the record by direct testimony.

53. § 2.754 (a). The requirement that proposed findings, etc., be filed "within twenty (20) days after the record is closed, or within such reasonable additional time . . ." appears to preclude the parties from submitting findings earlier. In reactor cases in particular in order to permit a licensee to meet its estimated startup schedule, we have frequently submitted proposed findings at the close of the hearing or very shortly thereafter. In most cases a twenty day period appears arbitrary in any event. In the absence of compelling reasons to the contrary, I would suggest that the time for filing of proposed findings remain with the Presiding Officer. Accordingly, I would recommend that the first clause of subsection (a) be deleted and that the following words be substituted in lieu thereof: ". . . within such period as the Presiding Officer may prescribe, . . ."

54. § 2.754 (b). It may be noted in passing that this subsection requires that the party who has the burden of proof shall file proposed findings ". . . and a proposed form or order or decision; . . ." Accordingly, it would seem preferable that in the future the Staff's proposed findings simply take the

form of an initial decision, rather than prepare two separate documents stating the same thing.

55. § 2.761 provides for expedited decisional procedure upon stipulation by the parties. This is a wholly desirable provision and should eliminate a great deal of unnecessary labor, particularly in reactor cases. However, it is suggested that both this section and § 2.203 be amended to make clear that an initial decision need not be issued if the specified criteria are met. Accordingly, I would suggest that in § 2.761 (a) following the word "hearing" in the first clause the following words be added: ". . . or as provided in § 2.203 . . ." The last sentence of § 2.203 should be amended by deleting the words ". . . in a decision and . . ."

56 § 2.771. This section refers to both "final decision" and "initial decision". Accordingly, it is not clear whether or not the language of this section permits a licensee to file a petition for reconsideration to the Hearing Examiner. It would appear that the petition for reconsideration should be limited solely to "final decision". If so, in the second sentence of § 2.771 (a) "initial decision" should be changed to "final decision".

57. § 2.103. I missed this item earlier because I assumed that it had been corrected because of earlier discussions. § 2.103 (a) now provides that upon the issuance of a license DL&R will inform the "appropriate state and local officials". Since this is only a matter of Commission policy, I think it should be deleted from the regulations.

In addition, in materials cases it imposes a severe additional burden upon the Staff to see that the hundreds of materials licensees also are sent to "appropriate . . . local officials." Many materials licenses permit licensees to operate throughout the United States or several states thereof (e. g., field radiography, beta gauge installation and maintenance). In such cases the designated state official in each state wherein the licensee may operate is sent a copy of the license. However, it would be administratively impossible to determine what local communities should be notified. Notice to local officials is certainly reasonable in particular classes of cases but should not be applied across the board.

OFFICE ▶	OGC	cc: Robert Lowenstein, DL&R Sidney G. Kingsley, OGC Gerald F. Hadlock, OGC
SURNAME ▶	TBCONNER:hcm	
DATE ▶	2-14-62	

Form AEC-318 (Rev. 9-53) U. S. GOVERNMENT PRINTING OFFICE 16—62761-3

Policy and procedures for the following types of filings:

1/ Orders Suspending Licenses (L+R)

2/ Orders Changing Licenses (L+R)

3/ Proposed testimony (Staff, Applicant, Intervenors)

4/ Exhibits

5/ Certificate of Service
Notice of Hearing
Intermediate Decisions
Commission, and Examiner's Orders and Decisions
L + R Orders
other filings by applicants, intervenors and Staff

6/ The Secretary to transmit all matter to the Federal Register for publication.

7/ Rulemaking
Participation in Public Council
Docketing
Processing for Commission approval — after Commission approval.

8/ Public Document Room
Categories of matter
Physical arrangement
Personnel

9/ Assistance for Proceedings
Hearing Calendar
arranging for physical facilities
" " Court reporters transcripts
Clerk of Court

10/ Patent Compensation Dockets

11/ Patent Compensation Board Servicing

12/ Contract Appeals Dockets

13/ Proposals by States for regulatory
authority Dockets

14/ A Hand book a means for
dissaminating instructions on
filings and proceedings -

1. 3 hearing examiners
2. OGC (~~including~~ 25 + 13 field offices) = 40
3. Price
4. Lowenstein
5. Compliance
6. Reduction standards
7. Gen Manager = ?
   Secretariat x
   Public document room 10

Each manager of operations and Compliance field office

Dated as of date of pub in Fed Reg, so can state effective date.

COMMENTS ON PART 2

RULES OF PRACTICE

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

Paragraph B-2.202

There is no provision for an Order to Show Cause to be published in the Federal Register and furnished to appropriate State and local officials.

Subpart C - Procedure for Declaring Patents affected with the Public Interest and for Licensing of Patents

Paragraph C-2.305

By definition, the term "Commission" means the 5 Commissioners. Recommend the term "AEC Staff" be used to differentiate from 5 man Commission.

Subpart D - Rules of Procedure in Contract Appeals

Paragraph 2.413 (a) and 2.414 (a)

Recommend that the number of copies required for submission, be established uniformly (except for the contract) as an original and three copies to permit the following distribution:

Original - Formal Docket File
1st Copy - Hearing Examiner
2nd Copy - Contracting Officer
3rd Copy - Public Document Room

Three copies of the contract should be furnished for the Formal Docket, Hearing Examiner and Public Document Room.

Paragraph 2.414 (b)

There is no provision made for the Contractor to know when the Contracting Officer has filed documents as required by 2.414.

Paragraph 2.415

Recommend that Secretariat assign the docket number, establish and maintain the Formal Docket and Public Document Room files. The paragraph should read:

"On receipt of the documents specified in paragraph 2.414, the Secretary will assign a docket number to the appeal, establish a Formal Docket and a Public Document Room file, transmit a copy to the Hearing Examiner and transmit a notice of the filing of the appeal to all parties."

Paragraph 2.416

There is no provision for a copy of the response to be served on the complainant.

Paragraph 2.430 (a)

Should specify that the Notice of Hearing will be issued by the Secretary

Pages 37 and 38

Recommend deletion of the "Docket No. _____" on these suggested forms. The Docket Number should be assigned by the Secretary upon receipt and all participants informed of the docket number either by a letter of acknowledgment or by the notice of hearing.

Subpart G - Rules of General Applicability

Paragraph 2.708 (d)

Recommend that an original and thirty (30) copies of all matters be required for submission. This number is required for internal distribution and to obviate the need for reproduction by the Secretariat.

Paragraph 2.712 (a)

The paragraph should be revised to read:

"Service of papers, methods, proof.

(a) Who may make service - Except for subpoenas, service of which is governed by 2.720, the Secretary will serve upon all parties, for the Commission, all orders, decisions, notices, and other papers issued by the Commission or Hearing Examiner."

Paragraph 2.740 - Depositions and Paragraph 2.743 - Evidence

Provisions with respect to the filing of depositions, admissions and evidence are vaguely worded as to filing requirements - Secretariat and serving of parties, e.g. the filing of proposed written testimony of all parties at least 5 days in advance of the hearing is permissive.

Paragraph 2.762 (a), (b) and (c)

Thirty (30) copies of the Petition for Review, brief and answer should be filed with the Secretary.

Subpart H - Rulemaking

Paragraph 2.802

Should provide for the filing of petitions for rulemaking with the Secretary.

Subpart I - Special Procedures Applicable to Adjudicatory Proceeding Involving Restricted Data

Paragraph 2.905 (a)

Party should file notice of intent to introduce Restricted Data with the Secretary not the Public Filings and Proceedings Branch.

With respect to the Changes on pages 22 and 25 proposed by the Chief Hearing Examiner, I would prefer to see those particular subparagraphs remain as they are written. Substituting "Commission" for "Secretary" fuzzes the responsibility and will leave to later negotiation among the Secretariat, OGC, and the Hearing Examiners the assignment of the responsibility for issuing a notice of hearing. Several of the other changes we have suggested are directed at this specific point--stating precisely who will take certain steps rather than using the vague term "Commission" which, by the definition on page 14 could mean any one of several people. Obviously, detailed checking will be necessary on many of the documents which the Secretary will issue under the new rules; for example, the Notice of Hearing covered under Sec. 2.104 will have to be closely coordinated with both the Hearing Examiner, the Division of Licensing and Regulation and the parties. Nevertheless, if the purpose of the establishment of our Public and Filings and Proceedings Branch is to be achieved--centralizing in one place in the AEC the responsibility for issuing, receiving, and controling the many documents involved in hearing matters, then all such orders by the AEC should eminate from the Secretary.

COMMENTS ON PART 2

RULES OF PRACTICE

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

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Subpart C - Procedure for Declaring Patents affected with the Public Interest and for Licensing of Patents

Paragraph C-2.303

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COMMENTS ON PART 2

RULES OF PRACTICE

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COMMENTS ON PART 2

RULES OF PRACTICE

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

Paragraph B-2.202

There is no provision for an Order to Show Cause to be published in the Federal Register and furnished to appropriate State and local officials.

Subpart C - Procedure for Declaring Patents affected with the Public Interest and for Licensing of Patents

Paragraph C-2.305

By definition, the term "Commission" means the 5 Commissioners. Recommend the term "AEC Staff" be used to differentiate from 5 man Commission.

Subpart D - Rules of Procedure in Contract Appeals

Paragraph 2.413 (a) and 2.414 (a)

Recommend that the number of copies required for submission, be established uniformly (except for the contract) as an original and three copies to permit the following distribution:

Original - Formal Docket File
1st Copy - Hearing Examiner
2nd Copy - Contracting Officer
3rd Copy - Public Document Room

Three copies of the contract should be furnished for the Formal Docket, Hearing Examiner and Public Document Room.

Paragraph 2.414 (b)

There is no provision made for the Contractor to know when the Contracting Officer has filed documents as required by 2.414.

Paragraph 2.415

Recommend that Secretariat assign the docket number, establish and maintain the Formal Docket and Public Document Room files. The paragraph should read:

"On receipt of the documents specified in paragraph 2.414, the Secretary will assign a docket number to the appeal, establish a Formal Docket and a Public Document Room file, transmit a copy to the Hearing Examiner and transmit a notice of the filing of the appeal to all parties."

Paragraph 2.416

There is no provision for a copy of the response to be served on the complainant.

Paragraph 2.430 (a)

Should specify that the Notice of Hearing will be issued by the Secretary

Pages 37 and 38

Recommend deletion of the "Docket No. _____" on these suggested forms. The Docket Number should be assigned by the Secretary upon receipt and all participants informed of the docket number either by a letter of acknowledgment or by the notice of hearing.

Subpart G - Rules of General Applicability

Paragraph 2.708 (d)

Recommend that an original and thirty (30) copies of all matters be required for submission. This number is required for internal distribution and to obviate the need for reproduction by the Secretariat.

Paragraph 2.712 (a)

The paragraph should be revised to read:

"Service of papers, methods, proof.

(a) Who may make service - Except for subpoenas, service of which is governed by 2.720, the Secretary will serve upon all parties, for the Commission, all orders, decisions, notices, and other papers issued by the Commission or Hearing Examiner."

Paragraph 2.740 - Depositions and Paragraph 2.743 - Evidence

Provisions with respect to the filing of depositions, admissions and evidence are vaguely worded as to filing requirements - Secretariat and serving of parties, e.g. the filing of proposed written testimony of all parties at least 5 days in advance of the hearing is permissive.

Paragraph 2.762 (a), (b) and (c)

Thirty (30) copies of the Petition for Review, brief and answer should be filed with the Secretary.

Subpart H - Rulemaking

Paragraph 2.802

Should provide for the filing of petitions for rulemaking with the Secretary.

Subpart I - Special Procedures Applicable to Adjudicatory Proceeding Involving Restricted Data

Paragraph 2.903 (a)

Party should file notice of intent to introduce Restricted Data with the Secretary not the Public Filings and Proceedings Branch.

With respect to the Changes on pages 22 and 25 proposed by the Chief Hearing Examiner, I would prefer to see those particular subparagraphs remain as they are written. Substituting "Commission" for "Secretary" fuzzes the responsibility and will leave to later negotiation among the Secretariat, OGC, and the Hearing Examiners the assignment of the responsibility for issuing a notice of hearing. Several of the other changes we have suggested are directed at this specific point--stating precisely who will take certain steps rather than using the vague term "Commission" which, by the definition on page 14 could mean any one of several people. Obviously, detailed checking will be necessary on many of the documents which the Secretary will issue under the new rules; for example, the Notice of Hearing covered under Sec. 2.104 will have to be closely coordinated with both the Hearing Examiner, the Division of Licensing and Regulation and the parties. Nevertheless, if the purpose of the establishment of our Public and Filings and Proceedings Branch is to be achieved--centralizing in one place in the AEC the responsibility for issuing, receiving, and controling the many documents involved in hearing matters, then all such orders by the AEC should eminate from the Secretary.

AEC Manual

Federal Personnel Manual

Procurement Regulations

Correspondence
Records
} agreement to maintain

Health & Safety

Executive Training

Awards

Emergency Handbook

Part 2
Rules of Practice

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February 26, 1962

Mr. Woodford B. McCool
Secretary
United States Atomic
Energy Commission
Washington 25, D. C.

Dear Sir:

This letter contains our comments on the Commission's Proposed Rules of Practice which were published in the Federal Register on January 13, 1962.

We are somewhat puzzled by the procedure of inviting comments on the proposed rules and, at the same time, making the rules effective before careful consideration can be given to the comments received. Such study is certainly desirable as the proposed rules are in several respects incomplete, ambiguous and conflict with other portions of the procedural rules and with some of the Commission's substantive regulations.

We urge that the effective date of the proposed regulations be postponed until these proposed regulations can be revised. To expedite this end, it might be worthwhile for the Commission's General Counsel to establish an advisory group which could examine the comments received and pool suggestions.

In addition to the observations made above, we have the following general comments on the proposed rules:

1. Dividing the rules into various subparts is convenient and appropriate. Subpart G - Rules of General Applicability - could more logically be made Subpart A. In addition, the scope of this subpart should be expanded. For example, rules governing the filing and docketing of material are not covered elsewhere in the proposed rules, yet, as presently drafted, the scope of this subpart is limited to adjudications initiated by an issuance of order to show cause, a notice of hearing or a notice of appeal. We believe it would be appropriate to expand the scope of this subpart to include all filings from the time an application is made to the Commission.

2. Throughout the proposed rules, there are numerous instances--a few of which are given below--where there is confusion in the use of the verbs "may," "shall" and "will." Each of the rules should be examined to ascertain whether the action characterized is mandatory, permissive or descriptive.

3. There is an omission of several important procedural matters such as (a) the form and content of briefs and the propriety of their incorporation in proposed findings; and (b) procedure for incorporation of relevant portions of the record in other proceedings.

4. There are several terms used which are imprecise in context and should either be defined (e.g. "AEC", Sec. 2.780) or changed (e.g. "limited interest", Sec. 2.754).

The following are our comments on specific sections of the proposed rules:

§2.4 - Definitions

f. Director of Regulation is defined as "the Director of Regulation or any officer to whom he has delegated authority to act." Only a few individuals qualify as officers under the Act (Secs. 24 and 25). The words "or employee" should be added. This change would also conform to Part 1 of the Commission's Regulations (Sec. 1.25 (6)).

1. Secretary "means the Secretary of the Commission." This definition should be enlarged to include "the Acting Secretary" and the "Office of the Secretary of the Commission."

Subpart A

§2.102 (a). If the applicant is required to submit additional information: (1) the request for the information should be in writing; and (2) should set forth specifically the additional information needed.

§2.102 (c). There is here an example of the use of the permissive verb "will", whereas the mandatory form "shall" was probably intended.

§2.103

This section is awkwardly worded. Why should local officials know about every curie in a license for by-product material? The burden on the Director could be substantial. Paragraph (b) of this proposed section states that:

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

(1) The information, if any, which is deficient;

(2) Other reasons, if any, for the proposed denial or denial;

(3) If a notice of proposed denial, the time within which the applicant must supply the additional information; and

(4) If a notice of denial, the right of the applicant to request a hearing within thirty (30) days from the date of the denial."

A literal interpretation of this section is that the Director need do nothing. Is a notice of denial the same as a denial? It would seem so in this case when read in conjunction with the notice of proposed denial. Perhaps the phrase "notification of denial" would be better. Is information deficient? Or is the application deficient because the information is missing, incorrect, or fails to give the Director the proper assurances regarding the applicant's qualifications?

§2.105 (a). The word "facility" has not been defined. It should be defined, or the type of facilities which have been defined should be listed. (This comment is also applicable to Sec. 2.106.)

§2.105 (c). One is not an applicant for a construction permit but for a license.

§2.105 (e). Why is the Secretary issuing the notice of hearing? In Sec. 2.704 the implication is that the Commission does so. In Sec. 2.106 it is clear the Commission issues the notice of hearing or the appropriate order. The language should be consistent.

§2.107

The first paragraph of this section implies that once a hearing has been ordered, the applicant must proceed. In other words, he has no legal right to change his mind. The Commission has no power to require an applicant to proceed. What the Commission

could do is to provide that if an applicant decides to withdraw his application, the Commission may deny the application or dismiss it with prejudice. There should also be certain formal requirements added regarding this notice--namely, it should be under oath, served upon parties, etc.

§2.108

This section should have a concluding paragraph similar to paragraph (e) of Sec. 2.106 in order to complete the Commission's procedural requirements in connection with the request.

§2.109

The use of the phrase "a new license" is questionable. There should be some language inserted which has the effect of relating this application for a "new license" to the fact that it involves some type of license previously granted.

Subpart B

§2.201

This section, in general, needs considerable editing. Among the changes which could improve this are the following: (1) the last clause (or perhaps even paragraph (c) should be the first paragraph) of the first sentence should be transposed to the first part of this sentence; (2) "will" should be changed to "shall"; (3) "reply" should be "answer." While not strictly a pleading, this would be more in line with the language of the following section; and (4) the Director should have discretion to extend the time for filing the reply. No such discretion is granted in the present version.

§2.202

There should be some correlation between this section and the prior section. The prior section requires the Director of Regulation to issue a notice of violation before a show cause order is issued except in cases of willful violation or where public health, safety or interest demand that such notice be omitted and the show cause order is issued. Language in the present regulation (2.202) would satisfy this. It states: "In any case described in 2.200, and after notice, if any as required by section 2.201."

Paragraph (d) states that the "answer may consent to the entry of an order in substantially the form proposed in the order to show cause." Yet there is no requirement that the Director attach such a form of proposed order. The use of the word "substantially" is questionable. This gives the Director a certain latitude which

is perhaps too great in view of the fact the consent waives licensee's rights to hearing, judicial review, etc. Quaere: Would the licensee be precluded from a hearing on whether or not the order was "substantially" in the form agreed to?

In paragraph (e) the inclusion of the phrase "findings of fact and conclusions of law" seems unnecessary.

§2.203

Although probably implied, the following sentence, inserted between the first and second sentences, would make this section more forceful: "Such stipulation shall be received in evidence at the hearing, and when so received shall be binding on the parties with respect to the matters therein stipulated." The section does not state there will be a hearing but how else will the stipulation, the decision of the Presiding Officer be made and an order issued without at least a pro forma proceeding?

Subpart D

§2.413 (a). The AEC's proposed rules provide that a notice of appeal may or may not be accompanied by a complaint. If the complaint accompanies the notice of appeal, it is "served" with the notice of appeal, but there is no procedure for its filing. It would be a better choice of words to use the word "filing" as is done in the ABCA rules.

§2.413 (b). The requirements in the complaint do not require that a dollar amount be specified. This should be included.

§2.414 (a) (2). The proposed rules require that the contract be forwarded with the notice of appeal. Does this mean only the contract itself or does it include pertinent plans, specifications, change orders, etc.? It would be preferable to include these pertinent documents to remove any ambiguity.

Subpart G

§2.701

For orderly procedure, filings should be deemed complete only when received, within the specified time limits, if any, at the Commission's Headquarters in Germantown or at the Public Document Room. A literal interpretation is that there would be compliance with the AEC's rules even though documents were never received. A more practical problem is that the time for filing a responsive pleading runs from the time of filing. This could be a burden, either because not timely received, or because an extension was necessary to give the necessary time in which to file a responsive pleading.

§2.704

In the proposed regulation, a party "may file an answer." Should he not be required to do so? The remaining paragraphs of this section, as well as Sec. 2.707, imply that an answer "shall" be filed.

§2.708

Paragraph (c) implies that counsel signs all documents if a party is represented by counsel in an adjudication as that term is defined in the introductory section of these proposed rules. This language problem could be avoided by using the following:

> "The original *** shall be signed *** by the party in interest, his attorney or his authorized representative."

§2.710

This section fails to note which jurisdiction controls as to a legal holiday. The jurisdiction should be so designated and probably should be the District of Columbia.

§2.714

"Standards of interest" required for intervention is very broad. The interest required for intervention could be narrowed by inserting the word "directly" before the word "affected."

§2.715

If a State is going to participate in a proceeding it should first be required to file and serve a notice of participation at a certain time before the hearing begins. As now drafted, the State's representatives could show up at the hearing, without advance notice, and participate.

§2.720

Parts of this section are awkwardly worded. For example, the subpoena can direct someone to produce "specified documents and other things." (Emphasis supplied.) This is odd phraseology for a subpoena duces tecum.

Usually U.S. Marshals serve subpoenas for the U.S. Courts and the administrative agencies. The rule should recognize this.

§2.730

This section is somewhat confusing.

Paragraph (a) implies that except in one instance the Commission will act on motions. The remaining paragraphs indicate that either the Commission or the Presiding Officer may issue them. In paragraph (a) does pending "before the Commission" mean (a) after the Examiner's decision, or (b) when in the process of adjudication at any level? If the former, the Examiner has no jurisdiction (see §2.718 supra). A number of motions (e.g. pre-hearing conference, correction of transcript, conforming pleadings to the evidence) are ruled upon by the Examiner. Therefore, paragraph (a) should be revised to reflect this fact.

Paragraphs (f) and (g) are confusing. Interlocutory appeals are not permitted. What the procedural device used is, is a certification or referral by the Examiner (not the parties) to the Commission so there is no allowance of an interlocutory appeal.

§2.740

Paragraph (a) implies that only the Commission may order the taking of depositions. Yet in Sec. 2.733 this is one of the powers of the Presiding Officer.

§2.741

In paragraph (a), the Presiding Officer should also have the power to rule on motions regarding discovery and related procedures. He is presumably more familiar with the needs and purposes for the utilization of such procedure.

In paragraph (a) (1) the term "pending action" is used. This is a new expression not elsewhere defined.

§2.754

In paragraph (b) (3) the wording should be changed as "service" by various parties could be at various times.

In paragraph (c) what is the significance of the use of the word "person" with a "limited interest"? Who is this individual? It cannot be one who makes a limited appearance as, by virtue of Sec. 2.715, he can only make a statement and cannot "otherwise participate in the proceeding."

§2.760

Paragraph (a) is in conflict with Sec. 50.57 of the Commission's Regulations on provisional operating licenses. Under Sec. 50.57 the decision does not become final until 45 days after its issuance (assuming no exceptions, etc.).

Paragraph (c) (3) implies that the initial decision will establish the time in which to file a petition for review. Yet Sec. 2.762 (a) categorically states this time will be 20 days. It is better to have it established in the rules.

§2.761

Certain parts of this section are also in conflict with Sec. 50.57.

§2.762

Here again the due date of certain pleadings seems from time of service not the time of filing.

What is the meaning of "governing precedent"?

In paragraph (g) it states that only exceptions to "important procedural or substantive matter" shall be taken. Later in the same paragraph it states "any objection to a ruling, finding *** not made a part of the exceptions will be deemed to be waived." (Emphasis supplied). This seems inconsistent.

§2.780

"AEC" is not defined in the definition section and here in the proposed regulations is used for the first time.

Subpart H

§2.810

This section has nothing to do with rule making. It should be a part of Subpart G.

Very truly yours,

LeBOEUF, LAMB & LEIBY

By _____
Partner

Mr. Robinson

B-92.

Thanks. Elyth

B-420

Mr. Robinson

(This became detached from letter you loaned us. Elyth T.)

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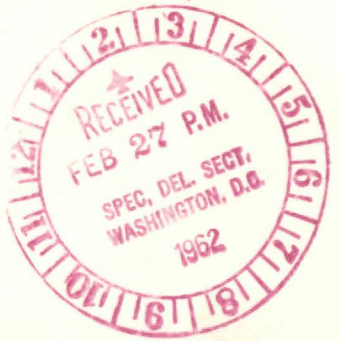

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