POLICY ISSUE
(Notation Vote)

November 10, 1992

SECY-92-381

For: The Commissioners

From: William C. Parler
General Counsel

Subject: RULEMAKING PROCEDURES FOR DESIGN CERTIFICATION

Purpose: To provide the Commission with OGC's assessment and final recommendations on procedures for the first design certification rulemaking.

Background: Under 10 CFR Part 52, designs for nuclear power plants are to be certified through rulemaking, in which the public has an opportunity to submit written comments on the proposed design certification rule, as required by the Administrative Procedure Act (APA). However, Part 52 goes beyond the requirements of the APA by providing the public an opportunity to request a hearing before an Atomic Safety and Licensing Board (Licensing Board) in the design certification rulemaking. Although hearings in NRC rulemakings are not unprecedented, e.g., the rulemaking associated with proposed adoption of the Generic Environmental Statement on Mixed Oxide Fuel (GESMO), they have been extremely rare and sui generis, and therefore provide no compelling precedent on what procedures should be followed here.

To assist the Commission in preparing for the first design certification rulemaking proceeding, OGC prepared a draft paper, SECY 92-170 (May 8, 1992) which identified and analyzed issues relevant to establishing procedures to govern design certification rulemaking. SECY 92-170 was made public by the Commission, and a Commission meeting on the paper was held on June 1, 1992.

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504-1639

NOTE: TO BE MADE PUBLICLY AVAILABLE UPON COMMISSION APPROVAL

Thereafter, in SECY 92-185 (May 19, 1992), OGC proposed holding a public workshop for the purpose of facilitating public discussion on the issues raised in SECY 92-170, and to obtain the comments of the public on those issues. Notice of the workshop was published in the Federal Register. 57 FR 24394 (June 9, 1992). The notice provided for a 30-day period following the workshop for the public to submit written comments on OGC's draft paper. The workshop was held on July 20, 1992. A transcript was kept of the workshop proceedings and placed in the Public Document Room. Approximately 46 persons outside of the NRC attended the workshop; an additional 8 persons requested copies of the SECY paper and workshop materials but did not attend. Eleven written comments were received following the workshop.

Discussion:

Enclosure 1, "Rulemaking Procedures for Design Certification," presents OGC's assessment and **final** recommendations on procedures for a design certification rulemaking. Enclosure 1 was prepared after consideration of the panel discussions at the public workshop and the written comments received after the workshop. Five principal issues were identified in SECY-92-170. Enclosure 1 provides final recommendations on each of these issues, as described below.

The first issue is the scope of the Atomic Safety and Licensing Board's responsibilities in a design certification rulemaking hearing. OGC recommended preliminarily that the Licensing Board act as "limited magistrate" to compile a record on controverted issues and certify the record to the Commission for resolution. After consideration of written public comments and the discussions at the public workshop, OGC now recommends an approach similar to that of a "full magistrate." Under this approach, the Licensing Board would have the option of, but not be required to, prepare recommendations on controverted hearing issues.

The second issue is whether the Commission should apply ex parte and/or separation of function limitations to the Commission (and Licensing Board, as applicable) in the design

certification rulemaking proceeding. OGC recommended preliminarily that, where hearings are held in design certification rulemakings, the Commission apply limited separation of functions. This would allow the Commission to obtain the advice and assistance of the Staff members who participated in the review of the design certification application and any hearing, but such communications would occur in a public process, e.g., preparation of SECY papers in response to Commission SRMs, and public meetings between the Commission and the Staff. In the absence of a hearing, the Commission could obtain the advice and assistance of the Staff the same as in any ordinary rulemaking. OGC continues to recommend this approach.

Third, the paper discussed whether a threshold should be adopted by the Commission for a hearing request submitted by an interested member of the public in a design certification. OGC recommended preliminarily that a person requesting an informal hearing be required to: (a) submit written comments in the written comment period; (b) submit the written presentations proposed to be included in the informal hearing, and (c) demonstrate that they, or persons they intend to retain to represent them in the informal hearing, have the qualifications to contribute significantly to the development of the hearing record on the controverted issues. The final OGC paper continues to recommend that a person requesting an informal hearing be required to meet the three-part threshold proposed in SECY 92-170, but makes clear that the a person need not meet the test of an "expert witness" in order to satisfy the qualifications requirement. Rather, the person must demonstrate that, because of knowledge, experience, education or training, he or she can contribute significantly to the development of the record on the controverted issue.

The structure and timing of the hearing, including the time for filing informal hearing requests and requests for additional procedures, is the fourth area requiring Commission guidance. OGC recommended preliminarily that informal hearing requests be filed concur-

rently with the time for submitting written comments, which OGC preliminarily recommended be set normally at 90 days. If the Commission grants the informal hearing requests, OGC recommended preliminarily that parties be provided the opportunity to make oral presentations before the Licensing Board, and that the Licensing Board be permitted to ask questions at the oral hearing without any special finding by the Licensing Board. OGC also recommended preliminarily that requests for additional procedures or formal hearings be filed 30 days before the commencement of the oral phase of the hearing. Thereafter, a special showing would have to be made for an untimely request. As a result of public comment, OGC now recommends that a 120-day period be provided for submitting written comments and requests for informal hearings. OGC also has changed its recommendation with respect to the timing of requests for additional procedures or full formal hearings. OGC now recommends that parties should file their requests for additional procedures or a formal hearing at the conclusion of the oral phase of the hearing, with the exception of requests for discovery. Discovery requests would be filed with the Licensing Board within 15 days of the Commission's grant of an informal hearing. The Licensing Board would refer meritorious requests to the Commission for final determination.

Finally, the use of, and access to, proprietary information in the design certification rulemaking was discussed. OGC recommended preliminarily that both "Tier 1" and "Tier 2" design certification information should not contain any proprietary information. In addition, OGC recommended preliminarily that access to proprietary information be provided following docketing of the design certification application, and that non-disclosure agreements be used in order to obtain access to proprietary information from the NRC's public document room (PDR). OGC now proposes two alternatives to address incorporation of proprietary information into a design certification rulemaking. The first alternative is that all important design information in Tiers 1 and 2 be non-proprietary, although proprietary information

could be referenced as a basis for both tiers. The second alternative is to seek a formal opinion from the Office of the Federal Register on incorporation by reference of proprietary information into Tier 2. With respect to public access to proprietary information, OGC proposes three alternatives for Commission consideration. The first alternative would require potential commenters and parties in any design certification hearing to seek access to proprietary information directly from the design certification applicant. Disputes over access would be resolved by the Commission or the Licensing Board, as appropriate. Access to proprietary information would await the initiation of the formal rulemaking proceeding (publication of an NPR). Access would be provided to all persons who would sign a non-disclosure statement. The second alternative would be the same as the first, except that persons seeking access would have to provide an affidavit explaining why access to proprietary information is necessary to provide comments and shows that the person has the necessary expertise to use the information and contribute significantly to the rulemaking record. The final alternative would grant access only to parties in any rulemaking hearing which the commission authorizes. Access would be granted only to parties who can show that the proprietary information is relevant to the issues at the hearing, the non-proprietary information is insufficient to adequately address the issues in the hearing, and that the party seeking access has the necessary expertise to use the information and contribute significantly to the rulemaking record.

OGC proposes that this paper be made available to the public and that notice of the availability of the paper be published in the Federal Register. Such publication will enhance public awareness of the design certification process. OGC understands that the Commission will establish the procedures to be followed in the first design certification rulemaking proceeding (expected to be for the General Electric (GE) Advanced Boiling Water Reactor (ABWR)) in the notice of

proposed rulemaking for that design certification.

Coordination — This paper has been reviewed by the Office of Nuclear Reactor Regulation, which has no objection.

Recommendation: That the Commission:

(1) Approve public release of the attached paper, including publication of notice of availability in the Federal Register.

(2) Note that final action on this matter will provide guidance to the Staff and OGC on the content of the NPR for the first design certification. Thereafter, OGC may recommend adjustments based upon the experience of that rulemaking.

(3) Note that upon Commission approval of public release of the attached paper, our Congressional oversight Committees will be informed and provided with a copy of the paper.

William C. Parler
General Counsel

Enclosures:
1. Rulemaking Procedures for Design Certification w/Attachments A,B,C and D
2. Federal Register Notice

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Friday, November 13, 1992.

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ENCLOSURE 1

RULEMAKING PROCEDURES FOR DESIGN CERTIFICATION

INDEX

I. INTRODUCTION

10 CFR Part 52[1] provides for Commission approval of standard designs for nuclear power facilities (e.g., design certification) through rulemaking. In accordance with the Administrative Procedure Act (APA), the public is accorded the opportunity to submit written comments on the proposed design certification rule. However, Part 52 goes beyond the requirements of the APA by providing the public with an opportunity to request a hearing before the Atomic Safety and Licensing Board in a design certification rulemaking. Although hearings in NRC rulemakings are not unprecedented, e.g., the rulemaking associated with the proposed adoption of the Generic Environmental Statement on Mixed Oxide Fuel (GESMO), they have been extremely rare and sui generis, and therefore provide no compelling precedent on what procedures should be followed here. While Part 52 describes a general framework for conducting a design certification rulemaking, Section 52.51(a) suggests that more detailed rulemaking procedures would be established by the Commission[2].

To assist the Commission in preparing for the first design certification rulemaking proceeding, the Office of General Counsel (OGC) prepared a draft paper, SECY 92-170 (May 8, 1992), which identified and analyzed issues relevant to establishing procedures to govern design certification rulemaking. In developing the draft paper, OGC had the benefit of discussion with counsel for the Nuclear Management and Resources Council (NUMARC), Westinghouse, General Electric (GE), an industry-developed proposed design certification rulemaking notice ("NUMARC Rule")[3], the comments of Ohio Citizens for Responsible Energy (OCRE) on the NUMARC Rule ("OCRE March 1992 Comments")[4], as well as the comments of the NRC Staff (Staff), SECY, and the Chief Counsel of the Atomic Safety and Licensing Board panel.

SECY 92-170 was made public by the Commission, and a Commission meeting on SECY 92-170 was held on June 1, 1992. Thereafter, in

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[1]54 FR 15372 (April 18, 1989).

[2]Attachment A provides the text of Section 52.51.

[3]Enclosed with November 22, 1991 letter from William H. Rasin, NUMARC to Dennis Crutchfield; Attachment B to SECY 92-170.

[4]Attachment C to SECY 92-170. OCRE's March 1992 Comments also discussed Enclosure 2 to the NUMARC Rule, "Part 52 Implementation: General Principles." Since the NUMARC enclosure addressed substantive aspects of design certification, as opposed to the rulemaking process, this paper does not address either NUMARC's statement of principles or OCRE's comments on those principles.

SECY 92-185 (May 19, 1992), OGC proposed holding a public workshop for the purpose of facilitating public discussion on the issues raised in SECY 92-170, and to obtain the comments of the public on those issues; the Commission approved OGC's proposal (May 28, 1982 Memorandum from Samuel J. Chilk to William C. Parler). Notice of the workshop was published in the Federal Register. 57 FR 24394 (June 9, 1992). The notice also provided for a 30-day period following the workshop for the public to submit written comments on OGC's draft paper.

A transcript was kept of the workshop proceedings and placed in the Public Document Room (the transcript references in this paper are to the workshop transcript). Approximately 46 non-NRC individuals attended the workshop; an additional 8 persons requested copies of the SECY paper and workshop materials but did not attend. The workshop was organized in a panel format, with representatives from OCRE (Susan Hiatt), NUMARC (Robert Bishop), two design certification vendors (Marcus Rowden and Bart Cowan), the State of Illinois Department of Nuclear Safety (Stephen England), the State of New York Public Service Commission (James Brew), the Administrative Conference of the United States (William Olmstead), OGC, the Staff, and a moderator. 11 written comments were received after the workshop, 3 from OCRE (OCRE August 1992 Comments; OCRE September 1992 Letter; OCRE October 1992 Letter), NUMARC (NUMARC Comments), Winston and Strawn (Winston and Strawn Comments), the State of Illinois Department of Nuclear Safety (State of Illinois Comments), Westinghouse Energy Systems (Westinghouse Comments), the U.S. Department of Energy (DOE Comments), Asea Brown Boveri-Combustion Engineering (ABB-CE), and AECL Technologies (AECL)[5]. Mr. Rowden submitted an additional comment on behalf of NUMARC which addresses proprietary information (Rowden October 1992 Comment).

This final paper sets forth OGC's assessment of the important issues with respect to establishing procedures for a design certification rulemaking, possible alternative approaches for resolving these issues, and OGC's final recommendations among these alternatives. This paper was prepared after consideration of the panel discussions at the public workshop and the written comments received after the workshop. OGC expects that the Commission will establish the procedures to be followed in the first design certification rulemaking proceeding (the GE Advanced Boiling Water Reactor (ABWR)) in the notice of proposed rulemaking for that design certification.

Following the completion of the first two design certification rulemaking proceedings, OGC will reassess its recommendations in

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[5]AECL is the vendor for the CANDU 3 design, which is presently undergoing a pre-application design certification review by the Staff.

light of the experience obtained in the design certification rulemakings and advise the Commission of OGC's views and recommendations at that time.

II. OVERVIEW OF A DESIGN CERTIFICATION RULEMAKING

This section provides a descriptive overview of OGC's recommended model for conducting a design certification rulemaking. Since the model is for the entire design certification rulemaking process, the discussion includes events or stages in the process which are not further addressed in this paper, because they do not raise any issues requiring Commission resolution. In addition, several issues are identified and discussed, which cannot be implemented for the initial design certifications (e.g., the GE ABWR, and the ABB/CE System 80+), because of the advanced state of the Staff's review of these designs. First, a brief summary of the design certification rulemaking process is set forth. Next, a detailed description of the sequence of events for design certification rulemaking is set forth. References are provided to either Section III, "General Policy Matters", or to Section IV, "Specific Design Certification Rulemaking Procedural Issues," where specific issues and alternatives for resolution are discussed and OGC's final recommendations are set forth. Attachment B, "Timeline for Design Certification Rulemaking" provides a graphic summary of OGC's proposed design certification rulemaking process.

A. Summary of Design Certification Rulemaking

The design certification rulemaking process begins with filing of the design certification/final design approval (FDA) application. If the Staff determines that the application is complete and acceptable for docketing under 10 CFR 2.101(a)(3), the application is docketed and notice of docketing is published in the Federal Register. As the Staff's review progresses, draft and final SERs are issued, and notice of availability of the final SERs are published in the Federal Register. During this time, there may be opportunities for obtaining early public involvement on matters raised by the Staff's review, e.g., through release of SECY papers on important policy and technical matters, Federal Register notice of the availability of the draft and final SERs, public workshops, and advance notice of proposed rulemakings (ANPRs) with opportunity for public comment. When the Staff's review is completed, an FDA is issued and notice of issuance is published in the Federal Register.

The official rulemaking proceeding begins with publication of a notice of proposed rulemaking which initiates the written comment period and an opportunity for requesting a hearing. If no request is received, the Commission proceeds to analyze the written comments and prepare a final design certification rule, which is published in the Federal Register following its formal adoption by the Commission. If a hearing request is received, the Commission determines if and under what conditions a hearing will be held. Provisionally, informal hearings would be held before a Licensing Board, and would consist of written

submissions, oral presentations followed by rebuttal by the applicant and the Staff. Upon conclusion of the informal hearing, the Licensing Board would certify the record to the Commission together with any recommendations the Licensing Board may wish to make. The Commission would analyze both the written comments and the hearing record, prepare a final design certification rule, and publish the rule in the Federal Register following its official adoption by the Commission. There are a number of steps in this process where the Commission may choose alternative approaches. These are identified in the next subsection, "Detailed Description of Design Certification Rulemaking Process" and are discussed in detail in Section III, "General Policy Matters," or in Section IV, "Specific Design Certification Rulemaking Procedural Issues."

B. Detailed Description of Design Certification Rulemaking Process

The design certification process begins with the filing of an application for a design certification and final design approval (FDA) pursuant to Section 52.43. The Staff undertakes an acceptance review pursuant to 10 CFR 2.101(a)(3) to determine if the application is "complete and acceptable for docketing." To assure that there is early public notice of the application, OGC recommends that the Staff continue its practice of docketing design certification applications and publishing notice of docketing in the Federal Register. See Section IV.A, "Docketing."

Following docketing of the application, the Staff's review of the application commences. During this phase, the Staff may identify important policy or technical issues on which the Staff may desire preliminary Commission guidance. The Staff normally informs the Commission of these issues and obtain preliminary Commission guidance through the use of SECY papers such as SECY-91-262. As the Staff completes its review in important areas, it transmits draft SERs to the Commission which set forth the Staff's proposed resolution of issues. During this time, the Commission could institute measures which are intended to enhance public notice and participation in the design certification review process. Such measures could include: (a) wider distribution, or notice of availability of Staff SECY papers which seek Commission guidance, (b) publication of notice in the Federal Register of the availability of draft and final SERs on the FDA/design certification, (c) establishment of a telephone information line to inform the public of upcoming meetings between the Staff and the design certification applicant (or publication of a monthly list of meetings), (d) publication of an Advance Notice of Proposed Rulemaking (ANPR) to seek public comment on SECY papers or other issues raised by the Commission, (e) convening public workshops to inform the public of the status

of Staff review, important policy and technical issues and the Staff's intended resolution and to obtain public comment, and (f) the use of alternative dispute resolution techniques, such as negotiated rulemaking. OGC notes, however, that while these measures could be employed for later design certifications such as the AP-600, these measures cannot be practically utilized in the GE ABWR or the ABB/CE System 80+ design certifications, because of the advanced state of the Staff's review of these two designs. See Section III, "Mechanisms for Early Public Participation."

After the Staff issues a final SER and an FDA on the proposed design, OGC recommends that notice of FDA issuance and public availability of the SER be published in the Federal Register. See Section IV.B, "Notice of Proposed Rulemaking: FDA Issuance and NPR Publication." Thereafter, the Commission would commence the official rulemaking proceeding by publishing a Notice of Proposed Rulemaking (NPR) which would consist of a proposed design certification rule, a statement of considerations (SOC) explaining the bases for the proposed rule, and detailed procedures and schedule for the remainder of the design certification rulemaking[6]. The Staff intends to develop the proposed design certification rule and SOC concurrently with its review of the FDA/design certification, so that the proposed design certification rule and SOC would be completed at the time of FDA issuance (or soon thereafter). OGC recommends that the NPR be published approximately 90 days after issuance of the FDA and SER to provide, inter alia, the public an opportunity to review the final FDA and SER, and to obtain access to proprietary information relevant to the design certification from the applicant. See Section IV.B, "Notice of Proposed Rulemaking: FDA Issuance and NPR Publication;" Section III.B, "Access to Proprietary Information in a Design Certification Rulemaking."

OGC recommends that a 120-day period be provided for submitting written comments on the proposed rule, and that a concurrent 120-day period be provided for submission of requests for an informal hearing, an informal hearing with additional 10 CFR Part 2, Subpart G hearing procedures, or a full formal hearing. See Section IV.B, "Notice of Proposed Rulemaking: Concurrent Notice of Opportunity to Submit Written Comments and Opportunity for Requesting Hearing;" Section IV.B, "Notice of Proposed Rulemaking: Length of Period for Submitting Comments and Requests for Hearings;" Section IV.F, "Informal Hearings;" and Section IV.G, "Additional Hearing Procedures and Formal Hearing: Basis

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[6]The SOC would not need to set forth the procedures to be followed in the formal design certification rulemaking if the Commission adopts generic rulemaking procedures. See Section III, "Generic versus Case-by-Case Determination of Rulemaking Procedures."

and Timing of Request." Members of the public who believe that a longer period for submitting comments and requesting a hearing is appropriate may request that the Commission extend the period.

If no hearing requests are received, the Commission would consider the written comments and proceed to develop a final rule, including an SOC which explains the bases for the rule and an analysis of the written public comments. OGC recommends that separation of functions should not be followed by the Commission if hearing requests are not received. This would allow the Commission to consult freely with and obtain the assistance of those Staff individuals who reviewed the design certification application without restriction, the same as in any other rulemaking. See Section IV.E, "Conduct of Hearings: Separation of Functions and Ex Parte Communication Limits." By contrast, if hearing requests are received and granted by the Commission, OGC recommends that separation of functions be followed by the Commission on controverted issues. OGC also recommends that regardless of whether hearing requests are received, that ex parte limitations be followed from the time that an NPR is published, so that all Staff and Commission communications with persons outside the NRC on all substantive rulemaking matters (not just controverted issues) be docketed. Id.

If hearing requests are received, OGC recommends that the Commission (as opposed to the Licensing Board) decide whether to grant the requests. See Section IV.F, "Informal Hearings: Denial of Hearing Request." OGC does not support using traditional "standing" concepts[7] to determine who should be entitled to participate in a design certification hearing. Instead, OGC recommends that two criteria be satisfied in order to obtain an informal hearing: (a) the requestor must submit the written presentations to be included in the record of the informal hearing (if the commenter submits written comments in the public comment period, it will be sufficient to identify that portion of the written comments that the requestor wishes to submit in the informal hearing), and (b) the requestor must demonstrate that they (or persons they intend to represent them at the hearing) have appropriate knowledge or qualifications to enable them to significantly contribute to the development of the hearing record on the issues they seek a hearing on. Although a person seeking a hearing would have to show the capability to participate

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[7]The concept of "standing," as developed by the courts, is intended to assure that only persons with a concrete interest in the outcome of a litigation are allowed to participate. Standing typically is found where a person has been "injured" or "aggrieved," and that the person falls within "the zone of interests protected." In NRC licensing proceedings, the concept of standing is embodied in the "interest" requirement of 10 CFR 2.714(a)(1).

meaningfully in a hearing, they would not have to show that they would satisfy an "expert witness" standard in order to gain an informal hearing. See Section IV.F, "Informal Hearings: Threshold for Request."

Since there is little distinction between the written comment period and an informal "hearing" in which a party is only permitted, as a matter of right, to submit a written presentation, OGC recommends that parties be provided the opportunity to make an oral presentation, and the Licensing Board be permitted to ask questions on controverted issues in the oral phase of the hearing (parties would be able to submit proposed questions for the Licensing Board to ask) without the Licensing Board finding contemplated by 10 CFR 52.51(b). See Section IV.F, "Informal Hearings: Written and Oral Presentations and Questioning." Outlines of oral presentations and a list of questions which a party wishes to suggest to the Licensing Board must be provided 30 days before the beginning of the oral phase of the informal hearing. Id. OGC recommends that the Licensing Board have the authority to consolidate parties and issues. See Section IV.E, "Conduct of Hearings: Consolidation of Parties and Issues and Scope of Commenting Party's Participation." OGC also recommends that parties not be permitted to participate as parties on issues with respect to which they did not seek a hearing, but that the Licensing Board in its discretion may permit parties to participate as "amicus" on issues which they did not seek a hearing. Id.

OGC recommends that parties' requests for additional hearing procedures or requests for formal hearings be filed with the Licensing Board within five days of the end of the final oral hearing session, with the exception of discovery requests. If a party seeks discovery, they must submit the request to the Licensing Board within 15 days after the hearing request is granted. See Section IV.G, "Additional Hearing Procedures and Formal Hearings: Basis and Timing of Request." Requests for discovery at the beginning of the hearing, as well as requests for additional procedures or formal hearing which are filed at the end of the oral hearing would be initially screened by the Licensing Board, who would then refer the request to the Commission for final determination, as provided in Section 52.51(b). OGC recommends that the requestor demonstrate why additional procedures or a full formal hearing are necessary. The Licensing Board should not sua sponte seek additional hearing procedures or a formal hearing from the Commission. See Section IV.G, "Additional Hearing Procedures and Formal Hearings: Sua Sponte Authority of Licensing Board to Utilize Additional Hearing Procedures or Conduct Full Formal Hearing."

In either an informal hearing, an informal hearing with additional procedures, or a full formal hearing, OGC recommends that the Licensing Board act as a "full magistrate," to certify

the hearing record to the Commission together with any recommendations that the Licensing Board may wish to provide to the Commission. See Section IV.C, "Licensing Board Authority in Hearings." OGC also recommends that the Licensing Board be able to request authority from the Commission to compile a record (and make recommendations at the Licensing Board's discretion) on significant safety issues identified by the Licensing Board during the hearing which were not raised by the parties. See Section IV.C, "Licensing Board Authority in Hearings: Sua Sponte Authority of Licensing Board to Raise New Issues for Discussion at Hearing."

OGC recommends that an informal hearing consist of written presentations by the parties on the controverted hearing issues, oral presentations (if a party desires to make one), and Licensing Board questioning based in part upon questions submitted by the parties. The applicant and the Staff would be afforded an opportunity for rebuttal, since their written presentations would be filed after the filing of commenting parties' written presentations and their oral presentations would be presented after the oral presentations of the other parties. See Section IV.F, "Informal Hearings: Written and Oral Presentations and Questioning; "Section IV. F, "Informal Hearings: Opportunity for Response/Rebuttal; "Section IV.E, "Conduct of Hearings: Status of Applicant;" and Section IV.G, "Additional Hearing Procedures and Formal Hearings." If the Commission decides to convene a formal hearing, the procedure and sequence afforded in 10 CFR Part 2, Subpart G would be followed.

After the Licensing Board closes the hearing, OGC recommends that the Licensing Board have 30 days to certify the record to the Commission together with any recommendations which Licensing Board may wish to make. OGC recommends that the Licensing Board consider all relevant written comments on controverted issues which it is making recommendations. See Section IV.C, "Licensing Board Authority: Decisionmaker or Magistrate, at n.24. OGC also recommends that the parties file their proposed findings of fact and conclusions directly with the Commission. The findings would be required to be submitted 30 days after the close of the hearing, in the form of a proposed final rule (or portion thereof) together with a supporting statement. See Section IV.H, "Post-Hearing Matters: Findings of Fact and Conclusions."

After the Commission has received the parties' findings, the certified record, and any Licensing Board recommendations, the Commission would proceed to review the entire rulemaking record, including the written comments received during the written comment period. A final design certification rule, a statement of considerations explaining the basis for the rule and resolving issues raised in the hearing, and an analysis of written comments would be prepared by the Staff under the direction of the Commission. In contrast to the case where no hearing is held,

OGC recommends that from the time that the Commission grants a hearing request, separation of functions limitations be followed to the extent that the Commission can consult with and obtain the assistance of those Staff members who reviewed the design certification application and who participated in any certification hearing, but that such communications and consultation be accomplished in an open public process, e.g., through SECY papers prepared by the Staff and public meetings between the Commission and the Staff. Following Commission adoption of a final design certification rule, the final rule and SOC would be published in the Federal Register.

III. GENERAL POLICY MATTERS

A. Use of Proprietary Information

Each of the three applications for design certification currently filed with the NRC[8] includes, as well as references, information which the applicants deem to be "proprietary," e.g., information that applicants do not routinely disclose to the public[9]. Such inclusion and referencing of proprietary information raises three issues with respect to design certification rulemaking. The primary issue is the extent to which the NRC may include proprietary information in: (a) the certified design itself ("Tier 1" of the design certification rule), and (b) that part of the design certification rule which includes more detailed supporting information and accorded "issue preclusion under Section 52.63(a)(4)("Tier 2").[10] The second issue is whether: (a) the Staff's SER on the FDA/certified design, and (b) the Commission's conclusions on the acceptability of the design, as documented in the statement of considerations (SOC) for the design certification rulemaking, may rely upon and/or reference proprietary information. Assuming that the Staff and Commission may rely upon proprietary information, must that information be disclosed to potential public commenters as well as hearing participants.

These issues were not raised in the NUMARC Rule or in OCRE's March 1992 Comments, but were first identified and discussed in SECY 92-170. OGC proposed preliminarily that neither Tier 1 nor Tier 2 contain any proprietary information.[11] OGC also assumed

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[8]The Westinghouse AP-600 design certification application has been received by the Staff, but has not yet been accepted for docketing. 57 FR 41155 (September 9, 1992).

[9]The industry has stated that they are in the process of reviewing the information in their applications to reduce the amount of information deemed to be proprietary. See, e.g., remarks of Marcus Rowden, Tr. 37, 44-45; remarks of Bart Cowan, Tr. 44.

[10]More detailed descriptions of Tier 1 and Tier 2, and their legal consequences in terms of issue finality were discussed in SECY 92-287, "Form and Content for a Design Certification Rule" (August 18, 1992). The exact scope of information to be contained in Tier 1 and in Tier 2 is currently being worked out by the Staff and OGC in connection with the reviews of the evolutionary plant designs.

[11]In its written comments, NUMARC asserts that SECY 92-170 incorrectly stated that non-publication of a rule renders the rule invalid, and argues that a rule is enforceable against a person who (continued...)

that Staff and Commission reliance on proprietary information was acceptable, and proposed preliminarily that potential public commenters should have access to all proprietary information relevant to the application. SECY 92-170, pp. 3-4.

At the public workshop and in the written comments, the industry generally agreed that Tier 1 should not contain any proprietary information. See, e.g., remarks of Marcus Rowden, Tr. 37; remarks of Bart Cowan, Tr. 48-49; NUMARC Comments, p. 20. However, with respect to Tier 2, the industry asserts that while "generically applicable" regulations must be free of proprietary information, rules which approve an "acceptable, but not exclusive" alternative for complying with generic requirements need not be published in the Federal Register. Industry cites the Commission rulemaking on ECCS as supporting this proposition. Remarks of Bart Cowan, Tr. 48-49, NUMARC Comments, pp. 13-15, citing In the Matter of Rulemaking Hearing (Acceptance Criteria for Emergency Core Cooling Systems for Light Water Reactors), CLI-73-39, 6 AEC 1085, 1089 (December 28, 1973). DOE's written comments expressed support of NUMARC's position on incorporation of proprietary information, and urged OGC to obtain a formal opinion from the Office of the Federal Register on incorporation by reference of proprietary information. DOE Comments, pp. 1-2. Winston and Strawn took a tentative position, noting its understanding that NUMARC was preparing a paper on proprietary information, that neither Tier 1 nor Tier 2 of a design certification rule should contain proprietary information. Winston and Strawn Comments, pp. 1-2. AECL generally supported NUMARC's Comments. AECL Comments, pp. 1-2. Following the filing of these comments, on October 14, 1992, Mr. Rowden, on behalf of NUMARC and the design certification applicants, filed a short paper setting forth additional proposals with respect to incorporation of proprietary information in the design certification rule in the event no proprietary information can be included in either tier. Mr. Rowden's proposal has the following elements:

> All information in Tier 1 and Tier 2 of the design certification rule (sometimes referred

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[11](...continued)
has actual notice of the terms of the rule. NUMARC Comments, p. 19, n.3. OGC was well-aware of the "actual notice" exception (c.f. Remarks of Geary Mizuno, OGC, Tr. 48); what OGC meant by "invalid" is that an unpublished rule may be subject to invalidation on judicial review, although if not judicially invalidated it may be enforced against someone who has had actual notice of the rule. The "actual notice" cases do NOT address the outcome on judicial review of an unpublished rule or some other action to force publication of an unpublished rule.

to as the "Design Control Document" or "DCD") would be non-proprietary.

Each design certification applicant would reduce the proprietary information in the application (SSAR) to a "commercially irreducible minimum."

The certification applicant would submit non-proprietary descriptions of the remaining proprietary information, where needed for inclusion in the DCD. The Staff would rely upon the non-proprietary descriptions for inclusion in the DCD.

Proprietary information would be obtainable by "party-requestors" only in a design certification rulemaking hearing and a combined operating license (COL) hearing from the NRC under the provisions of 10 CFR §§ 2.740, 2.744 and 2.790.

Approval of proprietary methods of meeting "generically applicable requirements" would be obtained through Staff approval of topical reports.

OGC's analysis begins with the second sentence of Section 52.51(c), which reflects the Commission's clear intent that the design certification rule contain no proprietary information:

> Notwithstanding anything in 10 CFR 2.790 to the contrary, proprietary information will be protected in the same manner and to the same extent as proprietary information submitted in connection with applications for construction permits and operating licenses under 10 CFR Part 50, <u>provided that the design certification shall be published in Chapter I of this Title</u>.

Since the Tier 1 and Tier 2 concepts were developed *after* the adoption of Part 52, the requirement in Section 52.51(c) that the "design certification" be published does not suggest any clear conclusion regarding proprietary information in Tier 2.

OGC offers two alternatives for consideration. The first alternative comports with the suggestions in NUMARC's Oct. 14, 1992 letter: no proprietary information would be included in the rule (Tiers 1 and 2). This would require that all important design descriptive information in the application be non-proprietary if, as is currently assumed to be the case, all this

information is intended to be part of either Tier 1 or Tier 2. Residual proprietary information in the application would possibly be referenced as a basis for one or both tiers, but not included in the tiers themselves, or be approved by Staff in a topical report as an acceptable means to comply with some ITAACs. In the latter case there would be no issue preclusion and the matter could be litigated in the COL hearing.

The second alternative is to seek a formal opinion from the Office of the Federal Register on incorporation by reference of proprietary information and, if that Office reached an affirmative conclusion, proceed with a partially proprietary Tier 2.

B. Access to Proprietary Information in a Design Certification Rulemaking

The inclusion and referencing of proprietary information in design certification applications, as well as the NRC Staff's review and possible reliance on such information in its safety reviews of the application, also raise issues on public access to such information. First, does the public have a right to review proprietary information in the context of a design certification rulemaking? Does that right extend to all members of the public or can it be limited in some fashion? If the public is entitled to examine proprietary information, when should access be provided and what procedures should govern such access?

These issues were not raised in either the NUMARC Rule or OCRE's March 1992 Comments, but were first identified and generally addressed in SECY 92-170. OGC preliminarily concluded that potential commenters on the design certification rule must be provided with access to proprietary information. OGC recommended preliminarily that the Public Document Room (PDR) be responsible for making proprietary information in the design certification rulemaking available to the public. Interested members of the public who wish to review proprietary portions of the rulemaking record would obtain a non-disclosure agreement from the PDR, execute and return it, and be allowed to review the proprietary portions of the docket and obtain copies of such portions as they request. Off-site PDR users would obtain copies through the U.S. mail upon execution of a non-disclosure agreement. The NRC would not assume any responsibility for policing or enforcing the non-disclosure agreements, or for assuring the accuracy of representations made in the non-disclosure agreements. Public access to proprietary information would be afforded within a reasonable time after docketing of the FDA/design certification application. SECY 92-170, pp. 5-7.

None of the public workshop participants, or the written comments filed after the workshop support OGC's proposals governing public access to proprietary information. The industry takes great

exception to OGC's proposals, arguing that they are inconsistent with Section 52.51(c), are not required by the APA or general administrative law, and are unworkable. The industry argues that potential commenters on a design certification rule are not entitled to access to proprietary information; only parties in a rulemaking hearing may obtain such access. Remarks of Bart Cowan. Tr. 26-28; remarks of Marcus Rowden, Tr. 41-43; NUMARC Comments, pp. 15-18. Industry also does not believe that the PDR approach protects the interests of the applicant. NUMARC Comments, pp. 16, 23-25. Instead, industry proposes that access be afforded only to parties in a design certification hearing and that access be initially obtained directly from the applicant. If the party was unable to obtain the requested information from the applicant, the party could then seek Licensing Board action requiring disclosure, after making the showing under 10 CFR §§ 2.740 and 2.744. Id. at 17-18. In camera proceedings would be utilized when proprietary information must be discussed in the hearing. Id. at 17. However, if the Commission determines that potential commenters should be allowed access, NUMARC requests that access be allowed only upon a showing comparable to that required for party access (presumably, compliance with 10 CFR §§ 2.740 and 2.744). According to NUMARC, qualification criteria should be specified to assure the need for proprietary information in formulating comments. Id. at 18-19. Westinghouse's written comments support the NUMARC proposal on public access to proprietary information. Westinghouse Comments, pp. 1-2. DOE's comments also argue that a "self-policing nondisclosure agreement" based only on the threat of liability for noncompliance would not be effective. However, DOE suggests that access could be provided to both commenters and hearing participants, using a method "similar to that used in providing access...in nuclear plant licensing hearing procedures." DOE Comments, p. 2. Winston and Strawn supports the use of non-disclosure agreements, but objected to OGC's preliminary recommendation that the PDR administer access to proprietary portions of a design certification application. Winston and Strawn Comments, pp. 3-4. Winston and Strawn strongly asserts that unless the matter of protection of proprietary information is treated "seriously and with dignity," persons who sign non-disclosure statements may not appreciate the seriousness of their obligations under the agreement. This may lead to carelessness and inadvertent disclosure. Accordingly, Winston and Strawn argues that the Staff should be actively involved in protecting proprietary information, including policing of the "validity of the nondisclosure statements," and vigorous enforcement of violations including the use of "all available sanctions...available to the agency to ensure compliance." Id. at 4. AECL generally supported NUMARC's Comments. AECL Comments, pp. 1-2. However, as noted above, Mr. Rowden has filed an additional comment setting forth the industry's revised position on proprietary information. With respect to public access, Mr. Rowden proposes that proprietary information be

obtainable by "party-requestors" only in a design certification rulemaking hearing and a combined operating license (COL) hearing from the NRC under the provisions of 10 CFR §§ 2.740, 2.744 and 2.790. Rowden October 1992 Letter, pp. 3-6.

The State of Illinois' written comments do not support the industry's position that proprietary information should be made accessible only to parties in a design certification hearing, see State of Illinois Comments at p. 2. However, the State agrees that the use of the PDR as recommended by OGC is infeasible. Id. at 1. The State recommends that proprietary information be provided directly to interested persons by the applicant subject to non-disclosure agreements, subject to NRC oversight and action if the use of such agreements proves unworkable. Id. OCRE indicated at the public workshop that the PDR approach suggested by OGC was not workable, but noted that developing a better alternative to OGC's proposal would be difficult. Remarks of Susan Hiatt, Tr. 28-31. In a subsequent letter, OCRE stated that proprietary information should be available to potential commenters, not just parties in a hearing. OCRE September 1992 Letter, p. 1. In OCRE's view, the industry proposal would likely result in greater number of informal hearing requests, in order for members of the public to obtain access to the proprietary information. OCRE argues that delay will be inevitable to allow parties a reasonable opportunity to review the proprietary information. OCRE September 1992 Letter, pp. 1-2; c.f. OCRE October 1992 Letter. OCRE also believes that imposition of criminal penalties for breech of non-disclosure agreements is excessive and extreme. OCRE September 1992 Letter, pp. 2-3.

OGC does not believe that Part 52 provides answers to the public access questions discussed above. First, Part 52 did not envision any distinct tier 2 rule and so questions about access to a possibly proprietary rule were not addressed. Second, Part 52 makes clear that proprietary information supporting the design certification will be protected in the same manner as in licensing proceedings, and the practice in licensing proceedings to make such information available only to parties signing an appropriate non-disclosure agreement and demonstrating need and relevance to admitted contentions. However, this does not resolve who the parties are in a certification proceeding (are commenters parties?), and how licensing practice should be applied to rulemaking with no formal requirements for contentions or provision for discovery as in a licensing proceeding.

OGC offers three alternatives for consideration. Under all alternatives proprietary information would be kept to a minimum. Also, OGC has reconsidered the practicality of providing access through the PDR, and now recommends that access should initially be sought from the design certification applicant. It would place an unreasonable burden on the PDR, and the NRC in general, to attempt to verify the accuracy of representations made in non-

disclosure agreements, and to police violations of such agreements. Moreover, such a procedure may prevent the applicant from obtaining private redress from a person who violates a non-disclosure agreement, due to the lack of privity between the applicant and the person making an unauthorized disclosure. Finally, in other rulemakings as well as in licensing proceedings, proprietary information was initially obtained directly from the applicant/licensee rather than from the NRC.

Accordingly, OGC now recommends that persons seeking access to proprietary information in the design certification rulemaking of should attempt to obtain the information directly from the applicant. Access may be conditioned by the applicant upon execution of a reasonable non-disclosure agreement.

If a person is unable to obtain information from the applicant, or believes that the terms of the applicant's non-disclosure agreement are unreasonable, OGC recommends that the Commission establish procedures whereby that person can seek a Board or Commission order resolving the disclosure issue.

Finally under all alternatives, access to proprietary information would not be provided during the staff's review but would await initiation of the rulemaking proceeding.

Under the first alternative proprietary information would be made available to all persons who provide notice to the Commission, within a set period which would elapse about midway through the comment period on the proposed rule, that they wish to have access in order to either prepare written comments or to participate in a later certification hearing. Thus under this alternative there would be no requirement that access be granted only to hearing parties - as is usually considered the case in rulemaking all commenters would be treated as parties to the proceeding. Moreover there would be no showing of need or other pleading prerequisites, although the ability and willingness to sign a non-disclosure agreement will entail some prerequisites as a practical matter (for example, a competition may have difficulty signing a non-disclosure agreement).

The second alternative is the same as the first, except that persons seeking access would have to provide an affidavit which (1) explains why the non-proprietary information in the docket is not adequate to prepare comments and (2) shows that the person has the expertise to use the information and contribute significantly to the rulemaking record.

The third alternative tracks the NUMARC proposal. Only persons admitted as parties to the informal or move formal hearing could be granted access. Access would be granted by the Licensing Board (subject to immediate Commission appeal) only upon a showing by the party that (1) non proprietary information in the

docket is not adequate to prepare for the hearing, (2) the information sought is relevant to issues to be considered at the hearing, and (3) the party has the expertise to use the information and contribute significantly to the hearing record.

C. Mechanisms for Early Public Participation

Part 52 does not generally provide for public notice and participation in the Staff's review of the design certification application, including the FDA review. With the exception of the requirements in 10 CFR Part 52, Appendix O, Paragraph 5 for publication of notice of FDA issuance, and public availability of the Staff's SER, early public notice and participation is not mandated. However, it is OGC's view that public acceptance of the legitimacy of the design certification rulemaking process, as well as timely completion of the process, will depend in part on early public participation in the design certification process. By "public participation," OGC means both informing the public of significant milestones in the design certification process, as well as providing meaningful opportunities for the public to comment on significant technical and policy issues. Several mechanisms that can be utilized by the Commission to inform the public, which are implicit in the rulemaking process under Part 52, are discussed elsewhere in this paper (e.g., Section IV.A, "Docketing;" Section IV.B, "Notice of Proposed Rulemaking:FDA Issuance and Publication of Notice of Proposed Rulemaking"). This section, however, discusses additional mechanisms for public participation that the Commission could decide as a matter of discretion to utilize. These mechanisms are: (a) publishing notice of availability of SECY papers in the Federal Register, (b) establishing a public information "hotline" or newsletter to inform the public of key FDA/design certification events, (c) publishing notice of availability of draft and final SERs in the Federal Register, (d) publication of advance notice of proposed rulemaking (ANPR) to seek public comments on important technical or policy issues, (e) public workshops, and (f) alternative dispute resolution techniques, including negotiated rulemaking.

Notice of Availability of SECY Papers

Throughout the review of the first two design certification applications, the Staff has informed the Commission of technical or policy issues in rulemakings and requested Commission guidance through submission of SECY papers. SECY papers are generally made available at the Commission meeting at which the SECY papers are discussed, and thereafter are placed in the PDR for public inspection. The nuclear industry, which has the time and resources to attend Commission meetings and interact with the Staff regularly, is aware of the availability of SECY papers. See remarks of Marcus Rowden, Tr. 82. Moreover, as suggested by the industry representatives at the public workshop, the industry often files responses to SECY papers with the Commission.

There is no question that the industry practice of reviewing publicly-released SECY papers and submitting additional comments is legal, in that it violates neither the APA nor general principles of administrative law on ex parte contacts. Nonetheless, it does raise questions of fairness and public perception since the availability of SECY papers is not made known to the general public through mechanisms such as publication of notice in the Federal Register and press releases, as OCRE argues in its September 1992 Letter. The problem is exacerbated in rulemakings when the Commission receives industry comments on SECY papers discussing the rulemaking **after** the official public comment period has closed. A person reading a notice of proposed rulemaking in the Federal Register, for example, would normally expect that the deadline for public comments represents a reasonably firm cut-off. The public would not expect that the Commission would continue to receive and consider comments on a paper which is the subject of the rulemaking, but for which no Federal Register notice was published concerning its availability. While these issues of public perception are not unique to design certification rulemakings but are common to all rulemakings, OGC suggests that a different approach be adopted for design certification rulemaking.

To address this issue, the Commission could consider publishing notice of the availability of all SECY papers in which the Staff requests Commission guidance on technical or policy issues related to a particular design certification, SECY papers on new technical and policy issues relating to design certifications in general, and SECY papers that provide information on the status of the Staff's review of a particular certification application. The Commission need not provide a specific opportunity for comment (OGC believes that this is better served through advance notice of proposed rulemakings (ANPRs)). Federal Register notice and press releases advising the public of the availability of SECY papers will help to address the notion that only "insiders" know about SECY papers. However, this would entail a sizable cost associated with Office of the Federal Register fees for publication. Recognizing this burden, OCRE proposes that the Commission publish a periodic notice (at minimum annually) inviting interested persons to be placed on a distribution list for SECY papers. OCRE September 1992 Letter, pp. 3-4. OGC believes that OCRE's proposal is a viable alternative to Federal Register notices of SECY paper availability.

Availability of SERs

Part 52, Appendix O, Paragraph 5 does not require public availability of draft SERs on an FDA/design certification or Federal Register notice. Furthermore, although Appendix O requires that the final Staff SER on an FDA/design certification be made available to the public, it does not require Federal

Register notice of public availability. The Staff is making the draft SERs for the first two FDA design certifications available for public inspection in the PDR. However, notice of the availability of the draft SERs have not been published in the Federal Register.

The Commission may wish to consider whether, in the interests of greater public knowledge of the FDA/design certification process, draft SERs should routinely be made available to the public, and notice of availability of both draft and final SERs be published in the Federal Register. OGC recommends at minimum that notice of availability of the final SERs be published in the Federal Register (such notice may be combined with the required Federal Register notice of FDA issuance). Public availability of draft SERs should not entail any additional Staff resources, nor should the publication of draft SERs delay the Staff's review process. The Commission need not provide a specific opportunity for public comment on draft SERs; OGC believes that if the Commission wishes to obtain public comment on draft SERs, this is better handled through advance notice of proposed rulemakings (ANPRs). As in the case of the availability of SECY papers, OGC is of the view that notice of public availability of draft and final SERs, whether by individual Federal Register notices or by distribution of SERs to persons on a distribution list, will help mitigate the impression that only "insiders" know about the availability of draft SERs.

Public Information Hotline/Newsletter

Apart from publishing notice in the Federal Register of major milestones in the design certification process, the Commission may wish to consider establishing a public information "hotline", with a recorded message setting forth upcoming events, meetings, and deadlines. A hotline was established by the Staff in the high level waste area, which provides information on date, location and subject matter of meetings between the Staff and DOE on matters relating to the Yucca Mountain high level waste repository. A hotline would be relatively easy to set-up and maintain. However, since there is no current data on the usage of high level waste hotline, the effectiveness of a design certification hotline cannot be determined. There would be some resource costs in maintaining a hotline.

Another method of "reaching out" would be the publication of a short monthly newsletter which provides information similar to that provided by a hotline. Although a service list could be established in each design certification, a newsletter would offer certain advantages. First, a newsletter would be able to emphasize important upcoming events and deadlines; a service list would not be able to perform such a "filtering" function. A newsletter would also save the agency the costs of reproducing and mailing out copies of all items which would otherwise be

distributed to persons desiring to be on the service list for a design certification proceeding. However, there would be resource costs for production and distribution of a newsletter.

Advance Notice of Proposed Rulemaking (ANPR)

In SECY 92-170, OGC suggested that the Commission could utilize advance notice of proposed rulemaking (ANPR) to inform the public of important technical and policy issues, and to obtain public comments on these matters. SECY 92-170, pp. 17-18. At the time that SECY 92-170 was being prepared, the industry appeared to be split on the desirability of an ANPR. NUMARC and GE did not support the use of ANPRs, whereas Westinghouse indicated that ANPRs which inform the public of important issues and obtain public comment can help avoid delay in the public comment phase of the design certification rulemaking. Id. OCRE did not specifically discuss ANPRs in their March 1992 Comments.

The use of ANPRs was not specifically discussed at the public workshop, and none of the written comments addressed the matter with the exception of the NUMARC comments, which briefly suggested the use of an ANPR to set forth conditions for access to proprietary information. NUMARC Comments, p. 29.

OGC has reassessed its preliminary recommendation on the use of ANPRs as part of its overall consideration of mechanisms for early public participation. OGC continues to believe that ANPRs are not practical for the GE ABWR or the ABB/CE System 80+ because of the advanced state of the Staff's review of these designs. However, OGC believes that ANPRs are the most practical formal mechanism for obtaining public comments on important technical and policy issues relevant to the Westinghouse AP-600 and subsequent designs. Since the exact nature of an ANPR will have to be determined on a case-by-case basis for each proposed design certification, OGC does not recommend any specific actions at this time.

Public Workshops

Following the release of a SECY paper or publication on an ANPR or NPR, the Commission could hold a public workshop which focuses on that SECY paper, ANPR or NPR. A public workshop could have three possible objectives. First, a public workshop could be used to inform the public of the Staff's views and to answer any questions which the public may have about the subject matter of the workshop. The Regulatory Information Conference conducted by NRR would be one possible format for conducting an informational public workshop.

Second, a public workshop could be structured to provide various segments of the public, e.g., the industry, special-interest groups, other government agencies and the states, an opportunity

to discuss with each other and with the NRC specific technical, legal and policy matters relevant to the design certification under Staff review. The goal would be to facilitate interchange among the interested public. The July 1992 public workshop on design certification procedures was intended, in part, to facilitate such exchanges.

Finally, a public workshop could be held to provide an opportunity for the public to express its views on matters which the Staff or the Commission seek advice. The workshops on the 10 CFR Part 54 license renewal rule and the GEIS for license renewal were structured to provide such an opportunity.

A workshop could enhance the public's understanding of the design certification under review, and the rulemaking process in general. It would also provide early insight into the concerns and issues that may be raised concerning the proposed certification. On the other hand, the overall usefulness of the workshop, in terms of allaying public concerns about the certification process, depends upon the attendance at, and/or participation in, the workshop by all important segments of the public. If, as in the case of the July 1992 public workshop, major environmental groups who have interests in certification do not attend, then the objectives of the workshop may not be effectively achieved. In addition, some resources would have to be expended by the Staff to conduct a workshop.

Alternative Means of Dispute Resolution

Alternative means of dispute resolution (ADR) are options to the use of adjudicative or adversarial methods of resolving issues. ADR processes include, but are not limited to, conciliation, facilitation, mediation, arbitration, mini-trials, and negotiated rulemaking[12]. In SECY 92-170, OGC discussed negotiated rulemaking as a potential process for resolving design certification issues. SECY 92-170, pp. 7-10. The use of negotiated rulemaking was suggested by OCRE as a way of obviating

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[12]OGC's concept of ADR is more expansive than either ADR as described in Subchapter IV of the APA, and includes "negotiated rulemaking" as described in the second Subchapter IV of the APA (there are two subchapters in the APA which are designated as IV, the first dealing with ADR, the second with negotiated rulemaking). The APA describes ADR as a process for "the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such a proceeding." 5 USC §582(a). Negotiated rulemaking is described as a process "to negotiate and develop a proposed rule." 5 USC §583(a). By contrast, OGC's view of ADR includes those circumstances where there is no formal "administrative program" or proceeding, i.e., prior to initiation of formal rulemaking.

the need for a hearing and minimizing litigation. OCRE March 1992 Comments, p. 6. OGC's preliminary view, as expressed in SECY 92-170, was that negotiated rulemaking probably is not a practical alternative because many of the prerequisites conducive to negotiated rulemaking are not likely to be present in design certification[13]. SECY 92-170, pp. 9-10.

ADR processes in general, and negotiated rulemaking in particular, were discussed throughout the public workshop. The Administrative Conference representative supported use of ADR, emphasizing that negotiated rulemaking was only one technique that the NRC should consider. See, e.g., remarks of William Olmstead, Tr. 83-90, 102-104, 177, 179-181. OCRE also continued to support use of ADR, at the workshop and in its written comments. Remarks of Susan Hiatt, Tr. 76-78; OCRE August 1992 Comments, pp. 1-3. The industry representatives at the public workshop consistently opposed the use of negotiated rulemaking, and expressed skepticism of other ADR techniques. See, e.g., remarks of Marcus Rowden, Tr. 81-83, 178-179; remarks of Bart Cowan, Tr. 204-208.

Written comments submitted by the industry also focused on their opposition to negotiated rulemaking. Westinghouse agreed with NUMARC's view on this matter, noting that "negotiating the design of future plants and the resolution of issues...is unsound public and regulatory policy." Westinghouse Comments, p. 2. Winston and Strawn also agreed with NUMARC, adding that groups and individuals opposed to the construction and operation of additional nuclear power reactors would not be interested in cooperating, or could participate in negotiated rulemaking with the intent of delaying or inhibiting the certification. In this regard, Winston and Strawn noted that the Commission's new policy statement on alternative dispute resolution[14] does not provide for criteria governing the imposition of sanctions against parties who unreasonably obstruct, delay, or impede negotiated rulemakings. Winston and Strawn Comments, p. 5 and n.6. The State of Illinois generally favors early public participation, but noted that it had insufficient experience in alternative dispute resolution mechanisms to make recommendations. However, the State stressed that the NRC should make no compromises in safety. State of Illinois Comments, p. 2.

Since SECY 92-170 was prepared, the Commission has issued a policy statement on the use of ADR (ADR Policy Statement) as authorized in the APA, 5 USC Subchapter IV. 57 FR 36,678 (August

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[13]Excerpts of the discussion in SECY 92-170 which describe negotiated rulemaking and the prerequisites for conducting the process are reproduced in Attachment D.

[14]57 FR 36678 (August 14, 1992).

14, 1992). The ADR Policy Statement generally expresses the Commission's encouragement of the use of ADR where appropriate. Upon consideration of the ADR Policy Statement, the workshop discussion and the written comments, OGC has determined that its earlier analysis was too narrowly focused on negotiated rulemaking, and failed to consider the potential for other non-adversarial dispute resolution processes in design certification.

From OGC's perspective, ADR, broadly defined, could be utilized at two distinct stages in the design certification process: (a) during the Staff's review, which encompasses the period from docketing of the application to the issuance of the FDA and the Staff final SER, and (b) during any hearing which may be held in the formal rulemaking proceeding, i.e., after issuance of an NPR. The purposes and objectives for employing ADR would be different at each stage. The purpose of ADR during the Staff review stage would be to facilitate the interchange of information and views between the Staff, the applicant and the public on the nature and course of the Staff's review, with the objective of achieving early agreement among the participants on policy and technical issues relevant to the design certification. The hope is that by involving those members of the public who are most likely to submit written comments and hearing requests in the formal design certification rulemaking early in the Staff's review, when Staff positions have yet to be developed and "hardened," contentious disagreements can be avoided during the formal rulemaking. The Commission could employ ADR to address specific technical and policy issues, or it could create a more open-ended process, whereby the public participants identify the issues for which they wish to employ ADR. By contrast, the purpose of utilizing ADR in a rulemaking hearing would be to facilitate settlement of the controverted issues, with the objective of limiting the issues that actually have to be the subject of a hearing, or even eliminating the need for a hearing. ADR in this context would have a more defined scope, as compared with ADR during the Staff's review, and represents the kind of ADR contemplated in the APA and the Commission's Policy Statement on ADR.

In OGC's view, the appropriateness of a utilizing an ADR technique at one or both of the design certification stages can only be determined by the Commission on a case-by-case basis. Many of the factors identified in the ADR Policy Statement to determine the appropriateness of ADR are similar to those identified by the Administrative Conference to judge the appropriateness of negotiated rulemaking (SECY 92-170, pp. 8-9). As OGC noted in SECY 92-170, many prerequisites for successful use of ADR may not be met in a design certification rulemaking. One approach for assessing whether ADR could be profitably utilized in a particular design certification would be to solicit public interest in participating in ADR. If the Commission wishes to gauge public interest in ADR during the Staff review stage, such notice could be published as part of the notice of

docketing, or during the review period as the Commission identifies issues suitable for ADR. On the other hand, requests for interest using ADR as part of any hearing process should be included in the NPR.

In sum, OGC recommends that the Commission consider the use of ADR on a case-by-case basis for each design certification.

D. Funding of Public Participants in Rulemaking Activities

Section 502 of the NRC Appropriations Act for FY 1992[15] states:

> None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.

Identical language has been included in every NRC appropriations act since FY 1981. This language appears to prohibit NRC funding of parties in informal or formal hearings. It may also prohibit funding of persons who wish to provide comments in a rulemaking proceeding, including hearings in design certification rulemaking. However, the language may permit the NRC to provide funding for members of the public to advise the Commission on matters relating to design certification before the institution of the rulemaking process (i.e., publication of an ANPR or NPR), as well as NRC funding of participants in negotiated rulemaking.

Potential funding needs of public commenters fall into four categories:

- o funds for hiring expert consultants to review the design certification application;
- o funds for travel expenses to attend NRC meetings related to design certification;
- o funds for legal assistance to participate in the design certification process; and
- o the provision of design certification documents.

At the public workshop and in its written comments, NUMARC takes the position that the language in the various NRC Appropriations Acts clearly prohibits financial support for "private advocacy," including participation in "activities centered on and leading to design certification hearings...." NUMARC Comments, p. 46.

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[15]Pub. L. No. 102-105, 105 Stat 536 (1991).

Winston and Strawn also agrees that the NRC is prohibited from funding parties in informal and formal hearings, and argues that the policy underlying the NRC Appropriations Acts also precludes funding of participants in a negotiated rulemaking. Winston and Strawn Comments, pp. 5-6. On the other hand, OCRE stated at the public workshop that it was "encouraged" by OGC's willingness to consider whether financial support could be provided in design certification rulemaking. Remarks of Susan Hiatt, Tr. 77-78. OCRE's written comments expanded upon OCRE's remarks at the public workshop. First, OCRE notes that the industry's arguments that private interests should not be subsidized by public monies is inconsistent with DOE subsidization of the development of advanced reactor designs by private vendors. OCRE August 1992 Comments, p. 2. OCRE then suggests that funding of responsible special interest intervenor groups would allow them to take "reasonable and responsible positions representing the majority of Americans [who are neither strongly pro or anti-nuclear]," rather than having to "pander to...the 20% of the Americans who are strongly anti-nuclear." Id. at 2-3. Finally, OCRE notes that even affluent public interest organizations, in the absence of financial support, would be unable to participate in every design certification rulemaking contemplated. Id. at 3.

Although "rulemaking proceedings" are not specifically mentioned in Section 502 or in the legislative history of Section 502 or its predecessors, it is reasonable to construe the term "regulatory" proceedings in Section 502 to include rulemaking proceedings. The critical determination then becomes when does a rulemaking proceeding begin. Agency interpretations of this issue in the context of negotiated rulemaking indicate the rulemaking proceeding does not begin until a Notice of Proposed Rulemaking (NPR) has been issued. Therefore, travel expenses and other types of assistance have been provided to participants in negotiated rulemakings. Although it is not entirely clear what constitutes a "regulatory proceeding" under Section 502, or when a rulemaking proceeding formally begins, particularly in the design certification case where the "rulemaking" does not involve the development of generic regulations, OGC believes that the funding and compensation prohibition in Section 502 would not apply until after the Notice of Proposed Rulemaking on a design certification application is issued. Therefore, the Commission could provide travel and other forms of assistance to participants in the period before the NPR was issued. However, from a policy and budgetary perspective, the Commission would need to carefully evaluate whether it would be advisable or necessary to provide such assistance, particularly in light of the 100% user fee requirements related to the NRC budget.

OGC recommends that the Commission consider developing appropriate mechanisms for funding of representative members of the public to provide advice on a proposed design certification

prior to initiation of the formal design certification rulemaking (i.e., prior to publication of an NPR)[16].

E. Generic versus Case-by-Case Determination of Rulemaking and Hearing Procedures

The second sentence of Section 52.51(a) states that the Commission shall institute a rulemaking for a design certification after an application has been filed "and shall specify the procedures to be used for the rulemaking." This suggests that the Commission intended to establish the procedures to be followed in any individual design certification rulemaking (including any procedures to be followed in informal hearings) at that time, on a case-by-case basis.

Nothing in Section 52.51(a), the remainder of Part 52, 10 CFR Part 2, or the AEA forecloses the Commission from adopting generic procedures for the conduct of design certification rulemakings. There are several factors in favor of generic rulemaking procedures. Generic procedures would foster a uniform set of expectations as to how a design certification rulemaking would be conducted. The Staff, as well as the public and certification applicants, would expend less resources since they would not be forced to learn new procedures in each rulemaking proceeding. There also would be some resource and schedular savings in each certification rulemaking proceeding, since time and resources would not have to be spent in repeatedly developing and publishing the procedures to be used in the proceeding. However, design certification rulemaking differs significantly from the routine notice and comment rulemaking with which the Commission is familiar, by providing the opportunity for informal and formal hearings as well as notice and comment.

The NUMARC Rule did not address establishment of generic procedures, and OCRE's March 1992 Comments did not propose establishment of generic procedures. Nor was this matter specifically discussed at the public workshop. However, the industry agreed in its written comments following the workshop that generic procedures should be established only after the Commission has gained experience with the first two design certification rulemakings. NUMARC Comments, p.29.

On balance, OGC recommends that the Commission delay codification of generic procedures for conducting design certification rulemakings until the first two design certification rulemakings

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[16]Because of the advanced state of both the GE and ABB/CE System 80+ designs, OGC does not believe it is practical to consider funding of public groups as part of the design certification process for these two designs.

have been conducted. The matter can be revisited at that time, and the Commission would have the benefit of the lessons learned from the conduct of the first two design certification rulemakings in developing generic procedures.

IV. DISCUSSION OF DESIGN CERTIFICATION RULEMAKING PROCEDURAL ISSUES

A. DOCKETING

Docketing of a design certification application is required by 10 CFR Part 52, although notice of docketing in the Federal Register is not. See 10 CFR 52.45(d), citing 50.30(a)(6), in turn citing 10 CFR 2.101(a); 10 CFR 52.51(a), citing 10 CFR Part 2, Subpart H; 10 CFR 2.802(e). The Staff has published a notice of docketing for the GE ABWR design certification application[17] and the ABB/CE System 80+ design certification application[18], and intends to do the same for the Westinghouse AP-600 design certification application[19].

The NUMARC Rule did not address whether Federal Register notice of docketing of a design certification application is necessary or desirable, nor did OCRE March 1992 Comments address the matter. In SECY 92-170, OGC recommended preliminarily that the Staff continue its practice of docketing design certification applications, and publication of a notice of docketing in the Federal Register.

NUMARC agrees with OGC's preliminary recommendation on notice of docketing, and further suggests that notice of docketing could be used to inform the public of future rulemaking activities, as discussed above in Section III.,"Mechanisms for Early Public Participation." NUMARC Comments, pp. 28-29. OCRE and the representative from the State of Illinois Dept. of Nuclear Safety implicitly support notice of docketing. Remarks of Susan Hiatt, Tr. 76-77; Remarks of Stephen England, Tr. 67-68.

Although notice of docketing is not required by Part 52, OGC believes that there is great merit in publishing such notice. Federal Register notice that a design certification application

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[17]57 FR 9749 (March 20, 1992).

[18]56 FR 21395 (May 8, 1991), modified, 56 FR 23602 (May 22, 1991).

[19]As discussed in note 8 above, the Staff has published a Federal Register notice of the receipt of the Westinghouse AP-600 FDA/design certification application, but has not accepted the application for docketing.

has been docketed will alert the public that a design certification application has been tendered, that the NRC is initiating its review and evaluation of the application, and that the application is available for public inspection. Such notice would help overcome arguments that the public was unaware of the pendency of a design certification. For these reasons, OGC recommends that the Staff continue its practice of docketing design certification applications, and publication of a notice of docketing in the Federal Register.

B. NOTICE OF PROPOSED RULEMAKING

FDA Issuance and Publication of Notice of Proposed Rulemaking

Once the Staff has completed its review of the FDA/design certification application, the Staff issues an FDA by publishing notice in the Federal Register indicating that an FDA is being issued by the Staff, and makes the SER documenting the Staff's safety review of the FDA available for public inspection. See Paragraph 5 of 10 CFR Part 52, Appendix O. As discussed above in Section III.C, "Mechanisms for Early Public Participation: Publication of SERs," OGC recommends that notice of availability of the final SER be published in the Federal Register.

The official design certification rulemaking proceeding begins with publication of a notice of proposed rulemaking (NPR) in the Federal Register which, inter alia, establishes the schedule for submission of written comments and requests for hearings, and the procedures to be followed in the rulemaking (including any hearing). Although OGC had been informed by the Staff that they intend to prepare a proposed rule and statement of considerations more or less simultaneously with the safety review of the application, OGC's "Draft Timeline for Design Certification Hearing"[20] indicated a 90-day minimum period between issuance of the FDA and publication of an NPR. OGC's recommendation in this regard was based on several factors[21]. First, some time will be required for the Commission to review and approve for publication the proposed rule and SOC. A period of time would then be necessary for the Staff to conform the proposed rule and SOC with any additional Commission directions. Finally, since OGC was unclear with respect to public availability of draft SERs and

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[20]Distributed at the June 1, 1992 Commission meeting and at the July 20, 1992 public workshop.

[21]The discussion that follows is intended to respond to Commissioner Remick's inquiry at the June 1, 1992 Commission meeting regarding the basis for the designation of 90 days as a "minimum" period. See remarks of Commissioner Remick, Tr. 18.

notice thereof, it was OGC's assessment that an additional 30-60 days may be necessary for the public to fully read and digest the SER before it could begin preparing its written comments and any requests for hearings (apart from the 90-day period provided for public comment and hearing requests, see Section IV.B, "Length of Comment Period").

This subject was not extensively discussed either at the public workshop or in the written comments from the public. At the public workshop as well as in its written comments, NUMARC noted with apparent approval the 90-day period between FDA issuance and NPR publication, in commenting on the appropriateness of the 90-day written comment and informal hearing request period. Remarks of Robert Bishop, Tr. 63; NUMARC Comments, p. 32. The other industry panelist stated that he had "minimal confidence" that the 90-day schedule can be met. Remarks of Marcus Rowden, Tr. 69.

Further discussions with the Staff with respect to the Staff's review process, the Staff's preparation of the "Design Control Document" (see SECY 92-287, "Form and Content for a Design Certification Rule (August 18, 1992)) and OCRE's objection to OGC's preliminary proposal for a 90-day public comment period, reinforces OGC's view that a minimum of 90 days is necessary from the date of issuance of a FDA to publication of a NPR. The "design control document," which constitutes and/or defines the scope of Tiers 1 and 2 of the certification rule cannot be finalized until the Staff has essentially completed its draft SERs. Also, OCRE continues to assert that the public comment period is too short. By providing a 90-day period for the public to review the final FDA and SER - a period of time which would otherwise be required by the Staff as a practical matter to prepare the NPR - the Commission can respond to OCRE's concern, while still minimizing the impact upon the length of the public comment period. For these reasons, OGC recommends that the Commission (and Staff) aim to publish a NPR approximately 90 days after Federal Register notice of FDA issuance.

Concurrent Notice of Opportunity to Submit Written Comments and Opportunity for Requesting Hearing

Although Section 52.51(b) provides for both a period to submit written comments and an opportunity to request an informal hearing before a Licensing Board, it does not indicate whether the period for submitting written comments should run concurrently with the period for filing informal hearing requests.

The NUMARC Rule provided for the periods to run concurrently. NUMARC Rule, pp. 15-16. OCRE did not address this issue in its March 1992 comments. OGC provisionally recommended that the

period for requesting an informal hearing should run concurrently with the written comment period. SECY 92-170, p. 19.

At the public workshop, OCRE noted that OGC's preliminary recommendation on this matter, in conjunction with OGC's proposal on thresholds for obtaining an informal hearing (see Section IV.F, "Informal Hearing: Threshold for Request"), would place an undue burden on members of the public who seek an informal hearing. However, OCRE's objections appear to be directed at the length of the comment period, rather than the concurrent running of the written comment period and the period for requesting an informal hearing. See remarks of Susan Hiatt, Tr. 60-62. The industry did not specifically address this matter either at the workshop or in their written comments.

As the Commission pointed out at the June 1, 1992 Commission meeting, there may be some benefit for the public to be able to review all written comments on a proposed certification before formulating their request for informal hearing. See remarks of Chairman Selin, Tr. 32-36; remarks of Commissioner Curtiss, Tr. 39. However, as a practical matter, the issues which an interested person wishes to raise should be determined by each party based upon that party's own interests and capabilities (technical or otherwise) which can be brought to bear on that issue. OGC also notes that serial periods for written comments and hearing requests would not eliminate duplication of contentions, and in any case such duplication could be addressed through consolidation of issues and parties (see Section IV.E, "Conduct of Hearing: Scope of Commenting Party's Participation." Serial periods would result in a further lengthening of the schedule. Moreover, there seemed to be no support for this concept either at the workshop (c.f. Tr. 143) or in the written comments. For these reasons, OGC continues to recommend that the written comment period and the period for requesting an informal hearing run concurrently.

Length of Period for Submitting Written Comments and/or Requests for Hearing

Neither Section 553 of the APA nor the Atomic Energy Act of 1954 (AEA) sets forth a minimum comment period for a proposed rule. Section 1(a) of Executive Order (E.O.) 12662 (December 31, 1988), which implements the United States-Canada Free Trade Agreement, provides that a 75-day comment period should be provided for "any proposed Federal standards-related measures or product approval procedures," except where, "in urgent circumstances, delay would frustrate the achievement of a legitimate domestic objective." A design certification rulemaking can be considered to be a "standards-related measure," since it approves a standard design for a nuclear power reactor. Accordingly, it is advisable to provide at least a 75-day comment period for a design

certification rulemaking, absent specific circumstances at the time of a design certification application suggesting that the "urgent circumstances" exception is applicable. Granting, however, that 75 days is necessary to comply with EO 12662, the Commission must nonetheless address whether 75 days is sufficient to provide the public with a reasonable period to prepare written comments on the design, or requests for an informal hearing.

The industry proposed a 90-day comment period in their draft rule. NUMARC Rule, p.11, 16. OCRE, by contrast, argued that a 90-day period for written public comments is inadequate to allow public review of "the voluminous amount of material which is contained in the application." A period of 150 days was suggested by OCRE. OCRE March 1992 Comments, p. 1. OGC recommended preliminarily that a 90-day comment and informal hearing request period should be provided if four "prerequisites" were met: (a) the FDA/design certification application is reasonably complete, (b) reasonable early notice is provided of the pendency of the certification applications, (c) the draft SERs for the design certification/FDA are noticed and made available, and (d) there is reasonable access by interested members of the public to proprietary portions of the design prior to the NPR[22]. SECY 92-170, pp.19-21.

At the workshop and in their written comments, NUMARC and the industry continue to assert that 90 days is a reasonable starting point for determining the length of the written comment and informal hearing request period. The NUMARC position is based upon, inter alia, OGC's recommendations with respect to early public notice of the FDA/design certification application and important rulemaking milestones, the completeness of the application at the time of docketing, early public access, and the 90-day period between FDA issuance and NPR publication. See remarks of Robert Bishop, Tr. 62-64; remarks of Marcus Rowden, Tr. 69-70; NUMARC Comments, pp. 30-32. Winston and Strawn's written comments, which supported a 90-day period, states that courts are concerned with the overall adequacy and reasonableness of the opportunity for submitting comments, with the length of the period merely being one factor under consideration. Winston

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[22]Portions of the GE and ABB/CE designs deemed by the applicants to be proprietary have not been publicly available, since the NRC has not established procedures for permitting interested members of the public to review the proprietary portions of these designs. However, the design certification rulemaking comment and hearing opportunity for the GE ABWR and the ABB/CE System 80+ is currently scheduled for sometime in mid-1993. Therefore, there may be adequate time for the Commission to establish procedures for public review of proprietary portions of design certification applications such that a 120-day comment period can be adopted for these two design certifications.

and Strawn Comments, pp. 10-11, citing Florida Power and Light Co. v. US, 846 F.2d 765, 772 (D.C. Cir 1988), cert. denied, 490 U.S. 1045 (1989); Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 534 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982). OCRE reiterated its view at the workshop that 90 days is not sufficient. Remarks of Susan Hiatt, Tr. 60-62. Further, in a subsequent letter responding to NUMARC's Comments, OCRE noted that the Westinghouse AP-600 application has not been accepted by the NRC for docketing. OCRE September 1992 Letter, p. 3. The Administrative Conference representative, while not taking a position on whether 90 days was reasonable or not, observed that to the extent there was early public notice and involvement in the rulemaking (e.g. through alternative dispute resolution techniques), it would be difficult to argue that 90 days was unreasonable. Remarks of William Olmstead, Tr. 65-66. The representative from the New York State Public Service Commission suggested that 90 days may not be adequate, if there is no advance notice and access to proprietary information until the NPR is published. Remarks of James Brew, Tr. 66-67. The representative from the State of Illinois also expressed some ambivalence over the adequacy of 90 days, but seemed to conclude that if all the OGC-recommended prerequisites were satisfied, 90 days may be acceptable. Remarks of Steve England, Tr.67-68, 72-73. The State of Illinois' views were amplified in its written comments, which states that if seven prerequisites[23] (which generally track the OGC's preliminary recommendations) are met, then a 90-day period for public comments would be adequate. However, the State also recommended that the NRC grant extensions should unexpected circumstances arise and the public interest necessitates an extension. State of Illinois Comments, p. 2.

Upon consideration of the discussion at the public workshop and the written comments, OGC believes that OCRE's and the states' concerns with the adequacy and reasonableness of the 90-day period may stem from OGC's failure in SECY 92-170 to clearly explain the inter-relationship between OGC's recommendations for resolution of other procedural issues, and OGC's recommendation for a 90-day written comment and informal hearing request period. To clarify, OGC's recommendations in each of the subsidiary, but

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[23]The seven prerequisites suggested by the State of Illinois Dept. of Nuclear Safety are: (1) Federal Register notice of submission of a design certification application; (2) access to proprietary information in the application within a short time after submission; (3) and (4) Federal Register notice of the availability of the draft SER and FDA, including an estimate of the time necessary to finalize the documents, (5) and (6) Federal Register notice of the availability of the final FDA and supporting SER; and (7) publication of the NPR no sooner than 90 days before the issuance of the final FDA and supporting SER. State of Illinois Comments, p. 2.

related procedural issues, provide the basis for OGC's recommendation with respect to the length of the written comment and hearing request period. All of these recommendations are premised on OGC's determination that early and full public notice and disclosure can help alleviate concerns over the briskness of the rulemaking process, and increase public acceptance of the design certification rulemaking. In this sense, OGC agrees with the Administrative Conference that the keys to widespread public acceptance of the legitimacy of the rulemaking process are public knowledge and opportunities for public involvement at each phase of the design certification process (OGC's recommendations in this regard are discussed in Section IV., "Mechanisms for Early Public Participation"). It was in this light that OGC recommended, for example, that notice of docketing be published in the Federal Register, and that notice be published in the Federal Register of the availability of Staff SECY papers which request preliminary guidance from the Commission on policy issues. Assuming that the Commission adopted the four subsidiary recommendations (prerequisites) listed on p. 21 of SECY 92-170, OGC's view was that a 90-day period was reasonable.

Recognizing, however, that public acceptance of the design certification process is important, the lack of support by the non-industry public for a 90-day period, OGC has revised its preliminary position and now recommends that the written comment and informal hearing request period be set at 120 days. OGC recognizes that extending the rulemaking by an additional 30 days to accommodate a 120-day comment period will result in extension of the Commission's schedule for completing a design certification rulemaking. Such a Commission-approved extension to the rulemaking schedule represents a reasonable trade-off in order to enhance public acceptance of the design certification rulemaking process.
In sum, OGC recommends that 120 days should be provided for the written comment and informal hearing request period. If members of the public can request extensions of the time from the Commission, for good cause. An example of good cause could be failure to obtain reasonably timely access to proprietary information of demonstrable relevance and significance to the issues which the person wishes to comment on, or seek a hearing. OGC stresses that the 120-day period should be viewed as a starting point, with the Commission having the discretion to modify the length of the period based upon circumstances not anticipated and discussed in this memorandum.

C. LICENSING BOARD AUTHORITY IN HEARINGS

Section 52.51(b) states that the rulemaking procedures for a design certification must provide for an "informal hearing before an Atomic Safety and Licensing Board," and provides that a formal hearing may be held at the discretion of the Commission.

However, neither that section nor the remainder of Part 52 explicitly indicate the precise authority and responsibilities of the Licensing Board with respect to the rulemaking process - in particular the responsibilities of the Licensing Board to the Commission.

Licensing Board Authority: Decisionmaker or Magistrate

In SECY 92-170, OGC identified three alternatives for defining the scope of the Licensing Board's authority: (a) the "limited magistrate" model in which the Licensing Board is responsible for developing a record on contested issues; (b) the "full magistrate" model in which the Licensing Board is responsible for developing a certified record and making non-binding recommendations to the Commission; and (c) the "initial decisionmaker," in which the Licensing Board resolves all matters properly before it by issuance of an initial decision, which becomes final absent further action by the Commission[24]. SECY 92-170, pp. 21-28. These alternatives, including a modified "full magistrate" alternative, are discussed below.

"Limited Magistrate"

Under a "limited magistrate" model, the Licensing Board would be responsible for assuring that a sufficient record is developed on any issue determined by the Commission to be appropriate for consideration in a hearing. The Licensing Board would not

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[24]An issue common to all approaches is whether the Licensing Board, when making either procedural determinations (e.g., requesting additional hearing procedures) or a substantive recommendation or finding, considers only the information developed in the hearing record, or whether it must consider relevant information submitted in the docket in the notice and comment phase. If the Licensing Board acts as a limited magistrate, there is little need for it to consider written comments which are relevant to the controverted issues, since the Commission approves the final rule and will have before it both the hearing record and the written comments. On the other hand, if the Licensing Board either has the discretion to submit recommendations or has the responsibility of preparing an initial decision on controverted issues, then the failure of the Licensing Board to consider all information in the certification rulemaking docket relevant to controverted issues, including relevant written comments, could result in an incomplete or erroneous recommendation or initial decision. Although such problems can be corrected by the Commission as part of its review of the Licensing Board's product, OGC believes that it is better to obviate any need for Commission corrective action by requiring the Licensing Board, acting as a full magistrate or initial decisionmaker, to consider written comments which are relevant to the controverted issues.

resolve controverted safety issues, but would take whatever procedural actions are authorized by Section 52.51(b) (e.g. oral questioning, requests to the Commission for additional formal hearing procedures including cross-examination and discovery) to develop a record which is adequate to support a rulemaking decision by the Commission. An "adequate record" is one that contains information to permit the Commission to make a fair and reasoned decision on the contested issue. Once the hearing is completed, the Licensing Board would "certify" the hearing record to the Commission. The nature of that certification would include a description of controverted matters, a summary index of the evidence received, and a limited finding that the record is sufficient for the Commission to make a decision on the controverted issues.

This approach provides the Commission with the greatest flexibility in reviewing the hearing record and developing a rulemaking decision i.e., the statement of considerations and supporting documents for the final design certification rulemaking. It also is consistent with the general rulemaking model where there is only one decisionmaker - the Commission - who resolves all issues raised by public commenters. The Licensing Board's authority in this alternative would be essentially the same as that exercised by the Licensing Board in the GESMO rulemaking hearing, whose structure and procedures were very similar to the Part 52 rulemaking process. See 41 FR 1133, 1135 (January 6, 1976). The GESMO procedures were upheld on appeal. NRDC v. NRC, 539 F.2d 824 (2nd Cir. 1976), vacated and remanded to consider question of mootness, 434 U.S. 1030 (1978). Finally, this model could provide for the shortest hearings, since the hearing schedule need not provide a reasonable period for the Licensing Board to review the hearing record and prepare its recommendations. However, the overall rulemaking proceeding may be lengthened, since the Commission will probably have to become more knowledgeable and familiar with the hearing record, since the Commission would be reviewing an unrefined hearing record de novo without the benefit of any Licensing Board analysis. The Commission's task would be compounded if the Commission decided to follow separation of functions principles (see "Separation of Functions and Ex Parte Communication Limits" infra.) It may also be difficult to recruit specialized Licensing Board members[25] to preside over a design certification hearing, if the Licensing Board's responsibilities are restricted to the narrow scope envisioned under this approach, although it appears that there was no problem recruiting the five Licensing Board members in the GESMO proceeding.

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[25]This matter is discussed below in "Composition of Licensing Board."

The industry adopted this concept of the Licensing Board's authority in their proposed rule, see NUMARC Rule, p. 19. By contrast, OCRE did not support such a limited role for the Licensing Board. In OCRE's view, such a limited Licensing Board role is "inconsistent with the Administrative Procedure Act [APA], 5 USC 554(d), which requires that 'the employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.'" OCRE March 1992 Comments, p. 3. OCRE also argued that this proposal is inconsistent with 10 CFR 52.51(c), which begins, "The decision in such a hearing...," thereby implying that the Licensing Board is authorized under Section 52.51 to issue a decision in either an informal or formal hearing. Id. Finally, OCRE suggested that a limited role for the Licensing Board would not make "appropriate and efficient use of talent, training and skills" of the members of the Licensing Board panel. Id., p. 2. The Licensing Board panel also submitted comments disagreeing with a "limited magistrate" role for the Licensing Board. Memorandum from Lee S. Dewey, Chief Counsel, Atomic Safety and Licensing Board (April 24, 1992). According to the Licensing Board, important administrative benefits accrue to the hearing process when the Licensing Board acts as a decisionmaker, since it can substantially reduce the number of controverted issues actually requiring resolution in a decision. The Licensing Board also argued that by preparing an initial decision or recommendation, the Licensing Board provides the Commission with an organized, thorough and well-supported analysis of the issues. Id. OGC recommended preliminarily that the Licensing Board act as a "Limited Magistrate." SECY 92-170, pp. 22-25.

At the workshop and in their written comments, NUMARC continues to support the "limited magistrate" model. Remarks of Marcus Rowden, Tr. 154-156; remarks of Robert Bishop, Tr. 158-159; NUMARC Comments, pp. 32-39. NUMARC's position is grounded on several points. First, NUMARC argues that the "limited magistrate" approach is consistent with "basic concepts of administrative law" and Commission's practice in rulemaking, by reserving decisional power in rulemaking. NUMARC Comments, p. 33-34. NUMARC cites the six rulemakings where hearings were held, in which the Commission adopted the "limited magistrate" approach[26]. Id. at 33, n.7. Second, NUMARC argues that the

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[26]The six rulemakings are: (a) Acceptance Criteria for Emergency Core Cooling Systems for Light-Water-Cooled Nuclear Power Reactors (Docket No. RM-50-1), (b) Effluents for Light-Water-Cooled Nuclear Power reactors (Docket No. RM-50-2), (c) Environmental Effects of the Uranium Fuel Cycle (Docket No. RM-50-3), (d) Environmental Effects of Transportation of Fuel and Waste To and (continued...)

Commission's familiarity with design certification issues, as well as the "strong policy content" of design certification rulemaking also favor the Commission retaining sole decisionmaking authority. Id. at 34-35. Next, NUMARC argues that the powers exercised by a Licensing Board acting as a "limited magistrate" will be sufficient to allow the Licensing Board to compile a "coherent and complete" record on controverted issues. Id. at 35. In NUMARC's view, the Licensing Board's role as a "limited magistrate" is not passive or inconsequential, listing twelve powers that the Licensing Board would be authorized to exercise as a "limited magistrate." Id. at 35-36. DOE and Winston and Strawn support NUMARC's position. DOE Comments, p. 1; Winston and Strawn comments, pp. 6-8. Winston and Strawn also argues that Section 189(a) of the AEA does not require that hearings under that section be held "on the record." Winston and Strawn Comments, pp. 7-8, citing Siegel, supra; Philadelphia Newspapers v. NRC, 727 F.2d 1195 (D.C. Cir. 1984); Nuclear Information and Resource Service v. NRC, No. 89-1381, slip op. at 9 (D.C. Cir. July 17, 1992). The State of Illinois, the State of New York, and OCRE all do not support the "limited magistrate" approach, and instead recommend the "full magistrate" model. They generally argued that the limited magistrate model is a waste of the Licensing Board's talent, that OGC did not identify any negative attributes for the alternative. Remarks of Stephen England, Tr. 150-152; remarks of James Brew, Tr. 156-158; remarks of Susan Hiatt, Tr. 153-154. The State of Illinois' written comments reiterate their opposition to the "limited magistrate model." State of Illinois Comments, p. 3-4.

Based upon the workshop discussions and the written comments, OGC has reconsidered its preliminary position and now recommends that the limited magistrate model should not be utilized for the first two design certifications. OGC recommends instead that a "modified full magistrate" model be utilized, whereby the Licensing Board has discretion to submit recommendations on controverted issues to the Commission. OGC's final recommendation is not based upon a determination that the Commission is legally precluded from utilizing the "limited magistrate" approach[27]. Nor does OGC accept the

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[26](...continued)
From Nuclear Power Reactors (Docket No. RM 50-4), (e) Generic Environmental Statement on Mixed Oxide Fuel (Docket No. RM-50-5) and (f) Authority for Access to or Control over Special Nuclear Material (Docket No. RM-50-7). NUMARC notes that in the Access Authorization rulemaking, the Commission later directed the Licensing Board to make recommendations.

[27]OGC disagrees with OCRE's determination that this approach is inconsistent with the APA or Section 52.51(c). The APA section
(continued...)

characterization of the Licensing Board acting as a "limited magistrate" as the role of a "potted palm."[28] Rather, OGC's final recommendation reflects OGC's concern that the "limited magistrate" model may undermine public confidence in the design certification rulemaking process, as well as OGC's view that appropriate design certification procedures can be developed to minimize the possibility of undue delay in any hearings conducted by the Licensing Board acting as a modified "full magistrate." Furthermore, the Commission may at any time in the hearing provide further guidance to the Licensing Board if the conduct of the hearing is not being managed consistent with Commission-established hearing procedures and the designated role of the Licensing Board.

"Full Magistrate"

The Licensing Board's authority under the "full magistrate" alternative, as described in SECY 92-170, was the same as the "limited magistrate" alternative, except that the Licensing Board would make non-binding recommendations to the Commission on the resolution of contested issues. The Commission would be free to accept or reject the recommendations of the Licensing Board in whole or in part, or to supplement the rationale provided by the Licensing Board with additional bases. A recommendation by the Licensing Board could take one of several forms, including "proposed findings" similar to that submitted by parties under 10 CFR 2.754(a), or proposed sections of the statement of

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[27](...continued)
cited by OCRE is applicable only to adjudications or rulemakings required by statute to be held on the record. NRC rulemakings under the Atomic Energy Act of 1954 (AEA) are not required to be made on the record after opportunity for public hearings. See AEA Sections 161.b, 103.a, Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968). With respect to OCRE's view on Section 52.51(c), OGC first points out that Section 52.51 generally addresses the subject of information upon which a design certification is based, and prohibits reliance on information which the public did not have adequate notice of or access to. OGC does not believe that the Commission intend to address the matter of the Licensing Board's authority in Section 52.51(c); that language was intended to specify what information the Commission may rely upon when resolving controverted hearing issues.

[28]The Licensing Board would have substantial responsibility and authority under the "limited magistrate" model, as evidenced by the NUMARC-compiled list of responsibilities and authorities that the Licensing Board would exercise in an informal design certification hearing. NUMARC Comments, pp. 35-36.

consideration (SOC) for the final rule which addresses controverted issues and related language for the certification.

As with the "limited magistrate" alternative, design certification rulemaking authority under the "full magistrate" alternative rests entirely with the Commission. A recommended decision could save some time, since the Commission would be able to use the recommendation as a basis for review of the record while still retaining ultimate decisionmaking authority. On the downside, the "full magistrate" model will result in some delay at the end of the hearing process, since a reasonable opportunity must be provided in the schedule to allow the Licensing Board to assess the hearing record and prepare its recommendations.

At the public workshop, the State of Illinois, the State of New York, and OCRE supported the use of the full magistrate approach. The representative from the State of Illinois, as well as OCRE, pointed out that the "full magistrate" model satisfied OGC's concern that the Commission retain decision-making power, and that OGC did not identify any negative features with this alternative. Remarks of Stephen England, Tr. 151-152; remarks of Susan Hiatt, Tr. 153. The representative from the State of New York argued that a technically-competent Licensing Board should be able to apply their expertise and provide the Commission with their recommendations. Remarks of James Brew, Tr. 157. The industry opposed the use of the "full magistrate" model, arguing that it would "violate the principle which the Commission has adhered to in past rulemaking proceedings, that the "rulemaking hearing should not add another layer of review to the in-depth extensive reviews which will have been conducted by the staff, the ACRS, and...by the Commission..." Remarks of Marcus Rowden, Tr. 154-156, 162-164. The written comments submitted by NUMARC and other members of the industry continue to oppose the use of a "full magistrate approach." NUMARC Comments, pp.32-39; Winston and Strawn Comments, pp. 6-8.

Upon consideration of the comments of the panel participants at the public workshop, as well as the written comments, OGC recommends that the Licensing Board act as a "full magistrate" with one modification: the Licensing Board would have the discretion, but not be required, to prepare recommendations to the Commission on any or all controverted issues. Under the "modified full magistrate approach, the Licensing Board possesses the flexibility of providing recommendations to the Commission, while eliminating any pressure the Licensing Board may feel that it must provide recommendations on all issues (or any issues at all). If the Licensing Board chooses not to prepare a recommendation, it can certify the record to the Commission immediately after the close of the record; as discussed below in Section IV.H, "Findings of Fact and Conclusions," parties would submit their findings directly to the Commission rather than to the Licensing Board. Thus, the modified full magistrate model

minimizes any unnecessary delays in bringing the record of the hearing to the Commission for its consideration.

"Initial Decisionmaker" with Review by Commission

As described in SECY 92-170, the Licensing Board would act as an initial decisionmaker for controverted issues under this alternative. The Licensing Board's decision could take one of two forms: (a) a discussion in the statement of consideration (SOC) for the design certification rule addressing controverted issues along with the certification rule language, which the Commission would have the authority to modify upon review, or (b) an "initial decision" which would ultimately be published as part of the final rule. Commission review of the Licensing Board's decision could be structured in one of two ways: (a) required review by the Commission, or (b) discretionary review by the Commission, either on its own motion or upon motion of the parties in the hearing. Under the discretionary review model, the Licensing Board's decision would become part of the final rule if there is no discretionary review by the Commission. Other issues not determined by the Commission to be the subject of the hearings would be addressed by the Commission as in normal rulemakings. OCRE originally appeared to favor this approach. OCRE March 1992 Comments, pp. 2-3.

The advantage of this approach is that the Commission would not have to review the record de novo, since it would have before it the Licensing Board's initial decision. The standard of review could be limited to a Commission determination whether the Licensing Board made any clear and substantial errors of fact. On the other hand, the Commission would be required to explain in the SOC for the final rule the reasons underlying any disagreement with the Licensing Board's decision. This approach, by placing decision-making authority in the Licensing Board's hands, would also move design certification away from the concept of rulemaking and towards the concept of adjudicatory licensing - an approach which was specifically rejected by the Commission when it adopted Part 52. See 54 FR 15372 at 15375-76.

This alternative was not supported by any panel participant at the public workshop, see Tr. 161 (no response to the moderator's request for comments in support of "initial decisionmaker" model), or in the written comments following the workshop.

In the absence of any public support of this alternative, and concerns that this alternative moves away from the concept of design certification as an informal notice-and-comment rulemaking, OGC does not recommend adoption of this approach.

Sua Sponte Authority of Licensing Board to Raise New Issues for Discussion at Hearing

It is conceivable that as a result of presentations by parties in a formal or informal hearing, the Licensing Board could identify significant issues regarding the safety of the design, but which are not directly relevant to the issues controverted by the parties. In describing the scope of informal and formal hearings, the second sentence in Section 52.51(b) refers to "controversies," while the fourth sentence refers to "disputes of fact." This language suggests that informal and formal hearings are limited to matters placed into controversy by the parties, and the Licensing Board has no authority to raise issues not controverted by the parties. The fourth sentence of Section 52.51(b) clearly states that a formal hearing could be held on "specific and substantial disputes of fact" under Subpart G of Part 2. Section 2.760a provides the Licensing Board with sua sponte authority to raise issues not placed into controversy by the parties if the Licensing Board makes the following finding:

> Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists.

The industry did not directly address this issue in their draft rule, but indicated in discussions with OGC prior to SECY 92-170 that the Licensing Board should not have such authority in either informal or formal hearings. OCRE took a contrary position, urging that the Licensing Board should have the authority to raise sua sponte those issues which it views as serious safety concerns. Denying sua sponte authority to the Licensing Board, in OCRE's view, would "impair the NRC's goal of assuring adequate protection of the public health and safety." OCRE March 1992 Comments, p.3. OGC recommended preliminarily that the Licensing Board should have no sua sponte authority. SECY 92-170, pp.26-28. However, OGC suggested that the Commission establish a process in the rulemaking procedures by which a Licensing Board can inform the Commission of safety issues which the Licensing Board identified during the hearing which were not raised by the parties, but which are significant enough to warrant calling them to the attention of the Commission. Id., p.27, n.29

Both OCRE and the industry reiterated their positions in the public workshop. Remarks of Susan Hiatt, Tr. 153-154; remarks of Marcus Rowden, Tr. 155; remarks of Robert Bishop, Tr. 159. The industry specifically noted its opposition to sua sponte authority on the basis of the following factors: (a) the industry's view that such authority is inconsistent with the principle that the hearing should not add an additional layer of

review in the certification rulemaking, (b) the fact that in no prior rulemaking hearing has the Commission given the hearing board sua sponte authority, and (c) that even under the "Limited Magistrate" model, the Licensing Board role will be substantial and challenging. Id., see also NUMARC Comments, p.37. The representatives from the State of Illinois Dept. of Nuclear Safety and the State of New York Public Service Commission each disagreed with OGC's recommendation. Remarks of Steve England, Tr. 150-152; remarks of James Brew, Tr. 156-157. However, in its written comments, the State of Illinois Dept. of Nuclear Safety indicates that the better procedure would be to allow the Licensing Board to request authority from the Commission to address new issues in the hearing. State of Illinois Comments, p. 3.

OGC indicated in SECY 92-170 that sua sponte authority is appropriate if the Licensing Board is responsible for preparing either a proposed or initial decision. Since OGC now recommends that the Licensing Board act as a modified "Full Magistrate" with the discretion to provide recommendations on controverted issues to the Commission, OGC also recommends that a Licensing Board be afforded the discretion to seek sua sponte authority from the Commission if a significant safety issue is identified. Under this approach, the Licensing Board has two options if it identifies a significant safety matter not controverted by the parties: (a) seek authority from the Commission to compile a record on the issue, and make recommendations at the discretion of the Licensing Board, or (2) identify the matter to the Commission along with any recommendations on controverted issues that the Licensing Board may wish to make after the close of the hearing[29].

D. COMPOSITION OF LICENSING BOARD

The composition of the Licensing Board in design certification hearings is not explicitly prescribed in Part 52. In Part 50 licensing proceedings, a Licensing Board usually consists of a chairman who is an attorney and two members who possess technical backgrounds[30]. On occasion, departures from this composition

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[29]To assure that there is no uncertainty with respect to the Licensing Board's authority in this matter, the design certification rulemaking procedures should clearly indicate the nature of the Licensing Board's sua sponte authority in the informal or formal hearings.

[30]Section 2.721(a) provides:

(continued...)

with respect to technical members are made in response to the nature of contested issues, as is permitted by Section 2.721(a)[31]. For a design certification hearing, the Commission could establish a special Licensing Board composed of members who possess specific expertise relevant to controverted issues and who are drawn from outside the Atomic Safety and Licensing Board panel.

Neither the NUMARC Rule nor OCRE's March 1992 comments addressed this matter. OGC's preliminary view was that establishment of a special Licensing Board possesses merit if the Licensing Board is responsible for preparing either a proposed or initial decision on controverted issues (especially policy issues) for the design certification hearing, but is unnecessary if the Licensing Board acts as a "Limited Magistrate." SECY 92-170, pp. 28-29.

This matter was also not discussed at the public workshop. Only NUMARC addressed the composition of the Licensing Board in the written comments. NUMARC appears to take the position that appointment of a special Licensing Board is not justified under any of the three models of Licensing Board authority. NUMARC Comments, p. 40.

Whether a Licensing Board, acting as a "modified Full Magistrate," should be composed of members who possess specific

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

[31]For example, in the Comanche Peak operating license proceeding, a separate Licensing Board was impaneled to address and resolve issues on quality assurance program worker intimidation. Two of the members of that Licensing Board were attorneys. In the GESMO proceeding, 5 Licensing Board members were appointed by the Commission, including 2 attorneys and three individuals with technical backgrounds. 41 FR 31621 (July 29, 1976).

expertise relevant to controverted issues and who are drawn from outside the Atomic Safety and Licensing Board panel can only be determined after consideration of the nature of the issues which are controverted, and the depth to which a subject may be explored. Accordingly, OGC recommends that the Commission consider appointing a special Licensing Board following its review of any hearing requests that may be submitted.

E. CONDUCT OF HEARINGS

Consolidation of Parties and Issues and Scope of Parties' Participation

In a design certification rulemaking, the Commission may receive numerous requests for either an informal or formal hearing where two or more commenters wish to litigate the same or closely-related issues. Subpart B of Part 52 does not indicate whether the Licensing Board has the authority to consolidate issues and/or parties, in order to avoid repetitive presentations or duplicative examinations. Nor does Subpart B of Part 52 indicate whether, once having been granted an informal or formal hearing on specific issues identified by the party, that party may participate in the hearing on matters unrelated to those issues.

Consolidation of parties and issues in 10 CFR Part 2, Subpart G hearings is specifically authorized by Section 2.715a, and has been utilized without any due process concerns. Furthermore, the Commission specifically authorized consolidation in the GESMO rulemaking procedures. 41 FR 1133, 1134 (January 6, 1976), Item 3.(e). Although there are no specific provisions in Part 2 defining the scope of a party's participation in a hearing, Section 2.754 permits a party to file findings of fact and conclusions of law on issues which were not controverted by that party. In Part 50 licensing proceedings, the practice has been that a party is permitted to participate in all hearing issues, not just issues with respect to which that party was permitted to intervene. However, Licensing Boards have frequently exercised their authority under Section 2.715a to combine parties and issues, in order to avoid repetitious presentations of evidence, multiple cross-examinations by various parties' representatives or counsel, and to otherwise expedite the hearing.

The industry did not directly address the issues of consolidation or scope of parties' participation in the NUMARC Rule, except to state that each party will file "a summary statement of position on matters which were within the scope of the party's presentations." NUMARC Rule, p. 22. OCRE did not address this issue in its March 1992 Comments. OGC's preliminary recommendations were that the Commission authorize the Licensing Board to consolidate parties and issues when it establishes the procedures for an informal hearing in a design certification

rulemaking, but that a person requesting a hearing should not be allowed to participate in issues other than those raised by that person. SECY 92-170, pp. 36-37; 29.

The State of Illinois disagreed at the public workshop with OGC's recommendation on participation by a commenting party in issues other than those raised by that party. In the State's view, the Board should have authority to control duplicative presentations. Remarks of Stephen England, Tr. 171-172. The State's written comments also argues that if a person is able to make a meaningful contribution, it is in the public interest to allow such participation. State of Illinois Comments, p. 4. However, the State agrees with OGC's preliminary recommendation permitting consolidation of parties and issues. Id. OCRE did not support the OGC position on participation of parties on issues which they did not controvert, arguing that such participation should be left to the discretion of the Licensing Board. Remarks of Susan Hiatt, Tr. 172-173. The industry representatives at the workshop supported OGC's preliminary recommendation that parties should be limited to the issues which they raise. Remarks of Robert Bishop, Tr. 170; remarks of Marcus Rowden, Tr. 173. NUMARC's written comments support OGC's preliminary recommendations on both consolidation of parties and issues and participation of parties on issues which they did not raise. NUMARC Comments, pp. 40, 47-48. In its written comments, DOE recommended that a provision be added to the hearing procedures to encourage participants to attempt to reach resolution of contested issues during the 30-day period between filing of oral presentations and the commencement of the oral phase of the hearing. If mutual agreement were reached, the Licensing Board would not need to proceed to hearings on that issue. DOE Comments, p. 2.

Since no comments were received that took issue with OGC's preliminary analysis or recommendation on consolidation, OGC continues to recommend that the Commission provide the Licensing Board with explicit authority[32] to consolidate parties and issues in an informal design certification hearing.

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[32]The Licensing Board probably has authority to consolidate parties and/or issues in a formal design certification rulemaking hearing under 10 CFR 2.715a, although strictly speaking that section by its terms applies only to parties "in a proceeding for the issuance of a construction permit or an operating license for a production or utilization facility...." By contrast, the Licensing Board may not have authority to consolidate parties and issues in an informal hearing absent Commission action, since neither Subpart H of Part 2, which governs the conduct of the informal hearing (see Section 52.52(a)), nor Section 52.51 contain any provisions for consolidation of parties and/or issues.

With respect to the participation of a party on issues which it did not controvert, OGC recognizes that there is balancing to perform: the possibility that parties other than the proponent of an issue may offer useful information or insights as the issues become more sharply focused, versus the potential for repetitious presentations and increased complexity associated with multiple participants addressing a single issue. On balance, OGC continues to recommend that parties should not be permitted to participate as parties on issues which they did not controvert. However, the Licensing Board should have the discretion to permit such parties to act as "amicus." Parties acting as "amicus" would have the opportunity to submit information and arguments on issues which they do not controvert to the Licensing Board, but would not have the right to either make oral presentations or submit oral questions to the Licensing Board on such issues.

Status of Applicant

Subpart B of Part 52 does not address the rights and responsibilities of a design certification applicant in a design certification rulemaking hearing. While Section 52.51(b) indicates that the Staff will be a "party" in a design certification hearing (see discussion below on "Party Status of NRC Staff"), that section does not refer to the applicant as a "party," nor does it describe the rights and responsibilities of the applicant in either an informal or formal hearing.

The NUMARC Rule reflected industry's view that a design certification applicant is a party in an informal[33] and formal hearing, with the right to respond to requests (e.g., a request for formal hearing) and presentations by commenting parties. NUMARC Rule, pp. 16-25. It also accorded the applicant a right to respond to requests for informal hearings[34]. However, the NUMARC Rule did not provide a basis for the industry's position on the party status of the applicant. OCRE did not specifically

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[33]Although the NUMARC Rule states that the applicant and Staff are parties in the informal hearing, NUMARC Rule, p.16, it is silent on the party status of the applicant and Staff in an formal hearing, id. at 23-24. However, the inherent nature of a formal hearing presumes that the applicant and Staff would be parties to such a hearing.

[34]Strictly speaking, prior to the grant of a hearing request, there is no hearing for either the applicant or the Staff to be a "party" to. One could therefore argue that according party status to the applicant and the Staff in a **hearing** would not per se entitle the applicant and the Staff to respond to initial requests for informal hearing, additional hearing procedures, or formal hearings.

address this issue in its March 1992 comments. OGC preliminarily recommended that the applicant should be considered a party in the informal rulemaking with a right to respond to motions, requests and presentations of commenting parties, because the applicant has the most "concrete interest in the design certification rulemaking...." SECY 92-170, pp. 29-30.

At the public workshop, counsel to the Senate Subcommittee on Nuclear Regulation suggested that OGC's analysis of the rights and interests of the design certification applicant (as well as the Staff) was inconsistent with OGC's analysis of the status of commenting parties. See remarks of Dan Berkovitz, Tr. 196-199. The Administrative Conference representative agreed with Mr. Berkovitz's comments, and added that by treating the design certification applicant as an applicant for a license, OGC is blurring the distinction between rulemaking and licensing under the APA. Remarks of William Olmstead, Tr. 203. Confusion over the status of the Staff and applicant was also expressed by the representatives from the State of New York and the State of Illinois, who suggested that an inequality between commenting parties, and the applicant and Staff, was reflected in OGC's preliminary recommendations on rebuttal and the ability of parties to participate on issues which they did not raise. See remarks of James Brew, Tr. 167-169; remarks of Stephen England, Tr. 171-172. However, the State of Illinois' written comments support OGC's preliminary recommendation. State of Illinois Comments, p. 4. OCRE agreed with the representatives from the State of Illinois and the State of New York. Remarks of Susan Hiatt, Tr. 172. The industry representatives at the public workshop supported the OGC preliminary recommendation, arguing that the applicant is in a fundamentally different position as compared to the commenting public, since the applicant is both the proponent of the design certification and has the greatest economic interest in certification. Remarks of Marcus Rowden, Tr. 199-200; c.f. remarks of Robert Bishop, Tr. 203-204. The industry's written comments, in attempting to explain the status of the applicant, point out that the applicant is the proponent of the design and bears the burden of demonstrating the adequacy of the design throughout the Staff's safety review leading to the FDA. The comments also note that the applicant's Final Safety Analysis Report (FSAR) is part of the bases for the design certification rule. NUMARC Comments, p. 41.

OGC continues to believe that the applicant, as proponent of the design certification rule (see, e.g., Section 52.45) in a fundamentally different position in a design certification rulemaking as compared with a commenting party. The applicant is responsible for preparing the design certification, and for assuring that the design has been developed in conformance with the Commission's requirements. It is also the applicant who initiates the rulemaking proceeding, who responds to and addresses Staff and Commission safety questions with respect to

the design, and who has invested the resources necessary to develop and obtain approval for the certified design. Establishing rulemaking procedures which reflect the distinction in interests of the applicant versus the commenting public does not, in OGC's view, convert an informal APA notice-and-comment rulemaking into an adjudicatory licensing proceeding. The commenting party who participates in an informal hearing is enjoying an opportunity which is not required to be provided by law. The Commission's decision to provide additional procedural rights-the opportunity for informal hearing, additional hearing procedures, or a formal hearing on limited factual issues-cannot reasonably form the basis for transforming an otherwise informal rulemaking into an on-the-record rulemaking proceeding. In OGC's view, such an approach would run counter to the spirit of the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519 (1978), which held that the agency should be free to use whatever administrative procedures to satisfy the agency's statutory responsibilities. OGC also rejects the suggestion that by providing a hearing and according the applicant (and the Staff) certain rights of response, the NRC has effectively converted the design certification rule into a license[35]. Failure to provide an opportunity for applicant response also poses the risks of an incomplete record being developed on controverted issues, and the submission of Licensing Board recommendations which are incorrect. Finally, as discussed in below in Section IV.F: "Informal Hearings: Opportunity for Response/Rebuttal," failing to provide an opportunity for an applicant to respond to evidentiary presentations elevates form over substance, since it is inconceivable that the Commission would not require an applicant to address in filings submitted to the Commission those safety issues which were raised in an informal hearing but for which the applicant was precluded from providing responsive evidence.

The case for allowing an applicant to respond to requests for informal hearing (and initial requests for additional hearing procedures or formal hearing, see Section IV.G, "Additional Hearing Procedures and Formal Hearings: Basis and Timing of Request," recommending an opportunity for the public to request additional hearing procedures or formal hearings concurrent to the written comment/informal hearing request period) is perhaps less compelling, since the risk of an erroneous decision on this matter does not include an incomplete record and erroneous Licensing board recommendations, but is limited to holding an otherwise unnecessary hearing. However, OGC notes that one of

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[35]One distinction between a design certification rule and a license is that the rule has no "holder," whereas a license is issued to, and is held by, a specified person or entity. Another distinction is that a design certification, by itself, does not authorize any action which requires a "license" under the AEA.

the Commission goals when it adopted 10 CFR Part 52 was to provide a stable and predictable regulatory environment for approval of future nuclear power plant designs. Holding an otherwise unnecessary hearing on issues which can be resolved without a hearing seems to be inconsistent with those Commission goals.

In sum, for the reasons set forth above, OGC continues to recommend that a design certification applicant be deemed to be a party in any informal hearing. In addition, OGC continues to recommend that the applicant enjoy an opportunity to respond to requests for an informal hearing, as well as initial requests for additional hearing procedures or a formal hearing.

Party Status of NRC Staff

Section 52.51(b) does not make clear whether the Staff is a "party" in an design certification rulemaking hearing:

> The Board may also request authority from the Commission to use additional procedures [in the informal hearing], such as direct and cross examination by the parties, or may request that the Commission convene a formal hearing under Subpart G of 10 CFR Part 2 on specific and substantial disputes of fact, necessary for the commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing. The staff will be a party in the hearing (emphasis added).

In particular, the last sentence is unclear whether "the hearing" in which the Staff is a party is: (a) the formal hearing (which is the last subject of the immediately preceding sentence), or (b) both the formal and informal hearing (which is the subject of all preceding sentences in Section 52.51(b)).

The NUMARC Rule treated the Staff as a party in both informal and formal hearings, with full right of response to motions, requests and written and oral presentations submitted by commenting parties, as well as the right to respond to requests for hearings. OCRE did not address the party status of the Staff in its March 1992 Comments. In SECY 92-170, OGC recommended preliminarily that the Staff should be considered a party in all hearings, and in addition should enjoy the opportunity to respond to requests for hearings. SECY 92-170, pp. 30-31.

The discussion at the public workshop criticizing OGC's preliminary recommendations on the status of the applicant was also directed at OGC's recommendation on the status of the Staff

(see discussion above in Section IV.E, "Conduct of Hearing: Status of Applicant"). In its written comments, NUMARC supported OGC's preliminary recommendations, as did the State of Illinois. NUMARC Comments, p. 42; State of Illinois Comments, p. 4. Although OCRE agreed that the Staff should be a party, OCRE pointed out that the procedures must be developed such that the perception of the Staff as "aligned" with the applicant-as opposed to being independent-is avoided. Remarks of Susan Hiatt, Tr. 224.

OGC continues to recommend that the Staff be deemed to be a party in informal as well as formal hearings, with an opportunity to present evidence and respond to motions, requests, and presentations of commenting parties and the applicant. OGC also continues to recommend that the Staff should have the opportunity to respond to requests for informal hearings and initial requests for additional hearing procedures or formal hearings (see Section IV.G, "Additional Hearing Procedures: Basis and Timing of Request"). Similar to the applicant, the Staff stands in a fundamentally different position in the rulemaking process as compared with the commenting parties. In ordinary rulemakings, the Staff advises the Commission with respect to the technical and policy matters raised by the rulemaking, and prepares the draft and final rule and supporting documents in accordance with the Commission's directions. Under Part 52 and Appendix O, the Staff is specifically accorded the responsibility for the safety evaluation of the FDA/design certification application. Thus, the Staff's SER for the FDA/design certification will be the primary basis for the Commission's evaluation and resolution of issues raised by the participants-that is reflected in the Appendix O requirement for availability of the Staff's SER on the FDA/design certification. Moreover, even under the narrowest reading of the last sentence of 52.21(b), the Staff is a party in any formal hearing. There is no basis for distinguishing the role of the Staff in an informal hearing as compared with a formal hearing. Finally, as discussed below in Section IV.F: "Informal Hearing: Opportunity for Response/Rebuttal," failure to provide an opportunity for Staff response/rebuttal will only complicate and lengthen the overall rulemaking proceeding, since it is inconceivable that the Commission would not request Staff responses to issues raised in a hearing but which the Staff was precluded from responding.

An opportunity to respond to requests for informal hearings should also be provided to the Staff, in order to assure that the Commission has the full benefit of the Staff's views as to whether a hearing is necessary.

OGC therefore recommends that the Staff be deemed to be a party in both informal and formal hearings with an opportunity to respond to commenting parties' motions, requests and presentations, and that the Staff be afforded the opportunity to

respond to requests for informal hearings and initial requests for additional procedures or formal hearings.

Separation of Functions and Ex Parte Communication Limits

The unique nature of design certification rulemaking under Part 52, whereby an opportunity for hearing is provided in addition to the opportunity to submit written public comments, raises concerns about separation of functions between the Commission and the Staff. Separation of functions is intended to assure that there is an impartial decisionmaker in agency proceedings. The APA's requirements on separation of function apply only to adjudications or rulemakings required by statute to be determined on the record after opportunity for agency hearing. See 5 USC §§ 556, 553(c), 554(a). NRC rulemakings under the AEA are not required to be made on the record after opportunity for public hearing. See Siegel v. AEC, 400 F.2d 778, 785-86 (D.C. Cir. 1968). Therefore, the APA's separation of functions requirements do not apply to Part 52 design certification rulemakings.

The Commission's requirements on separation of functions, which are set forth in 10 CFR §2.781[36], also apply only to formal

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[36] Section 2.781 states:

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicative employee about the initial or final decision on any disputed issue in that proceeding, except-

(1) As witness or counsel in the proceeding;

(2) Through a written communication served on all parties and made on the record of the proceeding; or

(3) Through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to-

(continued...)

hearings under Subpart G of 10 CFR Part 2. Parties in design certification hearings could request that the separation of functions requirements be applicable pursuant to a request for additional hearing procedures under Section 52.51(b). Therefore, the issue confronting the Commission is whether it wishes to apply any or all of the separation of functions procedures in Section 2.781 in design certification rulemakings where the Commission has determined that hearings should be held[37].

If separation of functions does not apply, the Commission will be able to call upon the Staff who reviewed the design certification application and who participated in any certification hearing to advise and assist it in preparing the final design certification rule and supporting documents through the existing agency

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[36](...continued)

(1) Communications to or from any Commission adjudicatory employee regarding-

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(iv) generic issues involving public health and safety or other statutory responsibilities of the agency...not associated with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of General Counsel, and the Secretary and employees of the Office of the Secretary regarding-

* * *

(iv) General regulatory, scientific, or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in a hearing.

[37]If there are no hearings, then a design certification rulemaking is like any other NRC rulemaking with an opportunity to submit written comments. Separation of functions is not required by the APA in informal rulemaking, and such requirements have not been applied by the Commission in such rulemakings. Accordingly, OGC recommends that separation of functions requirements **not** be applied in a design certification rulemaking where there is no hearing.

internal communications process, e.g., SECY papers prepared by the Staff, public Commission meetings, and private meetings between individual Commissioners and their technical and legal assistants and the Staff. The Staff individuals responsible for the review of the design certification/FDA application and who will represent the Staff in any hearing, will be the most knowledgeable persons in the agency with respect to the technical and policy issues associated with certification of the design under consideration. However, this situation could suggest an incorrect public perception of partiality by the decisionmaker for the views of a particular party.

Private Commission consultation with and reliance upon the Staff would not be allowed if the Commission chooses to apply separation of functions procedures. Separation of functions will enhance the appearance of impartiality in the design certification rulemaking. However, a separation of functions will complicate the Commission's internal process of conducting a design certification rulemaking, by precluding the Commission at the final rule stage from directly seeking confidential advice and assistance of members of the Staff and OGC who participated in the development of the rule and any design certification hearings, and those who are involved in the actual FDA and design certification reviews and have the most expertise and experience on the subject. This would have the greatest impact on the Commission's rulemaking review if the Licensing Board functions solely as a limited magistrate to compile a record and does not issue either a recommendation or an initial decision. The Commission will also have to consider the resource implications on agency missions as a result of segregating a sufficient number of Staff experts knowledgeable in the areas of likely controversy and OGC attorneys from the FDA and certification review and the hearing process, in order to assist the Commission in a design certification rulemaking. From a practical standpoint, if separation of functions is possible, the Commission would have to act early on in the rulemaking process to select knowledgeable Staff experts and OGC attorneys and to separate them from the ongoing FDA and design certification reviews, so that they can assist the Commission in preparation of a final design certification rule.

A third alternative, intermediate between the two positions outlined above, is to allow the Commission to request the views of the Staff in SECY papers which are made available to the public. The Commission could hold open meetings with the Staff to discuss issues raised in the papers and obtain the assistance of the Staff in preparing the final rulemaking documents. Meetings between the Staff and individual Commissioners and their technical and legal staff would be public and noticed. This alternative provides for public openness, while still allowing Commission access to the most knowledgeable members of the Staff. However, OGC also emphasizes that this alternative would

represent a modification of the practice which has been followed during the precertification reviews of the evolutionary designs, in which the Commission has received SECY papers from the Staff, and held both public meetings, as well as internal meetings between individual Commissioners and their technical and legal staff and the Staff

The NUMARC rule did not explicitly provide for any separation of functions, and OCRE's March 1992 Comments did not suggest that the Commission should follow separation of function principles. However, OGC's concern that the public perceive the design certification rulemaking as an impartial process led OGC to preliminarily recommend that the third alternative be adopted by the Commission. SECY 92-170, pp. 31-34.

A related though separate issue is the application of ex parte limitations - restrictions on decisionmakers' (e.g., the Commissioners and their staff) ability to receive, off the record, information on the design certification from interested outside persons such as the applicant or interested groups (e.g., NUMARC or UCS)[38]. Like separation of functions, ex parte restrictions do not apply to the certification rulemaking unless the Commission decides to do so; the Commission could choose to apply ex parte restrictions but not separation of functions. As with the separation of functions, the underlying consideration for the application of ex parte limitations is the public perception of the impartiality of the design certification rulemaking process.[39]

Neither the NUMARC Rule nor OCRE's March 1992 Comments suggested that ex parte limitations should be applied. However, because of OGC's assessment that application of ex parte rules would enhance public perceptions of an impartial certification process with no impacts on the agency's internal processes, OGC recommended preliminarily that the Commission apply ex parte restrictions in design certification rulemaking proceedings. SECY 92-170, p. 34.

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[38]Ex parte limitations differ from separation of function limitations in that the former apply to communications between the agency decisionmaker and any interested party, whereas the latter apply to internal agency communications between the decisionmaker and the remainder of the agency.

[39]In the GESMO procedure, it was unclear whether the Commission chose to apply either separation of functions or ex parte limitations. However, the Licensing Board chose to apply ex parte limits to prevent all participants from communicating with the Licensing Board with respect to the substantive merits of the hearing. 41 FR 34123, 34124 (August 12, 1976).

At the public workshop, OCRE supported OGC's preliminary recommendations on both separation of functions and ex parte limitations. Remarks of Susan Hiatt, Tr. 219. In a subsequent letter responding to NUMARC's Comments, OCRE continues to support application of separation of function and ex parte limitations. OCRE September 1992 Letter, p. 3. The State of New York representative, emphasizing the importance of public perception, supported the OGC preliminary recommendations. Remarks of James Brew, Tr. 223. The State of Illinois representative also supported OGC recommendations, and indicated that an open process will likely lead to a better work product from the Staff, a position which is reiterated in the State's written comments. Remarks of Stephen England, Tr. 224-225; State of Illinois Comments, p. 4. The Administrative Conference indicated at the public workshop that separation of functions is not legally required by the APA in rulemaking, but the issue is whether ex parte limits should be applied. Remarks of William Olmstead, Tr. 214. In the Administrative Conference's view, limits on oral ex parte communications are unenforceable, presumably because there are virtually no effective means of monitoring such communications. Id. As for written communications, the Administrative Conference merely noted that the NRC has a good history of placing all written communications between the public and the agency in the public docket, thereby avoiding ex parte concerns. Id. at 215. The industry representatives at the workshop supported OGC's preliminary recommendations on ex parte limits, a position that the industry continues to hold in the written comments. See remarks of Marcus Rowden, Tr. 215; NUMARC Comments, pp. 43-44. However, NUMARC's written comments recommend that the Commission apply ex parte limits only after a hearing is granted, and then only to controverted matters. Id. With respect to separation of functions, the industry does not support the application of such limits even when a hearing is held. In the industry's view, separation of functions, by limiting the Commission's "unfettered communication" with the Staff that is most knowledgeable about the design certification, will unduly handicap the Commission. Remarks of Marcus Rowden, Tr. 215-218, 220, 225-226; remarks of Robert Bishop, Tr. 224-225. Winston and Strawn's written comments indicate that they support OGC's recommendations on both separation of functions and ex parte limitations. However, Winston and Strawn urge that oral communications between parties and the Commission be permitted, with only a "brief notation of the time, place and subject discussed," in order to permit the Commission to "pursue nonpublic accommodations between the parties." Winston and Strawn Comments, pp. 8-10.

With respect to separation of functions, OGC continues to recommend that the Commission adopt the third alternative of requiring all communications between the Commission and the Staff to be public if a hearing is granted by the Commission. The industry's concerns that separation of functions will prevent or

inhibit effective communication between the Staff and Commission are not realistic, in OGC's view. Separation of functions does not prevent such communications, or control the nature of the information being transmitted. Rather, it simply requires that such communications be open.

OGC also continues to recommend that ex parte limitations be followed throughout the rulemaking proceeding (i.e., from the issuance of the NPR) regardless of whether a hearing request has been granted. Requiring all communications between the agency and outsiders throughout the rulemaking proceeding should not significantly affect the Commission's ability to obtain advice from the public. OGC also disagrees with the industry's suggestion that ex parte limitations should only be applied to controverted matters in a hearing. It may be difficult to distinguish between matters relating to the merits of a controverted issue, versus matters which are outside the scope of the issues in a hearing. Moreover, the industry has not identified any negative impacts from applying ex parte limitations to all rulemaking matters.

Location of Hearings

There are no requirements concerning the location of informal or formal design certification hearings in either Part 52 or Part 2[40]. In Part 50 licensing proceedings, hearings are generally conducted near the site of the facility to be licensed. This practice probably stems from the fact that an interested person with standing to intervene in a licensing proceeding generally lives or engages in activities close to the facility, cf. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973), Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-73-10, 6 AEC 173 (1973), Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

By contrast, the interests of persons affected by a design certification rulemaking are not defined geographically. The

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[40]10 CFR Part 2, Appendix A, which provides general guidance on the conduct of hearings for licensing hearings required by Section 189 of the AEA, indicates in Paragraph I.(b) that in setting the location of hearings:

> due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as that of the board members, the nature of the conference or adjourned session, and the public interest.

matters to be addressed in a design certification rulemaking are generic technical matters with respect to a particular design, and are not tied to any particular location or group of locations. Under such circumstances, it is appropriate to consider the convenience of participants in the hearing when determining the location of the hearing, cf. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530-31 (1979). Most of the potential participants in a design certification hearing are industry, environmental and public interest organizations with representatives in the Washington DC metropolitan area. Individual utilities will likely retain attorneys in Washington DC who traditionally represent utility clients in interactions with the NRC. In addition, where hearings have been held in other NRC rulemakings, those hearings have been held in the Washington DC metropolitan area. See, e.g., 36 FR 22774 (November 30, 1971) (ECCS rulemaking hearing conducted in Germantown, MD), 41 FR 34123 (August 12, 1976) and Order Convening Hearing (November 1, 1976) (GESMO rulemaking hearing conducted in Washington DC).

However, there may be circumstances where it would be difficult or impossible for a hearing requestor to travel to the Washington DC area to participate in a hearing (e.g., financial limitations, physical infirmity). There may also be situations where a large number of people in one area may wish to participate on one issue. Scheduling of a hearing session in a location accessible to the hearing requestor(s) on issues raised only by the requestor(s) probably would not place a great burden on the NRC, whereas to a failure to accommodate such a request would contribute to a perception that the rulemaking process excludes the public.

Neither the industry nor OCRE originally expressed any views on this subject. OGC preliminarily recommended that the NPR for a design certification rulemaking indicate that design certification hearings be held in the Washington DC metropolitan area, but that requests for hearing sessions in other locations should be considered by the Commission, based upon a statement of need submitted by the requestor or on the Commission's own judgment. SECY 92-170, pp.35-36.

This matter was not specifically discussed at the public workshop. The industry's written comments supports the OGC preliminary recommendation, as does the State of Illinois Department of Nuclear Safety's comments. NUMARC Comments, p.47; State of Illinois Comments, p. 4. No other written comments were received on this issue.

In the absence of new information or arguments to the contrary, OGC continues to recommend that design certification hearings be held in the Washington DC metropolitan area, but that requests

for hearing sessions in other locations should be considered by the Commission upon a demonstration of special circumstances by a requestor or upon the Commission's discretion.

F. INFORMAL HEARING

Threshold for Request/Standing

The first sentence of Section 52.51(b) states that a design certification rulemaking must provide for both notice and comment and "an opportunity for an informal hearing before an Atomic Safety and Licensing Board." However, Section 52.51(b) does not indicate whether all persons who request an informal hearing are entitled to one, and if not, what criteria should be utilized in deciding the hearing request.

The NUMARC Rule provided for an informal hearing to any person requesting it, so long as they met certain requirements, which include: (a) the name and interest of the person requesting the hearing, (b) the name and qualifications of the person who will be making the written presentations, (c) a description of the specific issue(s) that will be the subject(s) of the informal hearing, (d) a description of how the proposed rule or supporting bases should be changed with specific references to those areas, and (e) specific references to the documents or sources that the person intends to rely upon.[41] NUMARC Rule, pp. 16-17. In determining whether to grant the informal hearing request, the NUMARC Rule would authorize the Licensing Board to determine only whether these administrative requirements had been satisfied; the Licensing Board would not determine whether a sufficient showing had been made with respect to these elements[42]. OCRE did not support the industry proposal. With respect to the proposed requirement for a statement of "interest," OCRE asserted that the term implies the application of the judicial concept of standing. OCRE argued that this is inappropriate for a rulemaking proceeding for a design certification which could be utilized anywhere in the U.S. because any person could be affected by the design. OCRE March 1992 Comments, p. 3. OCRE also opposed the industry's proposed requirement for a statement of

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[41]In informal discussions, the industry clarified that the written presentation itself would not have to be submitted with the hearing request; only a description of the presentation is necessary.

[42]The industry indicated in informal discussions that the Licensing Board should have the authority to deny an informal hearing request if the subject matter of the requester's proposed written presentation in the informal hearing, as described in its hearing request, is clearly beyond the scope of the rulemaking.

qualifications, arguing that persons who do not possess expert credentials are nonetheless able to present documentary evidence, legal arguments and factual reasoning. Id. OCRE believed that the requirement, even if not used by the NRC as a screen to eliminate non-experts, will nonetheless have a "chilling effect" on potential hearing requestors, presumably discouraging them from requesting a hearing. Id. However, OCRE did not offer an alternative to the industry proposal.

OGC's preliminary view was that providing an informal hearing in a design certification to any person who requests one would be wasteful of agency resources and would delay the rulemaking proceeding. Hearings, even if informal and based upon written presentations, will result in some delay in schedule as well as expenditures of resources by the Staff and applicant in responding to written presentations. Resources will also be spent by the Licensing Board in the performance of its responsibilities, as well as by the Commission, which must resolve the matters and document its decision as part of the final rulemaking package. Although OCRE is correct in noting that every person in the U.S. could be affected by the design and therefore has an interest in the rulemaking, OGC points out that all persons affected have the opportunity provided by the APA and Part 52 to submit written comments. The APA does not require a hearing; the Commission has provided a hearing to afford the public an additional opportunity to present their concerns to the NRC. For these reasons, OGC recommended preliminarily that standards or criteria be adopted which would limit informal hearings to persons who can demonstrate that they will be able to participate in a meaningful manner.

OGC further suggested in SECY 92-170 that the concept of "standing," as used in 10 CFR Part 50 licensing proceedings to determine which members of the public have sufficiently discrete and real interests in the outcome of a decision such that they should be allowed to participate in a hearing, should not be used in design certification rulemaking to determine who should be granted an informal hearing. Typically, standing is found in facility licensing proceedings when there is potential "injury in fact" and the person can demonstrate that the injury is within the zone of interests protected by the AEA or the National Environmental Policy Act (NEPA)[43]. These factors do not appear

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[43]See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976), Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976). In connection with the initial licensing of a reactor, this is normally found if the person lives within close proximity to a facility, up to 50 miles away. See, e.g., Virginia Electric and Power Co. (North Anna Nuclear Power (continued...)

to be useful in assessing the interest of a potential party in the context of design certification rulemaking hearings. using a very strict test of interest or actual impact, only the design certification applicant and the NRC Staff could be parties. If, instead, a broader test of potential effect is used, then the entire public would meet the test for an informal hearing[44]. Cf. Lujan v. Defenders of Wildlife, ___ US ___, 112 S.Ct. Rept. 2130 (1992). Accordingly, OGC recommended preliminarily that persons requesting an informal hearing should be required to: (a) show that they have submitted written comments in the public comment phase of the rulemaking, (b) submit the written presentations which they wish to have included in the record of the informal hearing[45], which identifies the specific portion of the proposed rule or supporting bases which are challenged and proposed corrections, the bases for their position, and references to all sources and documents which are relied upon, and (c) demonstrate that they (or persons they intend to retain to present their position at the hearing) have the appropriate qualifications or expertise to contribute significantly to the development of the hearing record on the controverted issue.

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[43](...continued)
Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). By contrast, generalized grievances, the economic interests of a broad class of persons such as ratepayers, academic or "informational" interests, or broad public policy interests, are not sufficient to accord standing in facility licensing proceedings. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-02, ___ NRC ___ (February 6, 1992)(slip op. at 10-18), Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), Transnuclear Inc., CLI-77-24, 6 NRC 525, 531 (1977), Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183, 185 (1982).

[44]Indeed, rulemaking has been identified by one licensing board as an appropriate mechanism to address public interests of a general nature. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-21, 14 NRC 175, 178-179 (1981).

[45]If the Commission adopts the view that an informal hearing should be granted upon request, the Commission could still require filing of the proposed written presentations at the same time as the request for the informal hearing. If the hearing requests are to be regarded as virtually automatic, there is no reason why a public commenter should delay preparing and filing its written presentation until its hearing request has been granted. The commenter's position should already be known, since it has (at minimum) the entire public comment period to prepare its written comments as well as the written presentation for the hearing.

At the public workshop, OCRE agreed that a threshold should be established for obtaining a hearing. Remarks of Susan Hiatt, Tr. 119. However, OCRE expressed strong disagreement with OGC's proposed requirement that a person demonstrate appropriate qualifications or expertise to contribute significantly to the development of the record. In OCRE's judgment, OGC's proposed requirement is equivalent to an expert witness standard, and such a threshold is inappropriate. Id., Tr. 118-119. Both OCRE and the State of Illinois Dept. of Nuclear Safety representative took issue with OGC's proposed requirement for submission of a written hearing presentation, on the basis that the written presentation is duplicative of the first requirement for submission of written comments. Remarks of Susan Hiatt, Tr. 118-119; remarks of Stephen England, Tr. 123. In a subsequent letter responding to NUMARC's Comments, OCRE continues to oppose OGC's proposed threshold, arguing that OGC should revise the language to clearly indicate that an "expert witness" standard is not the requisite threshold for obtaining an informal hearing. OCRE September 1992 Letter, p. 4. Despite OGC's explanation as to the difference between the two (Tr. 124), the State continues to express its objection to submission of the written presentation, in part because it feels that the requirement is duplicative and burdensome. However, the State agrees that some threshold for requesting a hearing is appropriate. State of Illinois Comments, pp. 2-3. At the public workshop, the industry panelists generally supported OGC's recommendations. See remarks of Robert Bishop, Tr. 116-118, remarks of Marcus Rowden, Tr. 124-126. One of the industry panelists also stated his understanding that OGC's preliminary criterion that a person demonstrate the ability to contribute significantly to the hearing was not an "expert witness" standard. Remarks of Marcus Rowden, Tr. 124-125. These positions were reiterated in the industry's written comments. NUMARC Comments, pp. 49-51. The industry has also suggested that the Commission consider a mechanism, similar to 10 CFR §2.751, for interested states to participate in an informal hearing. See remarks of Robert Bishop, Tr. 117; NUMARC Comments, Executive Summary, p. 6.

After considering the comments, OGC now recommends a two-part threshold for obtaining an informal hearing: (a) the requestor must submit the written presentations to be included in the record of the informal hearing (if the commenter submits written comments in the public comment period, it will be sufficient to identify that portion of the written comments that the requestor wishes to submit in the informal hearing), and (b) the requestor must demonstrate that they (or persons they intend to represent them at the hearing) have appropriate knowledge or qualifications to enable them to contribute significantly to the development of the hearing record on the issues they seek a hearing on. Upon reflection, OGC agrees with the State of Illinois and OCRE that the proposed first criterion is largely duplicative of the second, and that it is sufficient for the public commenter to

identify which portions of its written comments it wishes to be admitted into the informal hearing record. Identification of the material which the requestor wishes to be included in the hearing record will help the Commission determine whether that person has significant information to offer which is worthy of exploration in a hearing[46]. The quality of the requester's analysis and discussion of the issue in the written presentation can be assessed by the Commission to determine whether a hearing is likely to result in significant development of the record on the issue. In addition, the quality of the arguments and analyses presented in the written presentation can also be considered by the Commission in determining whether the third criterion is satisfied, viz., whether the requester has the capability to contribute meaningfully to the development of the record. OGC continues to believe that the criterion, whether the requester has the capability to contribute to development of an adequate record on controverted issues, will help assure that hearings are not granted to persons who do not have an understanding of the issues, who are not familiar with the design, who have no understanding of hearing procedures, and who possess neither personal knowledge nor understanding (whether by education or experience) of the issues which that party wishes to address in a hearing. Since hearings involve a commitment of time and resources by the NRC, the applicant, and other commenting parties, it is important that hearings are not granted to persons who are incapable or unwilling to commit the time and resources to develop the record with respect to controverted issues. OGC emphasizes, however, that this requirement should **not** be interpreted to require that a person meet an "expert witness" standard, in order for that person to be deemed to have satisfied this criterion. OGC agrees with OCRE that informed individuals and organizations who have reviewed the materials in the docket which are relevant to their controverted issues, and have some understanding of the technical matters in controversy, should be deemed to have the capability to contribute meaningfully to the development of the record.

In sum, OGC recommends that a two-part threshold be satisfied for obtaining an informal hearing. However, the Commission should make clear in a design certification NPR that a person seeking a hearing need not satisfy a judicial "expert witness" standard in order to be deemed to have satisfied the third criterion for a hearing.

OGC agrees with the industry that interested states, as well as local counties, municipalities and agencies, should be afforded

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[46]As discussed in the paragraph above, even if the Commission decides that a hearing is not necessary, information presented in the written presentations will be considered by the Commission in developing the final rule.

an opportunity to participate in any informal hearing that may be held. Therefore, OGC recommends that the procedures established by the Commission for conducting the first design certification rulemakings include a provision similar to 10 CFR §2.715.

Denial of Hearing Request

Part 52 does not state whether the Commission, as opposed to the Licensing Board, rules on requests for an informal hearing. In Part 50 licensing proceedings, the Commission's practice has been that the Licensing Board rules on any requests for intervention[47].

NUMARC's Rule implicitly assumed that the Licensing Board would rule on requests for informal hearings. OCRE did not address this matter in their March 1992 comments. OGC's provisional position was that the Commission should decide whether a hearing should be held, and specify the controverted matters in the informal hearing. SECY 92-170, pp. 41-42.

The industry now supports OGC's preliminary recommendation that the Commission rule on informal hearing requests and specify the issues for the hearing. Remarks of Marcus Rowden, Tr. 125-126; NUMARC Comments, pp. 51, 52. The State of Illinois Department of Nuclear Safety also supports OGC's preliminary recommendation. State of Illinois comments, p. 3. OCRE, however, believes such requests should be determined by the Licensing Board because such determinations are "traditional routine case management" matters which the Commission should not get involved. Remarks of Susan Hiatt, Tr. 119.

OGC continues to recommend that the Commission rule on informal hearing requests (the Commission will also decide initial requests for additional hearing procedures and formal hearings, see Section IV.G, "Additional Hearing Procedures and Formal Hearings: Basis and Timing of Request"), and specify the controverted matters in the hearing on which the Licensing Board shall compile a record and provide any recommendations that it may wish to make. Although OGC's recommendation differs from the practice in Part 50 licensing proceedings, OGC notes that design

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[47]In an operating license proceeding under Part 50, a notice of opportunity for hearing is published in the Federal Register, but a Licensing Board is not appointed pursuant to 10 CFR 2.704 unless a request for intervention is received. By contrast, in a construction permit proceeding a mandatory hearing is required by Section 189 of the AEA, and a Licensing Board is appointed regardless of the pendency of requests for intervention.

certification is a rulemaking, and in rulemakings the Commission normally exercises plenary authority.[48]

Written and Oral Presentations and Questioning

An informal design certification hearing must include:

> the opportunity for written presentations made under oath or affirmation and for oral presentations and questioning if the Board finds them either necessary for the creation of an adequate record or the most expeditious way to resolve controversies. Ordinarily, questioning in the informal hearing will be done by members of the Board, using either the Board's questions or questions submitted to the Board by the parties.

Section 52.51(b), second and third sentences. Thus, Section 52.51 does not contemplate oral presentations or questioning unless the Licensing Board finds that it is necessary or the most expeditious way to resolve controverted issues.

The industry proposed that written presentations under oath or affirmation be filed at the same time as the informal hearing request. NUMARC Rule, pp. 16-17. Parties seeking oral presentations and questioning must file with their informal hearing request the following information: (a) the names and statement of the qualifications of the persons who would make the oral presentation, (b) the precise issues which are the subject of the oral presentation, (c) an outline of the presentation, and a statement explaining why oral presentation and/or questioning is necessary. NUMARC Rule, p. 17. Although it is somewhat unclear, it appears that the Staff and applicant would have the

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[48]However, if the Commission decides that the Licensing Board should rule on requests for informal hearings, OGC recommends that a Licensing Board denial of the informal hearing request should be immediately appealable to the Commission. In a 10 CFR Part 50 licensing proceeding, if a petition to intervene is denied in its entirety, an immediate appeal may be taken to the Commission under 10 CFR §2.714a. Decisions which do not refuse the petitioner entry into a proceeding are considered to be interlocutory and are not usually appealable until issuance of an initial decision. See 10 CFR 2.730(f); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-535, 9 NRC 377, 384 (1979). OGC believes that a similar procedure should be followed in design certification rulemakings, in order to allow the Commission an opportunity to timely rectify a mistake by the Licensing Board not to hold an informal hearing in response to a party's hearing request.

opportunity to respond to any request for oral presentations and questioning. Id., pp. 17-18. The outline of the oral presentations, and the questions would not have to be filed with the request for oral presentations, but would be filed 30 days after a Licensing Board order approving such presentations and/or questioning. Id., p. 19. The Licensing Board would have to address three criteria in ruling on requests for oral presentations and questions:

(a) The issues sought to be developed in oral presentations are material to the Commission's rulemaking decision and are within the scope of the requestor's written presentations;

(b) Supplementation of the record is necessary for the creation of an adequate record or the most expeditious way to resolve the controversies identified in the requests for oral presentations and Board questioning and these procedures will serve such purposes; and

(c) Supplementary written responses are not a more effective way to develop an adequate record or resolve the controversies identified.

Id., pp. 18-19.

OCRE did not object to the order of hearing events proposed by the industry. However, it raised strong objections to the time limits allowed for submitting oral presentations as well as generally objecting to the industry time limits as unduly compressed (see, e.g., OCRE March 1992 Comments, pp. 1-2, items 1.(a), (c and (d)). OCRE also opposed the Commission setting specific time limits, indicating that the Licensing Board should be afforded the discretion to set appropriate time periods, as in traditional licensing proceedings (id., pp. 1-2, item 1.(b)).

Although the NUMARC Rule's provisions on this matter were not inconsistent with Section 52.51(b), OGC pointed out in SECY 92-170 that it was difficult to distinguish the written comment period which is required by the APA and provided in the first sentence of Section 52.51(b), from the "informal hearing" under the second and third sentence of Section 52.51(b), if the only thing one is entitled to is the "opportunity [to submit] written submissions...." Other than the fact that the written submissions have to be provided under oath or affirmation, there is no difference between written "comments" submitted in the public comment period, versus a "written presentation" that a party would be entitled to as of right in an informal hearing. Accordingly, OGC recommended preliminarily that parties should be able to make oral presentations and submit questions for consideration by the Licensing Board without any further showing of need, and that the Licensing Board be able to question parties

at the hearing on issues in the hearing. OGC also suggested provisionally that outlines of the oral presentations and questions which the parties would like to be asked by the Licensing Board be submitted 30 days before the hearing[49]. SECY 92-170, pp. 42-43. OGC disagreed with OCRE's general observation that the time periods suggested by the industry are too short to permit the public to meet its responsibilities at each stage of the hearing. Time limits are necessary to assure that there are no unnecessary or undue delays in the conduct of the rulemaking hearing. To address OCRE's argument that establishing time limits would prevent the Licensing Board from departing from the schedule to accommodate scheduling conflicts, OGC recommended that the Licensing Board should have authority to grant extensions upon a showing of good cause[50]. SECY 92-170, p. 44.

None of the workshop panelists opposed OGC's preliminary recommendations with respect to oral presentations and the pre-filing of oral presentation outlines. Tr. 229-230. However, OCRE continued to express grave concerns about both the pace of the hearing, and the apparent lack of discretion to accommodate scheduling conflicts. Remarks of Susan Hiatt, Tr. 172-173, c.f. Tr. 60-62. OCRE's written comments also argues that the Commission's position against setting time limits in challenges to immediately-effective orders undercuts OGC's recommendation for time limits. OCRE August 1992 Comments, p. 1. The industry's written comments supported OGC's preliminary recommendations on oral presentations and prefiling of oral presentation outlines, NUMARC Comments, pp. 51, 52-53, as well as OGC's preliminary recommendations on timing and the authority of the Licensing Board to grant extensions upon a showing of good cause, id., p. 53.

OGC continues to recommend that: (a) the parties be able to make oral presentations and submit questions for consideration by the

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[49]If the Commission decided not to accept OGC's recommendation on this matter, OGC recommended provisionally that the requirements proposed by industry that must be satisfied before the Licensing Board permits oral presentations should be adopted, and that such requests be submitted to the Licensing Board within 30 days of its formation. SECY 92-170, p.44

[50]The authority of the Licensing Board to do so should be set forth explicitly in the hearing procedures established by the Commission. OGC does not recommend a process by which the Commission act on any requests for extensions of time. This is a matter which should be entrusted to the Licensing Board as a matter of routine administration of the hearing. A contrary course would immerse the Commission in the details of a hearing and possibly pose a resource drain on the Commissioners and their staff.

Licensing Board without any further showing of need, (b) that the Licensing Board be able to question parties at the hearing on issues in the hearing without a further finding, (c) outlines of the oral presentations and questions which the parties would like to be asked by the Licensing Board be submitted 30 days before the hearing, and (d) the Licensing Board have authority to grant extensions to the schedule upon a showing of good cause. OCRE's reliance upon the Commission's statement in the rulemaking on immediately-effective orders is not strictly on point, in OGC's view. In that rulemaking, the issue was whether there should be a fixed time for reaching a **final decision**, whereas the issue here is establishing time limits on completing hearing activities leading up to a final decision. In any event, by authorizing the Licensing Board to grant extensions of time, OCRE's essential objection to the specification of time limits, viz., lack of flexibility to deal with unexpected developments, is reasonably accommodated while reflecting the Commission's aspiration that design certification rulemaking be conducted in an expeditious fashion, consistent with the rights of affected persons.

Opportunity for Response/Rebuttal

Section 52.51 does not explicitly grant the applicant or the Staff the right to respond to written or oral material submitted by a commenting party in an informal hearing. Nor does Section 52.51 provide the commenting party with an opportunity to rebut the applicant's or Staff's responses.

The NUMARC Rule provided both the applicant and the Staff the right to respond to comments, but did not provide an opportunity for rebuttal by the party. See NUMARC Rule at pp. 17-18. OCRE did not specifically address this matter in their comments on the NUMARC Rule. In SECY 92-170, OGC expressed its preliminary recommendation that both the applicant and the Staff should be afforded an opportunity to respond to written and oral presentations of commenting parties, but that commenting parties should not have such an opportunity. OGC indicated that common sense suggests that rebuttal opportunities should be provided to both the applicant, who is proponent of the design certification, and the Staff, to whom the Commission has delegated the authority to review the design certification application. SECY 92-170, pp. 44-45. OGC proposed two alternatives for providing rebuttal. The first alternative was to allow the commenting party to file its written presentation on that issue as part of its hearing request (see "Informal Hearing: Threshold for Request/Standing," above). If the hearing request is granted, the applicant and Staff would file written responses. As part of the oral phase of the hearing, the applicant and Staff would be permitted an opportunity to respond orally to the oral presentations or answers to questions posed by the Licensing Board. No further opportunity would be provided for rebuttal by any party (unless

pursuant to a request to use additional hearing procedures or for a formal hearing). Alternatively, OGC proposed that the Commission allow for oral responses by all parties during the oral phase of the hearing, as well as written responses by all parties after the oral phase of the hearing. Because OGC felt that the second approach would not result in the expeditious conduct of the hearing, OGC recommended that the first alternative be adopted. Id.

As discussed above in Section IV.E, "Conduct of Hearing: Status of Applicant," it was suggested at the public workshop that the design certification applicant, the NRC Staff, and commenting parties were treated differently by OGC in SECY 92-170. See remarks of Dan Berkovitz, Tr. 196-199, remarks of William Olmstead, Tr. 203. The industry, however, supported the OGC preliminary recommendation, noting that the applicant is in a fundamentally different position as compared to the commenting public, since the applicant is both the proponent of the design certification and has the greatest economic interest in certification. Remarks of Marcus Rowden, Tr. 199-200; c.f. remarks of Robert Bishop, Tr. 203-204. The industry's written comments further argued that the applicant should have the right of last rebuttal. NUMARC Comments, p. 41.

As discussed in greater detail in Sections IV.E.,"Conduct of Hearings: Status of Applicant" and "Status of NRC Staff," OGC continues to believe that the applicant and the Staff have a fundamentally different status in a design certification rulemaking as compared to the commenting public. As proponent of the design and nominally responsible for demonstrating its adequacy, the applicant should be given the opportunity to respond to public allegations questioning its adequacy. By not providing the applicant an opportunity to respond to a commenting party's allegations by presenting information demonstrating the design's acceptability, the only course available to the Commission would be to deny the certification, which would almost certainly be followed by the applicant refiling the application together with the relevant information which it was prevented from submitting. OGC does not believe that the APA demands such a mechanistic and barren reading of informal rulemaking procedures. More importantly, OGC does not believe that the proposed approach in SECY 92-170 on rebuttal for the applicant and Staff either unfairly disadvantages commenting parties, or provides an undue advantage to the applicant or the Staff. If a party believes that the record has not been sufficiently developed as a result of applicant and Staff rebuttal responses, that party can request the use of additional hearing procedures or a formal hearing under Section 52.51(b). For these reasons, OGC continues to recommend that the applicant and the Staff be provided the opportunity to respond to the commenting parties' written presentations providing an opportunity for the applicant and Staff to file written responses. In addition, OGC continues

to recommend that the applicant and Staff be provided with an opportunity to respond to commenting parties' oral presentations.

G. ADDITIONAL HEARING PROCEDURES AND FORMAL HEARINGS

Basis and Timing of Request

The fourth sentence of Section 52.51(b) authorizes the Licensing Board to request authority from the Commission to use specific hearing procedures drawn from Subpart G of 10 CFR Part 2, or to request that the Commission convene a formal hearing under Subpart G:

> The Board may also request authority from the Commission to use additional procedures, such as direct and cross-examination by the parties, or may request that the Commission convene a formal hearing under Subpart G of 10 CFR Part 2 on specific and substantial disputes of fact, necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing (emphasis added).

The NUMARC Rule proposed a sequential, two-stage process for handling requests for additional hearing procedures or a formal hearing. NUMARC Rule, pp. 21-22. Under this approach, the first stage would be a request for additional hearing procedures, which could be filed anytime up to the conclusion of the oral presentations and Board questioning. Such requests would be evaluated by the Licensing Board only after the conclusion of oral presentations and questioning using essentially the same three criteria which the industry proposed for assessing requests for oral presentations or questioning. If the Commission grants a Board request for additional procedures, the oral presentation phase would continue in conformance with the Commission's directions granting the Licensing Board request. Id. The second stage of the industry process would be a request for formal hearing, which could be filed at anytime up to the completion of the informal hearing. A request for formal hearing would have to: (a) identify precisely the residual factual disputes, (b) identify the remaining safety issues and why their resolution is material to a Commission decision, (c) explain why the cumulative record is insufficient to resolve the disputes and the use of additional procedures will prove insufficient to develop the record or resolve the dispute, and (d) "explain, with reference to individual Subpart G procedures", why these procedures are essential to the "resolution of the dispute with sufficient accuracy." The Licensing Board would be required to find that the party has made "a compelling showing" on each of these

criteria. NUMARC Rule at pp. 23-24. OCRE did not specifically comment on this aspect of the industry proposed rule.

In SECY 92-170, OGC agreed in part with the industry approach. OGC provisionally supported the industry's suggestion that: (a) a party seeking additional hearing procedures or a full formal hearing explain why such procedures are necessary, and (b) the Licensing Board issue a decision explaining whether the criteria have been met. SECY 92-170, pp. 45-46. OGC's view was that such requirements should help assure that Licensing Boards carefully decide whether additional procedures up to and including a full formal hearing are necessary, provide a uniform basis for the Commission to assess such requests, and assure that the Commission has an adequate record upon which to review a Licensing Board request for additional hearing procedures or a full formal hearing.

However, to avoid a lengthy hearing process, OGC recommended preliminarily that the two-stage industry process be collapsed by giving a party a unitary opportunity to demonstrate why the use of either all or selected Subpart G procedures is necessary. SECY 92-170, pp. 45-48. OGC identified three points at which such a request could be filed: (a) at the time of the request for informal hearing (i.e., the time for filing written comments), in which case the Commission rules directly on the requests, (b) some time before the commencement of the oral phase of the hearing, in which the Licensing Board would first assess whether such a request should be forwarded to the Commission for resolution, and (c) prior to the conclusion of the oral presentations and questioning, where the Licensing Board would determine whether the request should be forwarded to the Commission. To avoid increasing the complexity of the hearing process while minimizing the potential for abusive delay, OGC recommended preliminarily that the second alternative should be adopted by the Commission, but that late requests could be filed anytime up to the end of the oral phase of the hearing if a showing could be made as to why the request could not have been submitted earlier. SECY 92-170, pp. 47-48.

OGC's preliminary recommendations on the criteria for requesting the use of additional procedures or a formal hearing, and the requirement for the Licensing Board to document the basis for its decision on such a request, was not discussed at the public workshop. The only written comments received on the matters was from the industry, which supported the OGC recommendation. NUMARC Comments, p. 55-56.

On the other hand, there is disagreement over the appropriate time(s) for requesting additional procedures or a formal hearing. One commenter, Winston and Strawn, disagrees with OGC's preliminary recommendation that requests for additional procedures and requests for a formal hearing should be filed at

the same time. Although Winston and Strawn urges that the two-step approach in the NUMARC Rule be adopted, they did not provide an analysis of OGC's preliminary recommendation. Comments of Winston and Strawn, p. 8, n.9. OCRE suggests that requests be allowed to be filed with the requests for informal hearing, and at the end of the oral presentation phase of the hearing. In OCRE's view, OGC's preliminary proposal to allow requests to be filed at any time during the oral presentations would complicate and disrupt the hearing process. One opportunity at the end of the oral presentation phase, in OCRE's view, allows for consideration of the "cumulative impact of the evidence" developed during the oral hearing. Remarks of Susan Hiatt, Tr. 139-140. The industry generally supports OGC's recommendation. The industry representatives at the public workshop noted that from the standpoint of hearing efficiency, requests for additional procedures or formal hearing should be submitted during the same period that one would request an informal hearing. However, they also recognize the need to provide some opportunity for a party to ask for additional procedures or a formal hearing on the basis of "good cause" - presumably evidence developed during the oral hearing. Remarks of Marc Rowden, Tr. 138-39, 140-141; NUMARC Comments, p. 55-56. The industry also suggests that the Commission consider setting parallel proceedings (i.e., convening a second Licensing Board panel to conduct separate hearings) if additional procedures or a formal hearing is granted by the Commission. Id., p. 56. In a letter responding to NUMARC's Comments, OCRE opposes the use of parallel proceedings, because such procedures would impose a significant burden on small, non-profit public interest groups. OCRE September 1992 Letter, pp. 4-5. The State of Illinois supported without further comment the Staff's preliminary recommendation. State of Illinois Comments, p. 3.

Despite the comments of Winston and Strawn, OGC continues to recommend against a serial process for requesting additional hearing procedures and a formal hearing. Such an extension of the hearing schedule is unaccompanied with any compensating benefits. Furthermore, in the absence of any contrary arguments, OGC continues to recommend adoption of the criteria for requesting additional procedures or formal hearing proposed in SECY 92-170, and the requirement for Licensing Board memorialization of the basis for its decision on such requests.

The more difficult issue to resolve is the timing of the requests. All of the panel participant recognized that there are competing concerns in determining where requests for additional procedures or a formal hearing should be timely filed. OGC believes that some opportunity must be given for the parties to request additional procedures or formal hearing based upon evidence developed during the hearing. However, safeguards must be adopted to prevent abuse from those who may seek to file late requests for additional procedures or a formal hearing solely for

the purpose of delaying the proceeding. OGC also agrees with OCRE that to permit filing of requests throughout the oral presentation phase of the hearing can result in disruption. Based upon experience in Part 50 licensing hearing, OGC believes that the hearing procedure which has historically resulted in lengthening the hearing process is discovery. A request for discovery at the end of the oral presentation phase would likely result in considerable disruption and lengthening of the hearing process in design certification, in the same manner that late-filed discovery requests have caused delays in Part 50 licensing hearing. After reconsidering the matter in light of the panel discussion and the written comments, OGC now recommends that parties should file their requests for additional procedures or a formal hearing at the conclusion of the oral phase of the hearing, **with the exception of requests for discovery.** Discovery requests would be filed with the Licensing Board within 15 days of the Commission's grant of the informal hearing request, and must explain why the information currently available to the party is insufficient. Requests for additional procedures or a formal hearing at the end of the oral hearing would be filed with the Licensing Board, and must explain why the requested procedures or formal hearing are needed, and specify the information submitted in the written presentations or developed in the oral hearings which shows that additional procedures or a formal hearing are necessary to assure a sufficient record on a controverted issue. In either case, requests which the Licensing Board determines are meritorious would be referred to the Commission for action. OGC recommends that the rulemaking procedures require the Licensing Board to specify the basis for the Licensing Board's recommendation that discovery should be authorized.

With respect to the industry's suggestion for parallel proceedings, OGC believes that such a procedure may offer some benefits under certain circumstances. The Commission will be able to consider whether parallel proceedings are appropriate at the time that it grants any request for additional procedures or a formal hearing.

Sua Sponte Authority of Licensing Board to Utilize Additional Hearing Procedures or Conduct Full Formal Hearing

Section 52.51(b) is unclear whether, in the absence of a request for additional hearing procedures or a formal hearing from one of the parties, the Licensing Board may sua sponte request such authority from the Commission.

Sua sponte authority to request additional procedures or a formal hearing was not addressed by the industry in the NUMARC Rule or by OCRE in its March 1992 Comments. OGC preliminarily recommended that in the absence of a request for additional procedures or a formal hearing, the Licensing Board should not

sua sponte request the Commission for such authority. SECY 92-170, p. 48.

This matter was also not discussed at the public workshop. Neither OCRE nor the NUMARC submitted written comments which address this issue. However, comments filed by Winston and Strawn indicated that the Licensing Board, even when acting as a "Limited Magistrate," is responsible for assuring the creation of an adequate record. Accordingly, Winston and Strawn argued that there should be "a mechanism available by which the ASLB can fulfill it's (sic) legal obligation specified in § 52.51(b) and further develop the record." Winston and Strawn Comments, p. 8. However, specific mechanisms or procedures were not set forth in Winston and Strawn's comments.

OGC continues to recommend that the Licensing Board not be provided with sua sponte authority to request additional hearing procedures or a full hearing. If none of the parties feels that it needs to utilize additional procedures up to a full formal hearing, then there is no reason for the Licensing Board to request that the parties be permitted to use additional procedures. OGC's recommendation in this regard should not affect the Licensing Board's capability to develop a full record on either controverted or Commission-approved sua sponte issues, since the Licensing Board will continue to have the authority to ask oral questions at the hearing or direct the filing of additional information on such issues. These mechanisms should be sufficient for the Licensing Board to assure the development of an adequate record.

H. POST-HEARING MATTERS

Findings of Fact and Conclusions

Section 52.51 does not provide for filing of findings of fact and summary conclusions following the conclusion of the oral phase of an informal hearing. If such findings and conclusions are permitted, the Commission must determine: (a) whether the findings and conclusion should be filed either with the Licensing Board or directly with the Commission, (b) the timing of the parties' filings, and (c) whether failure to file findings and conclusions should result in "dismissal" of that issue, analogous to the rule in licensing proceedings under 10 CFR 2.754(b).

The industry rule provided that parties other than the applicant and Staff file such findings with the Licensing Board within 20 days after the conclusion of the oral presentation phase. The applicant would have an opportunity to file its findings 20 days later and the Staff 10 days thereafter. The Licensing Board would then transmit the record of the informal hearing to the Commission within 5 days of the Staff's filing. NUMARC Rule, pp.

22-23. The industry rule did not clearly state whether a party's failure to file findings on an issue would result in "dismissal" of that issue from the rulemaking. OCRE's March 1992 comments did not specifically respond to the industry proposal, but did argue that the time periods in the industry rule were unreasonably short and inflexible. See OCRE March 1992 Comments, p. 1-2.

OGC's preliminary recommendation was that the parties file their findings directly with the Commission 30 days after the close of the hearing. OGC also recommended preliminarily that the Licensing Board, acting as a "limited magistrate," should certify the record to the Commission 5 days after receiving the last rebuttal filing. Finally, OGC indicated that "dismissal" of an issue from the hearing because the party propounding that issue failed to file findings of fact probably is not practical. Issues in informal hearings are based upon issues raised in written comments, which the Commission must address as part of the rulemaking. Thus, failure to file findings would affect the scope of issues in the rulemaking. SECY 92-170, pp. 48-49.

The industry supported OGC's preliminary recommendation, but also suggested that the party's submissions should include a recommended final rule and statement of considerations for the rule, with specific citations to the "rulemaking" (presumably hearing) record. NUMARC Comments, pp. 56-57. The industry did not address the question of failure to file findings, however. No other comments were filed on this matter.

Some adjustment of OGC's preliminary recommendation on the timing of filing of findings is necessary, in order to accommodate OGC's final recommendation that the Licensing Board act as a modified "Full Magistrate." OGC considered an approach whereby findings are filed 30 days after the record is closed with the Licensing Board, who would then have 30 days to consider the findings before certifying the record, the parties' findings, and any recommendations to the Commission. However, this approach was rejected because the serial nature of the process would lengthen the proceeding without offering any compensating benefits. Since one of the values the "Full Magistrate" approach is to provide the Commission with an independent assessment of the hearing record, OGC believes it is unnecessary for the Licensing Board to obtain the proposed findings of the parties before developing its independent recommendations. For this reason, OGC's final recommendation is that all parties file findings directly with the Commission 30 days after the Licensing Board closes the record. OGC also recommends that the Licensing Board have 30 days after the record is closed to certify the record to the Commission along with any recommendations it may wish to make (see Section IV.C above).

OGC also agrees with industry's suggestion on the form of findings. OGC therefore recommends that the Commission require each commenting party's findings to be in the form of a proposed final rule and SOC with respect to that party's controverted issues. The SOC should provide specific citations to the hearing record. The design certification applicant should be required to file a proposed final rule and SOC which address hearing issues as well as issues raised in written comments.

OGC continues to recommend that failure to file findings on a controverted issue should not result in "dismissal" of that issue from the rulemaking.

Reliance on Extra-Hearing Information in Final Rule

Section 553 of the APA does not require that an agency's final rulemaking decision be limited to materials in the rulemaking docket, except where a statute requires the rulemaking to be based "on the record." The AEA contains no requirement that Commission rulemakings be "on the record," and the Commission almost certainly did not intend, by providing an opportunity for either an informal hearing or a formal Subpart G hearing, to convert design certification rulemakings from an APA Section 553 informal rulemaking into an APA Section 554 "on the record" adjudicatory rulemaking. However, the first sentence of Section 52.51(c) states:

> The decision in such a hearing will be based only on information on which all parties have had an opportunity to comment, either in response to a notice of proposed rulemaking or in the informal hearing.

In SECY 92-170, OGC set forth its preliminary view that this language in Section 52.51(c) should be interpreted to require that a final design certification rule be based only upon information in the design certification rulemaking docket.

NUMARC's written comments support the OGC preliminary recommendation. NUMARC Comments, p. 57. No other comments were received on this matter. OGC continues to recommend that a final design certification rule be based only upon information in the design certification rulemaking docket.

Judicial Review and Exhaustion of Administrative Remedies

In seeking judicial review before the U.S. Court of Appeals of a final design certification rule, a person must demonstrate that all administrative remedies before the Commission have been exhausted, e.g., the person utilized all administrative

opportunities provided by the Commission's rulemaking process. The bifurcated nature of a design certification rulemaking - in which a written comment period and an opportunity for hearing are provided - poses the question, should the Commission take the position in any litigation challenging a design certification rule that a person who only submitted written comments and did not seek a hearing is barred from seeking judicial review because that person has failed to exhaust the available administrative remedies? Requiring a person to request either an informal or formal hearing in order to be deemed to have exhausted administrative remedies in order to appeal could serve to diminish the number of appeals. However, even with the threshold proposed by OGC for requesting an informal hearing (see Section IV.F, "Informal Hearing: Threshold for Request"), it would not be difficult to request an informal hearing. The practical effect could be a large number of requests for informal hearings submitted by persons who have no real interest in hearings but who are forced to do so in order to preserve their right of appeal. On the other hand, requiring that some form of hearing be requested makes it more likely that the Staff will have addressed the petitioner's specific concerns in a thorough fashion.

This issue was not addressed in either the NUMARC Rule or by OCRE in its March 1992 Comments. OGC's preliminary recommendation in SECY 92-170 was that the Commission take the position that persons should be required to have requested an informal hearing, and if granted, participated fully in the hearing process, in order for those persons to have been deemed to have exhausted their administrative remedies for purposes of review by the courts. SECY 92-170, p. 50.

At the workshop and in written comments, the industry simply indicated that the question of exhaustion would be judicially determined. See Remarks of Marcus Rowden, Tr. 128-130; NUMARC Comments, p. 58. However, OCRE strongly argued that OGC's preliminary recommendation on exhaustion is neither fair to the public nor in the interests of minimizing unnecessary hearings. Remarks of Susan Hiatt, Tr. 128. With respect to fairness, OCRE expressed its view that any commenting person has standing to obtain judicial review (a proposition that the NUMARC representatives disagreed with, see remarks of Robert Bishop). OCRE also asserted that OGC's preliminary recommendation would force commenters to request unnecessary hearings, simply to preserve their appeal rights.

Upon further consideration of the panelists' comments at the workshop and the written comments, OGC agrees that its preliminary position would likely encourage commenters to request hearings for the sole purpose of protecting their appeal rights. OGC has also considered the possibility that its preliminary position on exhaustion could be erroneously viewed by a reviewing

court as evidence that the Commission intended design certification to be an "on-the-record adjudication." See, e.g., remarks of William Olmstead, Administrative Conference, Tr. 64-65, 120-122, 145, 146, 205. OGC therefore recommends that the Commission should not take the position upon appeal of a design certification rule, that appellees have not exhausted their administrative remedies because they either did not request an informal hearing, or have not participated fully in a hearing which they requested and was granted[51].

[51]This discussion applies only to substantive disputes. Clearly, a party claiming the need for additional procedures (e.g., formal hearings) should be required to ask the Commission for them.

ATTACHMENT A

§ 52.51 Administrative review of applications.

(a) A standard design certification is a rule that will be issued in accordance with the provisions of Subpart H of 10 CFR Part 2, as supplemented by the provisions of this section. The Commission shall initiate the rulemaking after an application has been filed under § 52.45 and shall specify the procedures to be used for the rulemaking.

(b) The rulemaking procedures must provide for notice and comment and an opportunity for an informal hearing before an Atomic Safety and Licensing Board. The procedures for the informal hearing must include the opportunity for written presentations made under oath or affirmation and for oral presentations and questioning if the Board finds them either necessary for the creation of an adequate record or the most expeditious way to resolve controversies. Ordinarily, the questioning in the informal hearing will be done by members of the Board, using either the Board's questions or questions submitted to the Board by the parties. The Board may also request authority from the Commission to use additional procedures, such as direct and cross examination by the parties, or may request that the Commission convene a formal hearing under Subpart G of 10 CFR Part 2 on specific and substantial disputes of fact, necessary for the Commission's decision, that cannot be resolved with sufficient accuracy except in a formal hearing. The staff will be a party in the hearing.

(c) The decision in such a hearing will be based only on information on which all parties have had an opportunity to comment, either in response to the notice of proposed rulemaking or in the informal hearing. Notwithstanding anything in 10 CFR 2.790 to the contrary, proprietary information will be protected in the same manner, and to the same extent as proprietary information submitted in connection with applications for construction permits and operating licenses under 10 CFR Part 50, provided that the design certification shall be published in Chapter I of this Title.

ATTACHMENT B

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TIMELINE FOR DESIGN CERTIFICATION RULEMAKING

TIME	0 days	----	----	
EVENT	Filing of combined FDA/design certification application.	Acceptance review by Staff, and docketing. Notice of docketing published in Federal Register.	[OPTIONAL] Early public participation mechanisms such as workshops, notice of availability of SECY papers, ANPRs, ADR.	Staff completion of draft SER. Notice of availability of draft SER for public inspection published in Federal Register.

NOTES: 1. Times for events in official rulemaking period are calculated from publication of Notice of Proposed Rulemaking (NPR) in Federal Register.

2. Major assumptions used in developing this timeline are:

   a. Times shown are receipt dates; all filings are to be served by overnight mail, electronic transmission, or hand delivery.

   b. Commission has 120 days (4 months) to issue final rule and publish final rule in Federal Register under all alternatives.

   c. There will be 4-6 relatively uncomplicated contested issues if hearings (either informal or formal) are held. If additional complex issues are presented, the timeline must be adjusted accordingly.

   d. 30 days (i.e., 30 consecutive days from the first day of the oral hearing opens until the day that the hearing record is closed) are provided for informal hearing with no additional procedures. 45 days are provided for informal hearing with additional procedures or for formal hearing.

"TIMELINE (CONTINUED)"

TIME	----	90 days between FDA and Notice of Proposed Rulemaking (minimum)	0 days (Beginning of official rulemaking proceeding)	120 days (4 months)	
EVENT	Staff completion of final SER and issuance of FDA. Notice of issuance of FDA and public availability of final SER published in Federal Register.	Public review of FDA and final SER; Staff preparation of proposed rule and notice of proposed rulemaking. Applicant acts on requests for access to proprietary information.	Notice of Proposed Rulemaking (NPR) for design certification rulemaking published in Federal Register. Written comment period and period for requesting informal hearing begins.	Written comment period and period for requesting informal hearing closes.	**No hearing request**
					Informal hearing request

"TIMELINE (CONTINUED)"

TIME		135 days	165 days		180 days
EVENT	**No hearing request**				
	Informal hearing request	Applicant and Staff responses to request filed with Commission.	Commission decision whether to hold informal hearing on Commission-specified issues.	**Informal hearing request denied**	
				Informal hearing request granted on Commission-specified issues. Licensing Board established.	Requests for discovery filed with Licensing Board.

"TIMELINE (CONTINUED)"

TIME			195 days	225 days	240 days
EVENT	No hearing request				Commission adoption of final rule, statement of consideration (SOC), and supporting documents. Publication in Federal Register.
	Informal hearing request denied				
	Informal hearing request granted	No discovery request	Filing of parties' oral presentation outlines and proposed Licensing Board questions.	Oral hearing begins. [30 days provided for oral hearing].	
		Discovery request	Applicant and Staff responses to request for discovery filed with Licensing Board.	Licensing Board decision whether to refer request to Commission.	

"TIMELINE (CONTINUED)"

TIME		255 days		270 days	285 days
EVENT					
	Informal hearing request denied				Commission adoption of final rule, SOC, and supporting documents. Publication in Federal Register.
	Informal hearing request granted, no discovery request.	Oral hearing closes. Requests for additional procedures or formal hearings must be filed with Licensing Board by this time.	No request for additional procedures or formal hearing		Parties' findings filed with Commission. Licensing Board certifies record and any recommendations to Commission.
			Request for additional procedures	Applicant and Staff file responses to request.	Licensing Board decision whether to refer request to Commission.
			Request for formal hearing	Applicant and Staff file responses to request.	Licensing Board decision whether to refer request to Commission.
	Informal hearing request granted, discovery request	Commission decision on discovery request. Discovery on Commission-specified issues commences [60 days provided for completing discovery].			

"TIMELINE (CONTINUED)"

TIME		315 days	345 days	375 days	405 days
EVENT					
	No request for additional procedures or formal hearing				Commission adoption of final rule, SOC, and supporting documents. Publication in Federal Register.
	Request for additional procedures	Commission decision on request. Limited discovery, if authorized, begins. [60 days provided for discovery].		Limited discovery ends (e.g., all discovery responses completed).	Filing of parties' oral presentations or pre-filed testimony, as applicable.
	Request for formal hearing	Commission decision on request. Limited discovery begins. [60 days provided for discovery].		Limited discovery ends (e.g., all discovery responses completed).	Filing of parties' pre-filed testimony.
	Informal hearing request, discovery request granted	Discovery ends.	Filing of parties' oral presentation outlines and proposed Licensing Board questions.		Oral hearing begins. [30 days provided for oral hearing].
TIME		435 days	465 days	480 days	510 days

"TIMELINE (CONTINUED)"

EVENT					
	Request for additional procedures	Oral hearing begins on issues specified by Commission.		Oral hearing closes.	Parties' findings filed with Commission. Licensing Board certifies record and any recommendations to Commission.
	Request for formal hearing	Formal hearing begins on issues specified by Commission.		Oral hearing closes.	Parties' findings filed with Commission. Licensing Board certifies record and any recommendations to Commission.
	Informal hearing request, discovery request granted	Oral hearing closes.	Parties' findings filed with Commission. Licensing Board certifies record and any recommendations to Commission.		
TIME		585 days	630 days		

EVENT			
	Request for additional procedures		Commission adoption of final rule, SOC, and supporting documents. Publication in Federal Register.
	Request for formal hearing		Commission adoption of final rule, SOC, and supporting documents. Publication in Federal Register.
	Informal hearing request, discovery request granted	Commission adoption of final rule, SOC, and supporting documents. Publication in Federal Register.	

ATTACHMENT C

ATTACHMENT C

Negotiated Rulemaking

Negotiated rulemaking is an alternative to traditional procedures under the APA for drafting proposed regulations. The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and various interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them. The benefits of negotiated rulemaking can include:

* reduced time, money and effort spent on developing and implementing rules.

* reduced risk of litigation.

* more cooperative relationships between the agency and other parties.

The APA does not require the use of negotiated rulemaking. However, 5 USC Subchapter IV[1] sets forth a statutory framework for the conduct of voluntary negotiated rulemakings[2]. The Administrative Conference of the United States has identified a number of conditions which are conducive to negotiated rulemakings[3]:

1. A limited number of interests will be significantly affected, and they are such that individuals can be selected to represent them. A rule of thumb is that no more than twenty-five people would have to participate at any one time, although each interest may be represented by a "caucus" or team.

2. The issues are known and ripe for decision, as opposed to issues that are only emerging and neither well defined nor imminent for decision.

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[1]Added by the "Negotiated Rulemaking Act of 1990," P.L. 101-648 (1990).

[2]The Administrative Conference's recommendations on the procedures for conducting negotiated rulemakings are set forth at 1 CFR 305.85-5.

[3]Negotiated Rulemaking Sourcebook, p.37, citing testimony of Philip J. Harter before the Senate Committee on Governmental Affairs (May 13, 1988).

3. No party will have to compromise a fundamental value. although important issues can be resolved in a negotiated rulemaking, if issues rise to the level of "faith," agreement is unlikely.

4. The rule involves diverse issues, so that parties have room to give and compromise among a set of diverse issues. It is more difficult to come to agreement if only one issue is presented.

5. The outcome of the issues is genuinely in doubt, and no one interest should be able to dominate the proceeding.

6. The parties view it as in their interest to use the negotiated rulemaking process.

7. The agency is willing to use the process and participate in it. If senior management officials are not fully involved in the negotiations or otherwise committed to the process, the agency is not likely to feel part of the process and may reject a recommended rule proposal.

8. There should be a deadline for achieving consensus.

Some of these conditions appear to be satisfied in any design certification rulemaking, such as conditions 2 and 4. Others such as conditions 7 and 8 can be satisfied by appropriate Commission direction. Condition 5 can be satisfied if all participants in a negotiated rulemaking agree to take appropriate training on the negotiated rulemaking process before beginning to negotiate[4]. On the other hand, condition 1 may not be able to be satisfied since design certification will affect persons in the future who cannot reasonably be identified at the time of rulemaking, e.g., persons near sites of future nuclear power plants whose applications reference design certifications. Whether conditions 3 and 6 can be satisfied will depend upon the circumstances at the time of each design certification.

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[4]Training on negotiated rulemaking is available from the Administrative Conference, the Department of Justice and from private organizations such as the American Bar Association and American Law Institute.

ENCLOSURE 2

NUCLEAR REGULATORY COMMISSION

10 CFR Part 54

Standard Design Certification Rulemaking Procedures;

Notice of Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Availability.

SUMMARY: The Nuclear Regulatory Commission (NRC) is making available to the public a paper prepared by the Office of the General Counsel (OGC) which provides final recommendations to the Commission on design certification rulemaking procedures for the initial design certification rulemaking.

ADDRESSES: Requests for copies of the final OGC paper should be sent to Geary S. Mizuno, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Copies of the final paper may be examined, along with comments received on the draft OGC paper (SECY-92-170), and the transcript of a July 20, 1992 workshop on design certification procedures, at the NRC Public Document Room at 2120 L Street, NW (Lower Level), Washington, D.C. between the hours of 7:45 a.m. and 5:15 p.m. on Federal workdays.

FOR FURTHER INFORMATION CONTACT: Geary S. Mizuno, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone: (301) 504-1639.

SUPPLEMENTARY INFORMATION: Under 10 CFR Part 52, designs for nuclear power plants are to be certified through rulemaking, in which the public has an opportunity to submit written comments on the proposed design certification rule, as required by the Administrative Procedure Act (APA). However, Part 52 goes beyond the requirements of the APA by providing the public an opportunity to request a hearing before an Atomic Safety and Licensing Board (Licensing Board) in the design certification rulemaking. Although hearings in NRC rulemakings are not unprecedented, e.g., the rulemaking associated with proposed adoption of the Generic Environmental Statement on Mixed Oxide Fuel (GESMO), they have been extremely rare and sui generis, and therefore provide no compelling precedent on what procedures should be followed here.

To assist the Commission in preparing for the first design certification rulemaking proceeding, OGC prepared a draft paper, SECY 92-170 (May 8, 1992) which identified and analyzed issues relevant to establishing procedures to govern design certification rulemaking. SECY 92-170 was made public by the Commission (57 FR 24394; June 9, 1992), and a Commission meeting on the paper was held on June 1, 1992. Thereafter, in SECY 92-185 (May 19, 1992), OGC proposed holding a public workshop for the purpose of facilitating public discussion on the issues raised in SECY 92-170, and to obtain the comments of the public on those issues. Notice of the workshop was published in the Federal Register (57 FR 24394; June 9, 1992). A 30-day period following the workshop was provided

for the public to submit written comments on OGC's paper. The workshop was held on July 20, 1992. A transcript was kept of the workshop proceedings and placed in the Public Document Room. Approximately 46 persons outside of the NRC attended the workshop; an additional 8 persons requested copies of the SECY paper and workshop materials, but did not attend. Eleven written comments were received following the workshop.

After consideration of the panel discussions at the public workshop and the written comments received after the workshop, OGC has prepared a final paper which identifies and analyzes the issues relevant to design certification rulemaking procedures, and provides final recommendations to the Commission. Five principal issues on design certification rulemaking procedures were identified in SECY-92-170. OGC's paper provides final recommendations on each of these issues, as described below.

The first issue is the scope of the Atomic Safety and Licensing Board's responsibilities in a design certification rulemaking hearing. OGC recommended preliminarily that the Licensing Board act as "limited magistrate" to compile a record on controverted issues and certify the record to the Commission for resolution. After consideration of written public comments and the discussions at the public workshop, OGC now recommends an approach similar to that of a "full magistrate." Under this approach, the

Licensing Board would have the option of, but not be required to, prepare recommendations on controverted hearing issues.

The second issue is whether the Commission should apply ex parte and/or separation of function limitations to the Commission (and Licensing Board, as applicable) in the design certification rulemaking proceeding. OGC recommended preliminarily that where hearings are held in design certification rulemakings, that the Commission apply limited separation of functions. This would allow the Commission to obtain the advice and assistance of the staff members who participated in the review of the design certification application and any hearing, but that such communications would occur in a public process, e.g., preparation of SECY papers in response to Commission SRMs, and public meetings between the Commission and the staff. In the absence of a hearing, the Commission could obtain the advice and assistance of the staff the same as in any ordinary rulemaking. OGC continues to recommend this approach in its paper.

Third, SECY 92-170 discussed whether a threshold should be adopted by the Commission for a hearing request submitted by an interested member of the public in a design certification. OGC recommended preliminarily that a person requesting an informal hearing be required to: (a) submit written comments in the written comment period; (b) submit the written presentations proposed to be included in the informal hearing; and (c) demonstrate that they, or

persons they intend to retain to represent them in the informal hearing, have the qualifications to contribute significantly to the development of the hearing record on the controverted issues. OGC continues to recommend that a person requesting an informal hearing be required to meet the three-part threshold proposed in SECY 92-170, but makes clear that the person need not meet the test of an "expert witness" in order to satisfy the qualifications requirement. Rather, the person must demonstrate that, because of knowledge, experience, education or training, he or she can contribute significantly to the development of the record on the controverted issue.

The structure and timing of the hearing, including the time for filing informal hearing requests and requests for additional procedures, is the fourth area requiring Commission guidance. OGC recommended preliminarily that informal hearing requests be filed concurrently with the time for submitting written comments, which OGC preliminarily recommends be set normally at 90 days. If the Commission grants the informal hearing requests, OGC recommended preliminarily that parties be provided the opportunity to make oral presentations before the Licensing Board, and that the Licensing Board be permitted to ask questions at the oral hearing without any special finding by the Licensing Board. Requests for additional procedures or full formal hearings under 10 CFR Part 2, Subpart G, would normally be submitted at the time the outlines of the oral presentations are due, which OGC preliminarily recommended should

be filed 30 days before the oral hearing. Thereafter, a special showing would have to be made for an untimely request for additional hearing procedures or a full formal hearing. As a result of additional consideration following the public comments, OGC now recommends that a 120-day period be provided for submitting written comments and requests for informal hearings. OGC also has changed its recommendation with respect to the timing of requests for additional procedures or full formal hearings. OGC now recommends that parties should file their requests for additional procedures or a formal hearing at the conclusion of the oral phase of the hearing, with the exception of requests for discovery. Discovery requests would be filed with the Licensing Board within 15 days of the Commission's grant of an informal hearing. The Licensing Board would refer meritorious requests to the Commission for final determination.

Finally, the use of, and access to, proprietary information in the design certification rulemaking was discussed. OGC recommended preliminarily that both "Tier 1" and "Tier 2" design certification information should not contain any proprietary information. In addition, OGC recommended preliminarily that access to proprietary information be provided following docketing of the design certification application, and that non-disclosure agreements be used in order to obtain access to proprietary information from the NRC's public document room (PDR). OGC now proposes two alternatives to address incorporation of proprietary information

into a design certification rulemaking. The first alternative is that all important design information in Tiers 1 and 2 be non-proprietary, although proprietary information could be referenced as a basis for both tiers. The second alternative is to seek a formal opinion from the Office of the Federal Register on incorporation by reference of proprietary information into Tier 2. With respect to public access to proprietary information, OGC proposes three alternatives for Commission consideration. The first alternative would require potential commenters and parties in any design certification hearing to seek access to proprietary information directly from the design certification applicant. Disputes over access would be resolved by the Commission or the Licensing Board, as appropriate. Access to proprietary information would await the initiation of the formal rulemaking proceeding (publication of an NPR). Access would be provided to all persons who would sign a non-disclosure statement. The second alternative would be the same as the first, except the that persons seeking access would have to provide an affidavit explaining why access to proprietary information is necessary to provide comments and shows that the person has the necessary expertise to use the information and contribute significantly to the rulemaking record. The final alternative would grant access only to parties in any rulemaking hearing which the commission authorizes. Access would be granted only to parties who can show that the proprietary information is relevant to the issues at the hearing, the non-proprietary information is insufficient to adequately address the issues in the

hearing, and that the party seeking access has the necessary expertise to use the information and contribute significantly to the rulemaking record.

The Commission is making this paper available to the public to enhance public awareness of the design certification rulemaking process. The Commission will establish the procedures to be followed in the first design certification rulemaking proceeding (expected to be for the General Electric (GE) Advanced Boiling Water Reactor (ABWR)) in the notice of proposed rulemaking for that design certification.

Dated at Rockville, MD this _____ day of _____, 1992.

For the Nuclear Regulatory Commission.

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Samuel J. Chilk,
Secretary of the Commission.