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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 21, 2000

OFFICE OF THE
GENERAL COUNSEL

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen D. Cyr *Karen Cyr*
General Counsel

SUBJECT: CORRECTIONS AND CLARIFICATIONS TO CERTAIN PROPOSED
PROCEDURAL RULES IN SECY-00-0017, PROPOSED RULE
REVISING 10 CFR PART 2 - RULES OF PRACTICE

Following the issuance of SECY-00-0017, PROPOSED RULE REVISING 10 CFR PART 2 - RULES OF PRACTICE, the Office of the General Counsel (OGC) identified some unintended omissions, typographical errors and potential ambiguities or lack of clarity in certain of the proposed procedural rules in the draft notice attached to SECY-00-0017. The Atomic Safety and Licensing Board Panel noted many of the same omissions and the need for clarification and updating of various aspects of the proposed rules in the Panel's February 10, 2000 memorandum to the Commission on SECY-00-0017. To correct these inadvertent errors and omissions or to address the potential ambiguities, OGC proposes the modifications to the proposed rules reflected in the enclosure.

Enclosure: As stated

- cc: SECY
- ASLBP
- OCAA
- OIG
- OPA
- OCA
- OEDO
- OCFO
- OCIO

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Corrections and Clarifications to Certain Proposed Procedural Rules in SECY-00-0017

Following the issuance of SECY-00-0017, PROPOSED RULE REVISING 10 CFR PART 2 - RULES OF PRACTICE, the Office of the General Counsel (OGC) identified some unintended omissions, typographical errors and potential ambiguities or lack of clarity in certain of the proposed procedural rules in the draft notice attached to SECY-00-0017. The Atomic Safety and Licensing Board Panel (ASLBP) noted many of the same omissions and the need for clarification and updating of various aspects of the proposed rules in the Panel's February 10, 2000 memorandum to the Commission on SECY-00-0017. To correct these inadvertent errors and omissions or to address potential ambiguities, OGC proposes the following modifications to certain of the proposed procedural rules in the draft notice:

- (1) Proposed section 2.301 incorporates existing section 2.700a which allows alternative procedures in adjudications involving the conduct of military or foreign affairs. Existing section 2.700a contains a subsection (b) that applied 2.700a to proceedings in progress at the time 2.700a became effective. Subsection (b) is no longer necessary and might be confusing if it is retained in the proposed section 2.301. Proposed section 2.301 will be modified by deleting subsection (b) and eliminating the designation "(a)" so that section 2.301 will read as follows:

2.301 Exceptions

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

- (2) The ASLBP suggests that filing by telegraph is outmoded and that references to telegram filings should be deleted. Proposed subsection 2.302(c) will be modified by deleting the references to telegrams and telegraph companies so that subsection 2.302(c) will read as follows:

2.302 Filing of documents

* * *

(c) Filing by mail, electronic mail or facsimile will be deemed to be complete as of the time of deposit in the mail or upon electronic or facsimile transmission.

Similarly, subsection 2.304(f) will be modified by deleting telegraph filings and inserting facsimile transmissions so that subsection 2.304(f) will read as follows:

2.304 Formal Requirements for Documents; Acceptance for Filing

* * *

(f) A document filed by facsimile transmission or electronic mail need not comply with the formal requirements of paragraphs (b), (c), and (d) of this section if an original and copies otherwise complying with all of the requirements of this section are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear

Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

Similarly, subsections 2.305(c) and (e)(2) will be modified by deleting telegraph filings and renumbering subparagraphs (and correcting an erroneous reference in subparagraph (e)(5)) so that these subsections will read as follows:

2.305 Service of Papers, Methods, Proof

* * *

(c) How service may be made. Service may be made by personal delivery, by first class, certified or registered mail, including air mail, by electronic or facsimile transmission, or as otherwise

* * *

(e) When service complete. Service upon a party is complete:

(1) by personal delivery . . .

(2) by mail, on deposit in the United States mail, properly . . .

(3) by facsimile transmission, on transmission thereof . . .

(4) by electronic mail, on transmission thereof and receipt . . .

(5) When service cannot be effected in a manner provided by paragraphs (d)(1) to (3) [was (d)(1) to (5)] inclusive of this section, in any other manner authorized by law.

- (3) The ASLBP suggested that, because of the now-common use of facsimile and e-mail transmissions, it would be appropriate to modify proposed subsections 2.304(e) and 2.314(b) to require petitioners and parties to provide their facsimile numbers and e-mail addresses in initial filings. These subsections will be modified to add these requirements as follows:

2.304 Formal Requirements for Documents; Acceptance for Filing

* * *

(e) The first document filed by any person in a proceeding shall designate the name and address of a person on whom service may be made. Such document shall also designate the facsimile number and electronic-mail address, if any, of the person on whom service may be made.

2.314 Appearance and Practice Before the Commission in Adjudicatory Proceedings

* * *

(b) **Representation.** A person may appear Any person appearing in a representative capacity shall file with the Commission a written notice of appearance which shall state his or her name, address, and telephone number and his or her facsimile number and electronic-mail address, if any; the name and address of the person on whose behalf

- (4) The ASLBP notes that proposed section 2.305, which was intended to revise and replace existing section 2.712, does not include the words “upon some or all parties” when it provides an exception to the requirement for expedited delivery for situations in which such delivery would “impose undue burden or expense.” The subsection will be revised to include the words “upon some or all parties” so that subsection 2.305(c) will read as follows:

2.305 Service of Papers, Methods, Proof

* * *

(c) How service may be made. Service The presiding officer shall require service by the most expeditious means that is available to all parties in the proceeding, including express mail and/or electronic or facsimile transmission, unless the presiding officer finds that such a requirement would impose undue burden or expense upon some or all parties.

- (5) The ASLBP notes that, with regard to the requirement for confirmation of receipt of facsimile and e-mail transmissions in proposed subsection 2.305(e), its experience over several years has been that facsimile and e-mail transmissions are sufficiently reliable that receipt confirmation is not necessary. In addition, at least one NRC staff attorney has pointed out that receipt confirmation is not usually required under current practice. In view of these comments, we will modify subsection 2.305(e) to delete the requirements for receipt confirmation so that this provision will read as follows:

2.305 Service of Papers, Methods, Proof

* * *

(e) When service complete. Service upon a party is complete:

* * *

(3)[formerly (4) -- see item (2) above] by facsimile transmission, on transmission thereof;

(4)[formerly (5) -- see item (2) above] by electronic mail, on transmission thereof, except that if the sender receives an electronic message that transmission to an addressee was not deliverable, transmission to that person shall not be deemed to be complete; or

- (6) The ASLBP notes that the reference in proposed section 2.306 to receipt of a facsimile or electronic transmission prior to the "close of business" is ambiguous and should be clarified. Although the Panel suggests "making the filing deadline midnight Eastern Time on the day the filing is due," the intent here is to set the deadline as the "close of business" for the recipient party. To remove ambiguity, we would simply designate this as "5 PM in the recipient-party's time zone." Consequently, we will modify section 2.306 to read as follows:

2.306 Extension and Reduction of Time Limits

In computing any If a document is served by facsimile or electronic transmission and is not received by a party prior to 5 PM in the recipient-party's time zone on the date of transmission, the recipient's response date shall be extended by one business day.

- (7) Certain proposed or revised sections inappropriately retain references to a Chief Administrative Law Judge or an Administrative Law Judge or erroneously refer to a "Chief Judge" or to the "Chairman of the Atomic Safety and Licensing Board Panel." The intent is to refer to the "Chief Administrative Judge" or to an administrative judge in these instances. Consequently, we will modify sections 2.308, 2.313, 2.314, 2.318, 2.321, 2.322 and 2.702 to correct the appropriate references so that these provisions will read as follows:

2.308 Treatment of Requests for Hearing or Petitions for Leave to Intervene by the Secretary

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request . . . to the Chief Administrative Judge

2.313 Designation of Presiding Officer, Disqualification, Unavailability

(a) The Commission may If the Commission does not so provide, the Chief Administrative Judge will issue an order . . . or, if the Commission has not provided for the hearing to be conducted by an Atomic Safety and Licensing Board, the Chief Administrative Judge will issue an order designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code.

(b) If a designated presiding officer . . . and shall notify the Commission or the Chief Administrative Judge, as appropriate, of his withdrawal.

* * *

(d) If a presiding officer or a . . . the Commission or the Chief Administrative Judge, as appropriate, will designate another presiding officer or Atomic Safety and Licensing Board member. If he becomes unavailable after the hearing has been concluded:

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

(ii) The Chief Administrative Judge or the Commission, as appropriate, may designate another

2.314 Appearance and Practice Before the Commission in Adjudicatory Proceedings

(a) **Standards of Practice.** In the exercise of their functions under this Subpart, the Commission, the Atomic Safety and Licensing Boards, Administrative Judges and Administrative Law Judges function in a

2.318 Commencement and Termination of Jurisdiction of Presiding Officer

(a) Unless otherwise ordered by the Commission, the jurisdiction If no presiding officer has been designated, the Chief Administrative Judge has such jurisdiction or, if he is unavailable, another administrative judge has such jurisdiction. . . . When a notice of hearing provides that the presiding officer is to be an administrative law judge, the Chief Administrative Judge will designate by order the administrative law judge who is to

2.321 Atomic Safety and Licensing Boards

(a) The Commission or the Chief Administrative Judge may from time to time . . . or other qualifications as the Commission or the Chief Administrative Judge deems

(b) The Commission or the Chief Administrative Judge may designate If a member of the board becomes unavailable, the Commission or the Chief Administrative Judge may constitute the alternate In the event that an alternate is unavailable or no alternates have been designated, and a member of a board becomes unavailable, the Commission or the Chief Administrative Judge may appoint

2.322 Special Assistants to the Presiding Officer

(a) In consultation with the Chief Administrative Judge, the presiding officer

2.702 - Subpoenas

(a) On an application by any party, the designated presiding officer or, if he is not available, the Chief Administrative Judge, or other designated officer will issue

- (8) The ASLBP notes that proposed subsection 2.309(a)(3) on nontimely filings drops the factor -- on the extent to which the late petitioner may contribute to the development of a record -- that is in existing 2.714(a). This was inadvertent; proposed subsection 2.309(a)(3) will be modified to add this factor so that it will read as follows:

2.309 Hearing Requests, Petitions to Intervene, Requirements for Standing and Contentions

(a)(1) **General Requirements**

* * *

(3) **Nontimely Filings**

* * *

(vi) the extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

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

- (9) The ASLBP notes that the basis and specificity requirements of existing section 2.714 were not specifically included in proposed subsection 2.309(c) on contentions. Proposed subsection 2.309(c)(1) will be modified to incorporate current basis and specificity requirements as follows:

2.309 Hearing Requests, Petitions to Intervene, Requirements for Standing and Contentions

* * *

(c)(1) **Contentions.** A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised and for each contention

(i) provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) provide a brief explanation of the basis for the contention;

(iii) demonstrate that such contention is within the . . .

(iv) demonstrate that such contention is material to . . .

(v) provide a concise statement of the alleged facts or . . . and

(vi) provide sufficient information to show

- (10) The ASLBP notes that proposed subsection 2.315(c) appears to give interested governmental entities and tribes an unqualified right to interrogate witnesses that is not afforded to other parties under certain of the proposed subparts. Such a result was not intended; rather, interested governmental entities and Tribes were intended to have whatever rights parties have. Section 2.315(c) will be revised to clarify this matter and will read as follows:

2.315 Participation by a Person Not a Party

* * *

(c) The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and introduce evidence, interrogate witnesses in those proceedings where cross-examination by the parties is permitted, and advise the Commission without

- (11) The ASLBP suggests inserting a time limit of 10 days for motions for reconsideration under proposed subsection 2.323(e). To be consistent with the time requirements for motions for reconsideration to the Commission under proposed subsection 2.340(d), subsection 2.323(e) will be modified to add a 10 day time limit so that it will read as follows:

2.323 Motions

* * *

(e) Motions for reconsideration shall not Any such motion must be filed within 10 days of the action for which reconsideration is requested and any such motion and any responses thereto shall be limited to 10 pages or less.

- (12) To address the ASLBP's suggestion that the disclosure requirements of proposed section 2.336 address documents for which there is a claim of privilege, proposed section 2.336 will be modified to require a list of privileged documents to be filed. The modified section will read as follows:

2.336 General Discovery

(a) Except for proceedings . . . Disclose and/or provide:

* * *

(3) a copy (for those documents for which there is no claim of privilege), or a description by category and location, of all documents

(4) all other documents (for which there is no claim of privilege) that, to the party's knowledge

(5) a list of all discoverable documents for which a claim of privilege or protected status is being made.

(b) The NRC staff shall . . . disclose and/or provide, to the extent available:

* * *

(3) all documents (excluding those documents for which there is a claim of privilege) supporting the NRC staff's . . .

(4) any NRC staff documents (except those documents for which there is a claim of privilege) which act on . . .

(5) a list of all discoverable documents for which a claim of privilege or protected status is being made.

- (13) To address the ASLBP's suggestion that proposed section 2.336 should require the NRC staff to disclose negative information, subsection 2.336(b)(3) will be modified to read as follows:

2.336 General Discovery

* * *

(b) The NRC staff shall . . . disclose and/or provide, to the extent available:

* * *

(3) all documents (including documents that provide direct support for, or opposition to, the application or proposed action, but excluding those documents for which there is a claim of privilege) relating to the NRC staff's review of the application or proposed action that is the subject of the proceeding;

- (14) The ASLBP notes that the sanctions listed in proposed section 2.336 for a party's unexcused failure to make required disclosures appears to be directed to intervenors alone. This was not intended. To clarify the intent with regard to sanctions, proposed subsection 2.336(e)(1) will be modified to read as follows:

2.336 General Discovery

* * *

(e)(1) The Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action or the use of Subpart G discovery provisions against the offending party, for a party's continuing unexcused failure to make the disclosures required by this section.

- (15) The title of section 2.338 will be modified to "Expedited Decisionmaking Procedure" and "resolved" will be changed to "unresolved" in subsection (a)(2) so that these provisions will read:

2.338 Expedited Decisionmaking Procedure

* * *

(a) The presiding officer may determine . . . when:

* * *

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly

- (16) In proposed subsection 2.339(a) -- existing section 2.760a -- a clause was inadvertently dropped from the third sentence. Proposed subsection 2.339(a) will be modified to correct this omission so that it will read as follows:

2.339 Initial Decision in Contested Proceedings on

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

- (17) The draft statements of consideration (at pp. 54 and 59) discussing proposed section 2.340 and proposed subsection 2.340(f) erroneously refer to a subsection 2.340(g) which does not exist. The correct reference would be 2.340(f). The draft statements of consideration and proposed subsection 2.340(f) will be corrected to refer to 2.340(f) as follows:

SOC p. 54, first paragraph:

Proposed section 2.323 incorporates the . . . merits Commission review at the earliest opportunity. See also proposed section 2.340(f). . . .

SOC p. 59, first full paragraph:

Proposed section 2.340 on Commission review of decisions and actions of the presiding officer is, in essence, a restatement of existing section 2.786. However, subsection (f) on the standards for certifying issues or referring rulings to the Commission contains

2.340 Review of Decisions and Actions of a Presiding Officer

* * *

(f) Interlocutory review. (1)

(2) Even in the absence . . . Commission review is warranted under criteria specified in subsection (f)(1)

- (18) A comma was inadvertently placed between the words "Commission" and "adjudicatory employees" in proposed subsection 2.347(b)(2) on separation of functions. The comma will be removed so that the subsection will read as follows:

2.347 Separation of Functions

* * *

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

* * *

(2) Communications to or from Commissioners, members of their personal staffs, Commission adjudicatory employees in the Office of the

- (19) Proposed subsections 2.704(f) and (g)(1) erroneously refer to "consistency (a)(1)"; the intent was to refer to "paragraph (a)(1) of this section." Subsections 2.704(f) and (g)(1) will be modified to correct this reference and will read as follows:

2.704 General Provisions Governing Discovery

* * *

(f) Meeting of Parties; Planning for Discovery. Except when otherwise ordered . . . thereof, to make or arrange for the disclosures required by paragraph (a)(1) of this section, and to develop a proposed discovery plan

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to paragraphs (a)(1) or (a)(3) of this section shall be signed by at least one attorney of

- (20) The ASLBP notes that proposed subsection 2.704(c) requires a party who requests a protective order in discovery to certify that it has attempted to resolve its dispute with opposing parties. The ASLBP suggests that the same certification requirement should be added to proposed subsection 2.704(h) on motions to compel discovery. A requirement that the parties attempt to resolve their discovery disputes before going to the presiding officer is appropriate in both cases (requests for protective orders and motions to compel discovery). Proposed subsection 2.704(h) will be modified to include such a requirement as follows:

2.704 General Provisions Governing Discovery

* * *

(h) Motion to compel discovery. (1) If a deponent or party upon whom The motion shall be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the presiding officer and shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the

- (21) Proposed section 2.708, which deals with discovery against the NRC staff, inadvertently dropped the word "staff" in two places. Section 2.708(a)(i) will be corrected to read as follows:

2.708 Discovery against NRC staff

(a)(i) In a proceeding in which the NRC staff is a party, the NRC staff will make available one or more witnesses

- (22) The ASLBP notes that proposed section 2.709 on summary disposition does not incorporate subsections (b), (c), and (d) from the existing summary disposition procedure section 2.749. The omission was inadvertent, and proposed section 2.709 will be modified to add these subsections as follows:

2.709 Authority of the presiding officer to dispose of certain issues on the pleadings

(a) Any party . . . [proposed subsection 2.709(a)]

(b) [insert text of existing subsection 2.749(b)]

(c) [insert text of existing subsection 2.749(c)]

(d) [insert text of existing subsection 2.749(d)]

- (23) The ASLBP notes that proposed changes to section 2.1109 on requesting a “hybrid hearing” in proceedings on spent fuel storage capacity appear to assume that only an intervenor will invoke Subpart K. This was not the intent of the proposed changes to section 2.1109. To clarify, proposed section 2.1109(a)(1) will be modified to read:

2.1109 Requests for Oral Argument

(a)(1) In its request for hearing/petition to intervene filed in accordance with section 2.309 of this part or in the applicant's or NRC staff's response to a request for hearing/petition to intervene, any party may invoke the hybrid hearing procedures in this subpart by requesting an oral argument. If it is determined that

- (24) The statements of consideration (at p. 63) note that section 2.1111 on discovery in Subpart K would be eliminated but the proposed rule language does not show a deletion of existing section 2.1111. The rule language in the section of the proposed rules related to Subpart K will be modified by inserting the following after Section 2.1109 and before Section 2.1117:

[Section 2.1111 Discovery - DELETE]

- (25) OCAA notes that the proposed new Subpart L inappropriately withholds the right to subpoena witnesses or documents for hearing under Subpart L. OCAA suggests that the ban on subpoenas be removed but that an applicant for a subpoena be required to show that the evidence sought is generally relevant and reasonable in scope. Proposed subsection 2.1207(b) will be modified to delete subsection (b)(5) (the “ban” on subpoenas) and renumber subsections (b)(6) and (7) and proposed subsection 2.319(b)

(presiding officer's power to issue subpoenas) will be modified to require a showing of general relevance and reasonable scope.

Also with regard to proposed subsection 2.1207(b), the ASLBP expresses a concern that proposed subsection 2.1207(b)(7), as written, would preclude a presiding officer from using special assistants to question witnesses in Subpart L proceedings. Such a reading and result were not intended and subsection 2.1207(b)(7) (renumbered (b)(6) -- see above) will be clarified.

Thus, proposed subsections 2.319(b) and 2.1207(b) will be modified as follows:

2.319 Power of the Presiding Officer

A presiding officer has the duty to The presiding officer has all the powers necessary to those ends, including the powers to:

* * *

(b) Issue subpoenas authorized by law, including subpoenas requested by participants for the attendance and testimony of witnesses or the production of evidence upon the requestor's showing of general relevance and reasonable scope of the evidence sought;

2.1207 Process and Schedule for Submissions and Presentations in an Oral Hearing

* * *

(b) Oral Hearing Procedures

* * *

[DELETE (5) No subpoenas will be granted]

[RENUMBER(6) AS

(5) The presiding officer may accept written testimony from a person unable to appear at the hearing, and may request such person to respond to questions.]

[RENUMBER AND MODIFY (7) AS

(6) Participants and witnesses will be questioned orally or in writing and only by the presiding officer or the presiding officer's designee (e.g., an appointed special assistant). The participants or witnesses will be examined using either the presiding officer's/designee's questions or questions submitted by the participants or a combination of both. Questions may be addressed to individuals or to panels of participants or witnesses.]

(26) The ASLBP suggests that, to avoid any confusion, proposed subsection 2.1209(c)(1) on the contents of an initial decision be modified to make it clear that findings must be made with regard to "contentions in the proceeding." Subsection 2.1209(c)(1) will be modified to read:

2.1209 Initial Decision and Its Effect

* * *

(c) An initial decision must be in writing and The initial decision must include --

(1) Findings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact or law admitted as part of the contentions in the proceeding;

(27) Conforming Changes. The ASLBP notes that no changes have been proposed to Appendices A and D to Part 2. Obviously, conforming changes to Appendix D and possibly to Appendix A will be necessary if the Commission agrees to publish the proposed rules or variations thereon. The specific conforming changes will depend on the Commission's decision. OGC will modify the rulemaking package to comply with the Commission's decision and the modifications will include any changes to Appendices A and D that are needed to conform these appendices to the proposed revised Part 2. In addition, OGC will review other parts of 10 CFR to identify other necessary conforming changes (e.g., 10 CFR 72.46 will need to be modified to correct references to certain sections in Part 2), and will include such conforming changes in the proposed rulemaking notice that is to be published.

March 21, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen Cyr /s/
General Counsel

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