

January 21, 2000

FOR: The Commissioners

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SUBJECT: PROPOSED RULE REVISING 10 CFR PART 2 -- RULES OF PRACTICE

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PURPOSE:

To seek Commission approval of publication of a proposed rule which would substantially modify the NRC's regulations governing the conduct of hearings.

DISCUSSION:


I. Background

The Commission commenced a re-examination of its hearing process in 1998. In a Staff Requirements Memorandum dated June 26, 1998, the Commission directed the Office of the General Counsel to draft a Policy Statement on the Conduct of Adjudicatory Proceedings and also to advise the Commission on the legislative and rulemaking options that would further enhance the Commission's ability to utilize informal procedures in any proceeding in which formalized trial-type procedures are currently used. The Commission subsequently issued a Policy Statement which was published in the Federal Register on August 5, 1998. That Notice solicited public comment on the Policy Statement. The Office of the General Counsel submitted its analysis of the hearing process to the Commission in [SECY-99-006](#), dated January 8, 1999. In this memorandum, the General Counsel concluded that, with the exception of hearings on enrichment facility applications filed pursuant to section 193 of the Atomic Energy Act, the NRC has the authority to use informal hearing procedures.

In a Staff Requirements Memorandum ([SRM](#)) dated July 22, 1999, the Commission directed that NRC commence a rulemaking effort that would propose retaining formal trial-type procedures only for enforcement proceedings and proceedings for the construction and operation of enrichment facilities. Informal procedures could be used in all other proceedings.

The Commission directed that the proposed rule contain revisions to the informal hearing procedures in [10 C.F.R. Part 2](#), Subpart L, and establish a streamlined, "fast track" option. In addition, appropriate portions of the 1998 Statement of Policy on the Conduct of Adjudications were to be codified. In developing the proposed rule, the Commission authorized the use of an enhanced participatory process to gather the views of stakeholders. Finally, the Commission directed that as part of the notice of proposed rulemaking, public comments be sought on a number of specified issues.

On October 26-27, 1999, OGC convened a facilitated workshop involving participants from the nuclear industry, states, public interest groups, the academic community, the ALJ community and the NRC. Transcripts of that workshop are available for Commission review and a summary of the comments made at the workshop is included in the enclosed proposed rulemaking document. In brief, industry representatives generally supported a move towards informal procedures; public interest groups opposed any further efforts to "informalize" the NRC hearing process and strongly supported the use of formal hearing procedures (i.e., adversary proceedings with cross-examination) in all cases. The representative from the State of Nevada expressed strong views that the proceeding on licensing a high-level radioactive waste repository at Yucca Mountain should use formal procedures.

After reviewing the public comments on the Policy Statement and the views of the workshop participants and in accordance with the direction in the July 1999 SRM, OGC has prepared the [attached](#)  proposed rulemaking package for the Commission to consider. The draft Statements of Consideration accompanying the proposed rule address the major comments received on the Policy Statement and those made at the workshop.

II. Summary of Proposed Changes

The proposed rule consists of three main components: (1) a new Subpart C to 10 C.F.R Part 2 which would consolidate in one subpart the general hearing procedures that would apply to all NRC adjudications, including those procedures that would govern rulings on requests for hearings/petitions to intervene and admission of contentions in every case, would establish criteria for determining the specific hearing process/procedure or track (e.g., formal - Subpart G; informal - Subparts L, M and N; hybrid - Subpart K) to be used in particular cases, and would provide for document disclosure in all proceedings; (2) a substantially revised Subpart L which is enlarged in scope to provide hearing procedures to cover most NRC adjudicatory proceedings; and (3) a new Subpart N that will provide informal "fast track" hearing procedures to be used in appropriate, simple cases.

The proposed new Subpart C -- Rules of General Applicability for NRC Adjudicatory Hearings -- would be the starting point for consideration of, and rulings on, all requests for hearing/petitions to intervene and the admissibility of contentions, and for selecting the appropriate hearing procedures to be applied in the remainder of the case. The Commission, a designated presiding officer or a designated Atomic Safety and Licensing Board would rule on requests for hearing/petitions to intervene and the admissibility of proffered contentions using the standards and procedures of Subpart C⁽¹⁾. Where it is determined that a hearing should be held, the Commission, presiding officer or Licensing Board would next examine the nature of the action that is the subject of the hearing and the contentions admitted for litigation, apply the criteria in Subpart C to determine the specific procedures/subpart that should be used for the hearing, and issue an order for hearing designating the procedures/subpart to be used for the remainder of the proceeding. The hearing activities will then proceed under the designated subpart (e.g., Subpart G for formal hearings, Subpart L for most informal hearings, Subpart M for license transfer cases, Subpart N for an expedited "fast track" hearing).

Consistent with the Commission's direction in the July 1999 SRM, the hearing procedure selection provisions of proposed Subpart C would substantially broaden the range of proceedings that would utilize informal hearing procedures. Subject to certain exceptions, the norm will be an informal hearing process. Thus, under this approach, for the first time, all reactor licensing proceedings -- those involving initial licensing⁽²⁾, license renewal⁽³⁾ and license amendments -- could be conducted on an informal hearing track. The proposed hearing procedure selection criteria include a provision whereby the formal hearing procedure track of Subpart G would be applied to any reactor licensing proceeding that involves a large number of complex issues that would clearly benefit from the use of formal hearing procedures. It is possible, even likely, that many contested reactor license renewal proceedings (as well as future CP/OL proceedings, if any) will involve a number of complex issues such that the formal hearing procedures of Subpart G would be applied under this criterion. If that is the case, the Commission may wish to consider whether it is the most efficient process to make this decision in each case, or change the proposed rule to designate these cases for Subpart G from the outset.

As to specific procedures for hearings, the proposed rulemaking would retain essentially all of the current procedures specific to the conduct of formal trial-type hearings under Subpart G but would substantially modify the existing procedures for informal hearings in Subpart L to bring them more into line with the current procedures for hearings in Subpart M for license transfer proceedings. The rulemaking would also propose a new Subpart N that contains procedures for a "fast track" hearing. Proposed Subpart N provides for an expedited oral hearing and oral motions and would limit written submissions and the protracted written responses they often entail. Apart from these changes, the primary modifications to Subparts G, J, K, and M involve the removal of provisions that are generally applicable to all proceedings and the relocation of the essence of those common provisions to Subpart C and conforming reference changes. In addition, a number of changes would be made to Subpart J to remove the formal hearing procedures in that Subpart.

A more detailed discussion of the most significant proposed changes follows.

A. Subpart C

1. **Intervention and Contentions.** Under the proposed rules, requests for hearing/petitions to intervene and proffered contentions must be filed simultaneously at the outset of the case. This is a change from current requirements which allow the submission of contentions sometime after the request for hearing/petition to intervene is filed. Although the requirement to submit contentions at the time of the petition to intervene will facilitate the selection of hearing procedures/tracks, it may be appropriate to allow more time for the preparation of the petition to intervene/proposed contentions. The proposed rules would provide a minimum of 45 days from the notice of opportunity for hearing.

In addition, specific contentions must be submitted in all proceedings and the proposed contentions must meet the requirements of the current §2.714 to be admitted. Under existing rules in Subpart L for informal hearings, petitioners are only required to identify "areas of concern"; specific contentions that meet the standards of §2.714 are not required. The absence of specific contentions in proceedings under the existing Subpart L has sometimes resulted in unfocused litigation and an evidentiary record that is burdened with material of questionable relevance. To address that problem, the proposed rules would require contentions with a reasonable degree of specificity in every proceeding.

Current agency concepts of standing would continue to be used to determine whether a petitioner is entitled to a hearing as-of-right. In addition, the discretionary intervention standards from the Commission's *Pebble Springs* decision⁽⁴⁾ would be codified and applied to any petitioner who addresses those discretionary intervention standards in its petition and who otherwise fails to show that it has standing to intervene as-of-right.

2. **Selection of Hearing Procedures.** Under the proposed Subpart C, requests for hearing/petitions to intervene must also address the question of what hearing procedures/track should be used for the proceeding. The proposed rules also contain criteria for determining whether a hearing should be conducted under Subpart G (formal hearing); Subpart K (hybrid hearings on applications for the expansion of spent fuel storage capacity at power reactor sites); Subpart L (informal hearings); Subpart M (license transfer applications); or Subpart N (fast track procedures). Under the proposal, proceedings involving an application to construct and operate an enrichment facility would always be conducted under Subpart G (formal proceedings). Enforcement matters would also be litigated under the formal hearing procedures of Subpart G unless the parties agreed to the use of informal hearing procedures. All other proceedings could be conducted using informal procedures. Thus, as noted earlier, with certain exceptions⁽⁵⁾, reactor licensing proceedings would use informal hearing procedures.

Informal Hearing Procedures for High-Level Waste Repository Licensing. As directed by the Commission⁽⁶⁾, OGC has formulated rule changes that would provide for the use of informal hearing procedures for the high-level waste repository licensing proceeding. The hearing procedure/track selection provisions of proposed Subpart C would apply the informal hearing procedures of revised Subpart L to the proceeding on the licensing of the HLW repository at Yucca Mountain. Conforming changes -- to require the use of the informal hearing procedures of Subpart L -- would be made to Subpart J.

The move to informal hearings for the repository is a significant change in position and is very likely to engender substantial opposition. While OGC concluded in SECY-99-006 that formal hearings are not required for repository licensing, the Commission has long and consistently taken the position, and raised public expectations, that it would provide a formal hearing for repository licensing. There are good and cogent reasons for using an informal hearing process for repository licensing but the Commission should anticipate a very negative reaction to, and little support for, the proposal to switch to an informal hearing track⁽⁷⁾. That proposal is likely to be very controversial.

3. **Case Scheduling and Management.** Subpart C also addresses general case scheduling and management, requiring presiding officers to consult with the parties early in the proceeding in order to set schedules, establish deadlines for discovery (if permitted) and the filing of motions, and set the ground rules for the control and management of the proceeding. Presiding Officers would be required to notify the Commission if there are slippages in the established schedule that would delay the issuance of the initial decision more than 60 days from the date established in the schedule. This notification would include an explanation of the reasons for the delay and a description of the actions, if any, to avoid or mitigate the delay.
4. **General Discovery.** Subpart C would revise the provisions governing discovery. Based on the provisions of Federal Rules of Civil Procedure - Rule 26, after a matter is set for hearing, there would be prompt and open disclosure of relevant information by the parties and the NRC staff, without resort to formal processes, except if intercession by the Presiding Officer becomes necessary to resolve disputes over disclosure. This would be the only form of discovery that would be permitted in proceedings that are not conducted using the formal procedures of Subpart G or the special discovery provisions of Subpart J.
5. **Settlement and Alternative Dispute Resolution.** The subpart also addresses settlement and encourages the use of alternate dispute resolution (ADR) methods. The proposed Statement of Considerations discusses various ADR techniques and asks for comments on several questions pertaining to the use of ADR in NRC proceedings.

B. Subpart L

The informal hearing procedures currently set forth in Subpart L have sometimes proven to be unexpectedly cumbersome and inefficient in the development of a record. At times a massive paper hearing record has been developed that is not effectively focused on the issues and is burdened with extraneous, untested material that makes the formulation of a decision difficult and time consuming. In addition, the procedures in the existing Subpart L sometimes result in extensive "motion practice" and litigation on the procedures to use rather than the substantive issues to be decided. To address these problems, existing Subpart L would be replaced with a revised approach. As noted above, petitioners (other than States or Indian Tribes participating as interested governmental entities) would have to file specific contentions and would have to have at least one of those contentions admitted before becoming a party. There would also be limited discovery -- in the form of a general disclosure obligation on all parties -- pursuant to general discovery provision of Subpart C (none is permitted under the existing Subpart L). The provisions regarding staff participation in the proceeding would be generally patterned after those found in the current Subpart L. The NRC staff would not be required to be a party to the proceeding unless: (1) the staff proposes to deny the application which is the subject of the hearing; (2) the proceeding involves an application to receive and possess high-level radioactive waste at a geologic repository operations area or (3) the Presiding Officer determines that the resolution of any issue in the proceeding would be aided materially by the staff's participation in the proceeding and orders the staff's participation.

In general, the proposed new Subpart L is patterned after the informal hearing procedures of existing Subpart M. Under the proposed approach, parties could submit initial written statements of position and written testimony on admitted contentions. Parties could then provide written responses, rebuttal testimony, and proposed questions that they believe the presiding

officer should pose to other witnesses. At the oral portion of the hearing, the party would present its witnesses. After the witness adopted his or her prefiled written testimony, the Board would pose questions to the witness. There would be no cross-examination by the parties⁽⁸⁾. After the oral phase of the hearing ended, parties could file post-hearing statements of position on the contentions addressed in the oral hearing. The regulation would also authorize hearings consisting entirely of written presentations, but only if all the parties agreed. The expectation is that written hearings would be used infrequently.

C. Subpart N

This new subpart would contain "fast track" procedures to be used when the issues in the proceeding are limited and not complex, and the hearing is expected to take no more than two days to complete or where the parties choose to use Subpart N. Under this subpart, the parties generally would not submit written pleadings, briefs or motions. Instead, a party would provide a written statement identifying its witnesses and summarizing the testimony of each witness. Parties could provide the Presiding Officer with questions that could be posed to the witnesses at the oral hearing. The oral hearing procedures would be similar to those for Subpart L. The presiding officer could issue a decision from the bench and follow up with a written memorialization. The entire process would be conducted rapidly resulting in substantially shorter and less burdensome proceedings than proceedings conducted under the other subparts.

D. Conforming Amendments

Conforming amendments would be made to Subparts G (formal proceedings), J (repository licensing), K (spent fuel storage applications) and M (license transfer proceedings), largely to implement the move to informal procedures and to reflect that many of the procedures regarding filing requests for hearings, the filing and admission of contentions, and rules governing discovery will be removed from those sections and included as part of Subpart C.

E. Issues Not Addressed

Although the rules are being revised to explicitly provide for electronic filing of documents, many of the details regarding the electronic submission of documents to the NRC will be established in a rulemaking proceeding that will commence later this year. That proceeding will commence only after the Commission has implemented, on a pilot basis, its new Electronic Information Exchange program.

COORDINATION:

The [attached](#)  rulemaking proposal was provided to the Atomic Safety and Licensing Board Panel on January 21, 2000 for its information and possible comment directly to the Commission. The EDO has been briefed on the proposed rule.

RECOMMENDATIONS:

The Office of the General Counsel believes that the attached proposed rulemaking is responsive to the Commission's guidance in the July 1999 SRM on the hearing process and recommends that the Commission:

1. Approve publication in the Federal Register of the attached notice of proposed rulemaking allowing 60 days for public comment.
2. To satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the attached Federal Register notice.

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Attachment: [Draft Federal Register Notice](#) 

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1. These standards embody the standing and contention admission requirements currently contained in 10 C.F.R. §2.714.
 2. Initial licensing for reactors would include the issuance of construction permits (CPs) and operating licenses (OLs) and the issuance of a combined CP/OL.
 3. In the Statement of Considerations for the original (1991) license renewal rule, the Commission stated that it would provide an "opportunity for a formal public hearing" in reactor license renewal cases. 56 F.R. 64943, 64946, 64961 (December 13, 1991). The Commission also noted, however, that "the holding of any hearing in connection with a license renewal is a matter of Commission discretion." 56 F.R. 64961.

4. *Portland General Electric Company* (Pebble Springs Nuclear Power Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).

5. As noted, the rule would provide that contested reactor licensing proceedings "involving a large number of very complex issues that would demonstrably benefit from the use of formal hearing procedures" may be conducted under the formal hearing procedures of Subpart G. If the Commission retains this provision, OGC recommends that the Commission specifically solicit public comment on what criteria should be used to determine whether a reactor licensing proceeding involves a large number of complex issues that could best be addressed through formal adjudication.

6. In a January 12, 1999 SRM on SECY-98-225 - Proposed Rule: 10 CFR Part 63 -- "Disposal of High-Level Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada", the Commission directed the staff to note in the Rulemaking Package for Part 63 that

. . . in the interest of openness, the Commission wishes to say that, at present, the Commission is inclined to provide for informal hearings for both construction authorization and licensing to receive and possess waste. No statute requires formal hearings in either case; EPA conducted none in certifying the Waste Isolation Pilot Project; and informal hearings allow for both greater efficiency and greater openness.

Subsequently, in the SRM on SECY-99-006 - Reexamination of the NRC Hearing Process, the Commission directed OGC to prepare a rule to "modify at least 10 CFR Part 2, Subparts G, L and J [J contains the hearing procedures for HLW repository licensing](Continued next page) so that all hearing requests (except enforcement cases but including reactor and materials licensing matters) will follow a similar path."

7. Those public interest participants in the October 1999 hearing workshop who expressed views on the matter opposed informal hearings for repository licensing; industry representatives did not enthusiastically support it.

8. While questioning of witnesses would normally be done by the presiding officer alone, a provision in the proposed Subpart L would allow any party to file a motion to permit cross-examination by the parties on particular contentions. Under this provision, the presiding officer may grant such a motion and allow cross-examination by the parties if he/she determines that a failure to allow cross-examination will prevent the development of an adequate record