

POLICY ISSUE NOTATION VOTE

March 25, 2011

SECY-11-0042

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: REVISIONS TO INTERNAL COMMISSION PROCEDURES SECTION ON
MANDATORY HEARINGS

PURPOSE:

To provide the Commission with revised internal commission procedures governing the conduct of uncontested mandatory hearings.

BACKGROUND AND DISCUSSION:

In SRM-SECY-10-0082 (December 23, 2010), the Commission directed OGC (in consultation with OCAA, as appropriate) to draft any revisions to the Internal Commission Procedures section entitled "Conduct of Mandatory Hearings on Applications for Combined Licenses" that would be necessary in light of the Commission's determinations, specified in the SRM, regarding mandatory hearings. These revised procedures were to include, among other things, hearing milestones and a Notice of Hearing template. Accordingly, I am submitting the enclosed revisions for incorporation into Chapter IV of the Internal Commission Procedures.

The enclosed revisions follow the guidance in the Commission's SRM, including the adoption of the "Option 1" language from SECY-10-0082 for the Notice of Hearing template to describe interested State, local government, and federally-recognized Indian Tribe participation. We have made modest adjustments to the Option 1 template to make clear, consistent with the intended scope of uncontested hearings, that issues within the scope of admitted contentions are not to be addressed in the uncontested proceeding. These proposed revisions would not

CONTACT: James E. Adler, OGC
(301) 415-1656

impair the rights of interested governments and Indian Tribes to address contested issues in the separate contested proceeding.

This paper has been coordinated with OCAA.

/RA/

Stephen G. Burns
General Counsel

Enclosure: [Revised Uncontested Hearing Procedures](#)

The following is the replacement text for the “CONDUCT OF MANDATORY HEARINGS ON APPLICATIONS FOR COMBINED LICENSES” section on pages IV-11 to IV-14 of the Internal Commission Procedures (November 2, 2006 version, as amended on December 1, 2009).

1. Before the Hearing:

Notice: 10 CFR § 2.104(a) requires that the Secretary issue a notice of hearing for publication in the *Federal Register* as soon as practicable after a COL application has been docketed (or, in certain cases, tendered (see 10 CFR § 2.101(a)(2))). The Secretary will also issue a supplemental notice of hearing—specific to the uncontested, or “mandatory,” portion of the COL proceeding—as soon as practicable after the staff submits to the Commission the Information Paper described below under “Pre-Filed Documents.”

This supplemental notice should state: (1) the time and place of the hearing, (2) the nature of the hearing, (3) the authority under which the hearing is to be held, (4) the matters of fact and law to be considered (i.e., whether the staff’s review has been adequate to support the findings set forth in 10 C.F.R. §§ 52.97(a) and 51.107(a)), (5) the schedule for submittal of the pre-filed documents, and (6) the designation of the Commission itself as the presiding officer for the hearing.

Pre-Filed Documents: Concurrent with completion of the Final Safety Evaluation Report (FSER) or Final Environmental Impact Statement (FEIS), whichever comes later, the NRC staff will submit an Information Paper to the Commission. This Information Paper will be made publicly available and should, at minimum:

(1) Address each of the findings in §§ 52.97(a) and 51.107(a), and provide an adequate basis for the Commission to conclude whether each of these findings can be made. The Information Paper should not recap all matters in the safety or environmental review process, particularly routine aspects of the review where there was no real complication or controversy. Rather, the Information Paper should be focused on non-routine matters.

(2) In focusing on non-routine matters, the areas of particular importance in supporting the Part 51 and 52 findings would be any unique features of the facility or novel issues that arose as part of the review process. However, the staff’s Information Paper should exclude matters that were previously addressed and resolved in the context of other reviews undertaken as part of the Part 52 process, e.g., as part of an earlier Early Site Permit (ESP) review, an earlier reference COL review, or have been (or are being) addressed in the context of a design certification rulemaking.

(3) Include other aspects of the staff's review that are important for the Commission to make its final decision, but are not necessarily tied to specific findings. For instance, if an applicable design certification rulemaking is currently ongoing, the staff's Information Paper should include a brief summary of any significant technical or policy issues that the staff believes would be of significant Commission interest and an estimate of the completion date of that rulemaking.

This Information Paper shall serve as the staff's primary pre-filed testimony. In addition to this paper, the staff shall identify its witnesses for the hearing and answer any Commission pre-hearing questions. Answers to any pre-hearing questions and the witness list would be due 15 days prior to the scheduled hearing date, unless the Commission directs otherwise.

The following documents should be referenced in the pre-filed testimony and included as enclosures to the SECY paper or otherwise made available, for example, by providing ADAMS accession numbers:

- The license application, and all supplements;
- The Final Safety Evaluation Report, and all supplements;
- The Final Environmental Impact Statement, and all supplements;
- The pertinent letter from the Advisory Committee on Reactor Safeguards; and
- The proposed license.

The applicant should also submit pre-filed written testimony, which would also be due 15 days prior to the scheduled hearing date, unless the Commission directs otherwise. This testimony should, at minimum, include answers to any pre-hearing questions issued by the Commission and identify the applicant's witnesses for the oral hearing. The applicant may also include in this pre-filed testimony any additional views that it wishes to provide.

Interested States, local government bodies, and federally-recognized Indian Tribes may also submit written statements to the Commission. Such statements should be filed 30 days prior to the scheduled hearing date.

No filings submitted in an uncontested (i.e., "mandatory") COL proceeding, whether submitted by the staff, the applicant, or an interested State, local government body, or federally-recognized Indian Tribe, may address substantive issues within the scope of the contentions that have been admitted in a contested adjudicatory proceeding for the same COL application. Such filings would include, for instance, the staff's Information Paper, the applicant's pre-filed testimony, answers to pre-hearing questions, question responses filed subsequent to the hearing, and any statements filed by interested States, local government bodies, or federally-recognized Indian Tribes. Presentations made at the oral hearing must also not address issues within the scope of admitted contentions. However, key reference documents such as the license application and supplements, the FSER, the FEIS and supplements, the Advisory Committee on Reactor Safeguards letter, and the proposed license need not be redacted to remove

references to contested issues before being made available to the Commission for the uncontested hearing.

Commissioners have the option of issuing written questions to the applicant or the staff before the hearing. The Commission should consolidate each Commissioner's pre-hearing questions into a single set of questions, which would be issued by the Secretary pursuant to his or her authority in the form of an order no later than 28 days before the scheduled hearing date. The order should specify the date by which responses to these questions must be filed (as indicated above, responses would generally be due 15 days prior to the scheduled hearing date and would be filed in conjunction with the witness list in the case of the staff and the witness list and any other pre-filed testimony in the case of the applicant). These questions could also serve to focus the parties' presentations at the oral hearing.

All documents submitted by the staff, the applicant, and interested States, local government bodies, and federally-recognized Indian Tribes should be filed in accordance with 10 CFR § 2.302, docketed by SECY in accordance with 10 CFR § 2.303, and made part of the hearing record.

Fourteen (14) days prior to the scheduled date of the oral hearing, the Secretary will also issue a scheduling order, which will provide additional logistical details regarding the hearing.

2. The Hearing:

Documents for the Hearing: A sufficient number of copies of viewgraphs or other relevant written information should be placed in the hearing room for the public 30 minutes before the start of the oral hearing.

Opening Remarks: The Chairman will call the hearing to order, describe the nature of the proceeding, under what statutes and rules it is taking place, what findings the Commission would have to make before authorizing issuance of the license, what the general order of the hearing will be, and when a Commission decision might be expected.

Testimony: Witnesses for both the applicant and NRC staff, as well as any representatives of interested States, local government bodies, or federally-recognized Indian Tribes that the Commission has invited to participate, will be identified and sworn in by the Chairman. The applicant's presentation will come first and should address any written questions directed to the applicant by the Commission. The Commissioners will ask questions of the applicant's witnesses before hearing from the staff. The staff's presentations will follow, and should address any written questions directed to the staff by the Commission. The staff's presentation will be followed by another round of Commission questions. Any invited representatives of interested States, local government bodies, or federally-recognized Indian Tribes will also participate as the Commission deems appropriate. Limited appearance statements will not be entertained.

The maximum allotted time for each Commissioner to ask questions and receive answers to questions at the hearing should be established by a majority of the Commission prior to the hearing on a case-by-case basis, premised on the complexity of issues that surround the application. Each Commissioner will decide how to divide his or her time for questions and answers among the witness panels not to exceed the allotted time. Any requests to extend this time could be granted by a majority of the Commissioners present. The Commission does not anticipate, even with many complex issues, that a hearing would last more than three business days.

Post-hearing Responses to Follow-up Questions: If Commissioners, at the hearing, ask any follow-up questions that cannot be fully answered at the hearing itself, the staff, the applicant, and/or participating interested States, local government bodies, or federally recognized Indian Tribes, as appropriate, may file supplemental responses to such questions no later than 14 days after the hearing concludes (unless the Commission sets an earlier deadline for such responses).

Record: The oral hearing will be transcribed, and the transcription reviewed for errors, corrected, and made part of the hearing record. See 10 CFR § 2.327. Also made part of the record will be any presentation materials used by the applicant, the staff, or representatives of interested States, local government bodies, or federally-recognized Indian Tribes at the hearing, and any written responses from the applicant and staff to orders or questions presented by the Commission. Except for the limited purpose of making any necessary transcript corrections, the record will close once the deadline for filing any post-hearing responses to questions posed at the hearing has passed, or at the conclusion of the hearing if no such responses are filed.

3. Commission Decision after the Hearing:

The Commission adjudicatory decision after the oral hearing, if favorable to the applicant, should address whether the staff's review has been adequate to support the findings set forth in 10 C.F.R. §§ 52.97(a) and 51.107(a), provide a brief basis supporting the Commission's determinations, list the documents that comprise the entire record considered by the Commission, and authorize the Director of the Office of New Reactors to issue the combined license. The decision, if unfavorable to the applicant, would explain, citing to the record, why one or more of the findings set forth in §§ 52.97(a) or 51.107(a) was insufficiently supported, list the record documents on which the Commission relied, and deny or appropriately condition the license or order further action, as appropriate. See 10 CFR § 2.344.

In the event that a contested adjudicatory proceeding regarding the COL application is taking place, or has already taken place, at the time the Commission issues its decision in the uncontested proceeding, the Commission will condition its uncontested hearing decision as appropriate to ensure no prejudice is done to the contested proceeding.

4. Schedule for Uncontested Hearings:

The Commission intends to issue adjudicatory decisions in mandatory hearings no later than 4 months after the FSER and FEIS are both complete, except that if an associated design certification rulemaking is still pending as of that date, the Commission will issue a decision immediately after affirming the final rule for the referenced design.

The Commission also intends, to the extent practicable, to adhere to the target dates listed below for the key milestones leading up to the Commission decision. The Commission recognizes, however, that circumstances may warrant occasional deviations from these target dates. It is not anticipated, however, that, absent extraordinary circumstances, such deviations would alter the Commission's overall objective of issuing its mandatory hearing decisions no later than four months from the issuance of the later of the FSER or FEIS.

Milestone	Target Date
Staff submits Information Paper to Commission	Concurrent with completion of FSER & FEIS
Notice of mandatory hearing sent to <i>Federal Register</i>	As soon as practicable after staff's Information Paper is submitted to the Commission
Interested States, local government bodies, or federally-recognized Indian Tribes file any written statements	30 days before the hearing
Commission issues any pre-hearing questions	28 days before the hearing
Applicant files pre-filed testimony, including witness list and answers to any pre-hearing questions	15 days before the hearing
Staff files witness list and answers to any pre-hearing questions	15 days before the hearing
Secretary issues scheduling order	14 days before the hearing
Mandatory hearing commences	45 days after staff's Information Paper is submitted to the Commission
Staff and applicant file responses to any follow-up questions	14 days after hearing is complete
Commission affirms adjudicatory decision if referenced design certification rulemaking already complete	4 months after FSER & FEIS are both complete
Commission affirms adjudicatory decision if referenced design certification rulemaking still pending as of 4 months after FSER & FEIS for COL are both complete	Immediately after Commission affirms final design certification rulemaking for referenced design

TEMPLATE

Notice of Hearing

A template for drafting a mandatory hearing notice is provided below. This notice is to be used to provide specific information on the uncontested (“mandatory”) portion of the hearing and will be issued by SECY after receipt of the Staff’s SECY paper supporting the mandatory hearing for each Combined License(COL). Appropriate adjustments will be made to accommodate any case-specific circumstances (e.g., if the COL application contains an ITAAC closure request pursuant to 10 CFR 52.97(2) or a limited work authorization request).

NUCLEAR REGULATORY COMMISSION

Docket No. **[Insert Docket Number]**

TITLE: In the Matter of **[Insert Name of Applicant]**; Combined License for **[Insert site name and number of units]** Notice of Hearing

The Commission hereby gives notice that, pursuant to section 189a of the Atomic Energy Act it will convene an evidentiary session to receive testimony and exhibits in the uncontested portion of this proceeding regarding the **[Insert Date of Application]**, application of **[Insert Name of Applicant]** for a 10 C.F.R. Part 52 combined license (COL), seeking approval to construct and operate a new nuclear power generation facility at **[Insert Description of the Site]**. This mandatory hearing will concern safety and environmental matters relating to the proposed issuance of the requested COL, as more fully described below. Participants in the hearing are not to address any contested issues in their written filings or oral presentations.

DATE, TIME, AND LOCATION OF THE EVIDENTIARY UNCONTESTED HEARING

The Commission will conduct this hearing at the specified location and time:

1. Date: **[Insert Date]** Time: **[Insert Time]** Location: **[Insert Location]**

The hearing on these issues will continue on subsequent days, if necessary.

PRESIDING OFFICER

The Commission is the presiding officer for this proceeding.

MATTERS TO BE CONSIDERED

The matter at issue in this proceeding is whether the review of the application by the Commission's staff has been adequate to support the findings found in 10 C.F.R. §52.97 and 10 C.F.R. §51.107. Those findings are as follows:

Issues Pursuant to the Atomic Energy Act of 1954, as Amended

(1) whether the applicable standards and requirements of the Act and the Commission's regulations have been met; (2) whether any required notifications to other agencies or bodies have been duly made; (3) whether there is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations; (4) whether the applicant is technically and financially qualified to engage in the activities authorized; (5) whether issuance of the license will not be inimical to the common defense and security or the health and safety of the public.

Issues Pursuant to the National Environmental Policy Act (NEPA) of 1969, as Amended

(1) Determine whether the requirements of Sections 102(2) (A), (C), and (E) of NEPA and the applicable regulations in 10 CFR part 51 have been met; (2) independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; (3) determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values; (4) determine whether the NEPA review conducted by the NRC staff has been adequate.

SCHEDULE FOR SUBMITTAL OF PRE-FILED DOCUMENTS

No later than [**replace with date that is 15 days prior to the scheduled hearing date**], unless the Commission directs otherwise, the staff and the applicant shall submit a list of its anticipated witnesses for the hearing.

No later than [**replace with date that is 15 days prior to the scheduled hearing date**], unless the Commission directs otherwise, the applicant shall submit its prefiled written testimony. The staff previously submitted its testimony on [**replace with date of staff testimony**].

The Commission may issue written questions to the applicant or the staff before the hearing. If such questions are issued, an order containing such questions will be issued no later than [**replace with date 28 days before the scheduled hearing date**]. Responses to such questions are due [**replace with date that is 15 days prior to the scheduled hearing date**], unless the Commission directs otherwise.

INTERESTED GOVERNMENT PARTICIPANTS

No later than [**replace with date that is 30 days prior to the oral evidentiary hearing**], any interested State, local government body, or affected, federally-recognized Indian Tribe may file with the Commission a statement of any issues or questions that the State, local government body, or Indian Tribe wishes the Commission to give particular attention to as part of the uncontested hearing process. Such statement may be accompanied by any supporting

documentation that the State, local government body, or Indian Tribe sees fit to provide. Any statements and supporting documentation (if any) received by the Commission using the agency's E-Filing system¹ by the deadline indicated above will be made part of the record of the proceeding. The Commission will use such statements and documents as appropriate to inform its pre-hearing questions to the Staff and applicant, its inquiries at the oral hearing, and its decision following the hearing. The Commission may also request, prior to **[replace with date that is no later than 15 days prior to the oral hearing]**, that one or more particular States, local government bodies, or Indian Tribes send one representative each to the evidentiary hearing to answer Commission questions and/or make a statement for the purpose of assisting the Commission's exploration of one or more of the issues raised by the State, local government body, or Indian Tribe in the pre-hearing filings described above. The decision of whether to request the presence of a representative of a State, local government body, or Indian Tribe at the evidentiary hearing to make a statement and/or answer Commissioner questions is solely at the Commission's discretion. The Commission's request will specify the issue or issues that the representative should be prepared to address.

States, local governments, or Indian Tribes should be aware that this evidentiary hearing is separate and distinct from the NRC's contested hearing process. Issues within the scope of contentions that have been admitted in a contested proceeding for a COL application are outside the scope of the uncontested proceeding for that COL application. In addition, while States, local governments, or Indian Tribes participating as described above may take any position they wish, or no position at all, with respect to issues regarding the COL application or the NRC Staff's associated environmental review that do fall within the scope of the uncontested proceeding (i.e., issues that are not within the scope of admitted contentions), they should be aware that many of the procedures and rights applicable to the NRC's contested hearing process due to the inherently adversarial nature of such proceedings are not available with respect to this uncontested hearing. Participation in the NRC's contested hearing process is governed by 10 C.F.R. § 2.309 (for persons or entities, including States, local governments, or Indian Tribes, seeking to file contentions of their own) and 10 C.F.R. § 2.315(c) (for interested States[, local governments, and Indian Tribes] seeking to participate with respect to contentions filed by others). Participation in this uncontested hearing does not affect a State's, local government's, or Indian Tribe's right to participate in the separate contested hearing process.

If necessary: The Commission recognizes that [a request] / [requests] to participate under 10 C.F.R. § 2.315(c) in proceedings regarding this COL application [was] / [were] previously dismissed on mootness grounds by an NRC Atomic Safety and Licensing Board. Such dismissals apply solely to the contested portion of the proceeding, and do not affect any rights to participate in this uncontested portion of the proceeding.

If necessary: If the COL application contains an ITAAC closure request pursuant to 52.97(2) or an LWA request, appropriate language should be inserted regarding the necessary findings for those items.

¹ The process for accessing and using the agency's E-Filing system is described in the [DATE] **notice of hearing** that was issued by the Commission for this proceeding. See Notice of Hearing [xx FR xx].