

January 12, 2011

MEMORANDUM TO: Stephen G. Burns
General Counsel

FROM: Annette L. Vietti-Cook, Secretary /RA/

SUBJECT: STAFF REQUIREMENTS – SECY-10-0106 – PROPOSED
RULE - 10 CFR PARTS 2, 51, AND 54 AMENDMENTS TO
ADJUDICATORY PROCESS RULES AND RELATED
REQUIREMENTS (RIN 3150-AL43)

The Commission has approved publication in the *Federal Register* of the proposed amendments to 10 CFR Parts 2, 51, and 54, to amend adjudicatory process rules and related requirements, subject to the comments and changes noted below.

The staff should seek public comment on the interlocutory appeal standards by incorporating the options discussed in SECY-10-0106, Enclosure 2 into the Federal Register notice.

The staff should proceed with the proposal to modify 10 CFR 2.346(j) to make explicit the Secretary's authority to take action on "procedural and other minor matters," recognizing that the Secretary should continue the current practice of notifying the Commission before taking action under that authority. In parallel, the staff should provide the Commission with additional information regarding the past uses of the Secretary's authority, as well as potential future uses under the proposed rule.

(OGC)

(SECY Suspense: 4/12/11)

SECY's practice of notifying the Commission before taking action under 10 CFR 2.346(j) should be incorporated into the Internal Commission Procedures to formalize the process for the future.

The staff should specifically solicit stakeholder input on proposed changes to 10 CFR 2.309(c) that would make good cause the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention, petition, or hearing request. The Statements of Consideration should further explain the basis for eliminating the other factors that currently exist in our rules, and seek public comment on the effect, if any, of eliminating the other "eight factors" from use in our adjudicatory process.

The following changes should be made to the Federal Register notice:

- a. page 2, line 6, delete extra space in phone number
- b. page 3, add a period to the end of the line for "III., IV. C., IV. D., and IV. F."

- c. page 4, add a period to the end of the line for “VI. E.”
- d. page 4, “Background” Section, line 4, change “were also” to “also were”; line 7, add a comma after “achieved”; line 11, change “were also” to “also were”
- e. page 5, first sentence under Section II., change “Procedures” to “Procedure”
- f. page 5, add a period at end of heading title for Section III.
- g. page 9, line 22, delete last sentence: “Paragraphs (c)(3) through (6) would be reserved for future NRC use.” Last line, change “(c)(7)” to “(c)(3)”
- h. page 10, line 2, change “(c)(8)” to “(c)(4)”;
- line 3, change “have” to “has”
- i. page 12, add a tab space after “f.” in last section on page.
- j. page 13, line 2, change “of” to “on”; line 22, change “Staff” to “staff”; line 23, revise to read “...reviews and **generally** does not affect...”
- k. Change all occurrences of “Presiding Officer” to “presiding officer”
- l. page 17, line 12, delete extra space in “U.S.C. 2239”; line 21, change “would also” to “also would”
- m. page 18, revise first full paragraph to read as follows:

“Finally, this section would be amended to clarify that the presiding officer could make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental or common defense and security matter exists, **and only to the extent the Commission, upon a required referral by** ~~Upon making this determination,~~ the presiding officer, **approves an examination of and decision on the referred matters** ~~must refer its determination to the Commission, and may undertake review of those issues following the Commission’s consideration and approval of the referral.~~”

- n. page 19, line 1, change “is also” to “also is”; line 6, change “Staff” to “staff”; line 7, change to read: “..reviews and **generally** does not affect...”; line 23, change “is therefore” to “therefore is”
- o. page 19, line 11, change “action on” to “acted upon”
- p. page 20, line 8, change “is therefore” to “therefore is”
- q. page 23, revise ~~clarify the last sentence in first paragraph re:~~ section 2.704 as follows:

“Section 2.704(a) through (c) sets forth the required disclosures that parties other than the NRC staff must make in formal NRC adjudications. ~~In~~ **To** conformance with the timing provisions of § 2.336(d), a change in § 2.704(a)(3) is being proposed. Presently, § 2.704(a)(3) requires that the initial disclosures be made within 45 days after a prehearing conference order following the initial prehearing conference specified in § 2.329. And § 2.704(e) requires a party **that** ~~who~~ has made a disclosure under § 2.704

to supplement ~~its~~ their disclosures if the party learns that ~~in~~ some material respect the information disclosed ~~of the disclosed material~~ was incomplete or incorrect (provided the additional or new information ~~was not~~ wasn't made available to other parties ~~during the discovery process or~~ in writing), and where. In addition, with respect to the testimony of an expert from whom a report is required under § 2.704(b), the duty to supplement under § 2.704(e) extends (extending to both the information contained in the report and provided through a deposition of the expert)." The proposed § 2.704(a)(3) would require that unless otherwise stipulated or directed by order of the presiding officer, a party's initial disclosures must be made within 30 days of the order granting a hearing and that parties must provide disclosure updates every 30 days. Each update would include documents subject to disclosure under this section that have not been disclosed in a prior update, and that are developed, obtained, or discovered during the period that runs from the last disclosure update to 5 business days before the filing of the update. Presently, § 2.704(a)(3) requires that the initial disclosures be made within 45 days after a prehearing conference order following the initial prehearing conference specified in § 2.329. And § 2.704(e) requires a party who has made a disclosure under § 2.704 to supplement their disclosures if the party learns that some of the disclosed material was incomplete or incorrect (provided the additional or new information wasn't made available to other parties in writing), and where testimony of an expert from whom a report is required (extending to the information contained in the report and provided through a deposition of the expert)."

- r. page 23, add a period to end of heading title for 2nd paragraph.
- s. page 24, delete the 2nd sentence: "This proposed amendment would limit staff disclosures to disputed issues alleged with particularity in the pleadings."
- t. page 25, add a period after "Title" in paragraph D.1
- u. page 26, line 18, change "is also" to "also is"
- v. page 28, line 5, change "is also" to "also is"; line 13, add a comma after "Subpart M"; line 18, add a comma after "that"
- w. page 29, add following sentence at end of line 11: **As with § 2.1202, "the NRC staff must take the proceeding in whatever posture the hearing may be at the time that it chooses to participate as a party."** (69 FR 2228, January 14, 2004).
- x. page 30, line 2, change "Staff" to "staff"; line 3, change to read: "...reviews and **generally** does not affect..."
- y. page 30, first sentence of last paragraph, change "four" to "three"
- z. page 31, line 20, change "published" to "and publication"
- aa. page 32, line 14, change "are also" to "also are"; line 19, change "would also" to "also would"
- bb. page 34, add the following sentence to the end of paragraph A.1: **"This section also would modify the definition of "NRC personnel," which contains outdated references to § 2.336 and 2.1018; the proposed revision would remove these references."**

- cc. page 34, add a period at end of heading for paragraph B.1
- dd. page 36, line 14, change “2.309(c)(2)(ii)” to “2.309(c)(2)(iii)”; line 20, change “2.309(c)(7)” to “2.309(c)(3)”; line 24, change “2.309(c)(8)” to “2.309(c)(4)”
- ee. page 37, make first full sentence a new paragraph revised as follows: “Section 2.309(~~fc~~)(~~25~~) would clarify that all new or amended or ~~new~~ contentions arising under the National Environmental Policy Act also must meet the filing requirements of § 2.309(c)(1)-(2).”
- ff. page 38, line 12, add a period after “Motions”
- gg. page 39, line 2, add a period after “Discovery”
- hh. page 40, heading for 11.b., change “on” to “upon”
- ii. page 41, revise the second sentence of paragraph numbered 12. to read as follows: “Also, the reference in paragraph (e) to 2.311 has been removed because requests for review appeals under 2.311 do not have, associated with them, deadlines for Commission action. are term “appeals” rather than “petitions for appeal.”
- jj. page 43, line 2, change “would also” to “also would”
- kk. page 50, line 5, revise to read: “...10 CFR Parts 2, 51, and 54, ~~60, and 63.~~”
- ll. page 51, line 15, change “NRC Personnel” to “NRC personnel”
- mm. page 57, revise paragraphs (3)-(6), (7) and (8) as follows:
- ~~(3)-(6) Reserved~~
- ~~(73) New Petitioner.~~ A hearing request or intervention petition filed after the deadlines in paragraph (b) must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs 2.309(d) and ~~(f)(1)~~.
- ~~(84) Party or participant.~~ A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph 2.309(f)(1). If the party or participant has already addressed the requirements for standing under § 2.309(d) in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.
- ~~(5) Environmental Contentions.~~ For a new or amended contention arising under the National Environmental Policy Act and based on conclusions in an NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, the party or participant also must show that the data or conclusions in the NRC’s documents differ significantly from the data or conclusions in the applicant’s environmental report.
- nn. page 58, delete entire paragraph: “(2) Contentions must be based.... the provisions of paragraph (c) of this section.”

- oo. page 59, line 14, change “must also” to “also must”
- pp. page 63, paragraph numbered 12., add a period after “...2.323 Motions”
- qq. page 68 -69, revise last sentence to read: “Matters not put into controversy by the parties, but identified by the presiding officer as matters requiring further examination, shall be referred to the Commission for its determination; the Commission may, in its discretion, treat any of these referred matters as a request for action under §2.206 and process the matter in accordance with § 52.103(f) of this chapter.
- rr. page 69, line 9, change “shall also” to “also shall”
- ss. page 70, line 13, revise sentence to read as: “Matters not put into controversy by the parties, but identified by the presiding officer as requiring further examination, must be referred to the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate.”
- tt. page 73, line 13, change “§2.206” to “§ 2.206”; line 16, change “section,” to “section;”; line 18, change sentence to read: “This section does not apply to ~~review of~~ appeals under § 2.311 and or to appeals in the high-level waste proceeding, which are governed by § 2.1015.”
- uu. page 73, paragraph numbered 16. (a)(1), first sentence, change “provided;” to “provided,”
- vv. page 74, paragraph numbered (2), first sentence, change “will” to “may”
- ww. page 75, line 6, delete comma after “2.323(f)”
- xx. page 81, line 2, change “§2.1207” to “§ 2.1207” and “§2.1208” to “§ 2.1208”
- yy. page 82, paragraph numbered 33.(a), first sentence, change “which” to “that” in both instances.
- zz. page 84, line 2, add a period after “sec”
- aaa. page 84, paragraph numbered 37.(b), line 4, add a comma after “impact”
- bbb. page 85, add period at end of §51.109 heading
- ccc. page 86, line 8, add period after “secs”; line 15, change “10 CFR 2.105 and 2.309” to “10 CFR §§ 2.105 and 2.309”

The following changes should be made to Enclosure 2:

- a. page 1, revise last sentence of first paragraph to read: “The NRC requests comment on the options, and on the possible rule language that would implement each option, including comments on the resource implications of both options for all parties and for the Commission.

b. page 1, revise proposed rule language for § 2.311(c) as follows: "...question as to whether the request or petition should have been granted..."

c. page 2, revise 3rd sentence to read: "...Commission's appellate workload at the early stage of a proceeding and the attention given to matters that it may prove be unnecessary to address at all because if a party decides not to pursue the matter at the conclusion of the proceeding or if further developments, such as settlement, obviate the need to address the admissibility question."

d. page 2, Option 2, revise 2nd sentence to read: "This would effectively leave all parties with the same similar appellate rights, including the right to seek interlocutory review under § 2.341(f)(2)."

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
OCAA
CFO
OCA
OPA
Office Directors, Regions, ACRS, ASLBP (via E-Mail)
PDR