ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

COMMISSION MEETING

Affirmation/Discussion and Vote

(Public Meeting)

Docket No.

Location: Washington, D. C.
Date: Thursday, September 5, 1985 Pages: 1 - 5

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D I S C L A I M E R

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

AFFIRMATION/DISCUSSION AND VOTE

Public Meeting

Room 1130
1717 H Street, N.W.
Washington, D.C.

Thursday, September 5, 1985

The Commission met in public session at 11:35 a.m., pursuant to notice, Nunzio J. Palladino, Chairman of the Commission, presiding.

COMMISSIONERS PRESENT:

Nunzio J. Palladino, Chairman

Thomas M. Roberts, Commissioner

James K. Asselstine, Commissioner

Frederick M. Bernthal, Commissioner

Lando W. Zech, Jr., Commissioner

STAFF SEATED AT COMMISSION TABLE:

S. Chilk, SECY

M. Malsch, OGC

J. Zerbe, OPE

P R O C E E D I N G S

CHAIRMAN PALLADINO: Will you please come to order.

This is an affirmation/discussion session. We have four items on the agenda, one of which, I understand, has been withdrawn, and I am going to ask the Secretary to walk us through the items.

MR. CHILK: The first item, Mr. Chairman, is SECY 85-235. It's Final 10 CFR Part 2, Subpart K, entitled "Hybrid Hearing Procedures for the Expansion of Onsite Spent Fuel Storage Capacity at Civilian Power Reactors."

Here the Commission is being asked to approve the issuance of a final rule that establishes hybrid hearing procedures for licensing proceedings regarding expansion of spent nuclear fuel storage capacity at civilian nuclear power reactor sites.

The Commission has approved the final rule, with several modifications proposed by Commissioners Zech and Bernthal. Commissioner Asselstine, while agreeing with the following rule, would have preferred the original text that appeared on pages 16, 31, 33 and 34.

Would you please affirm your votes.

[Chorus of ayes.]

MR. CHILK: The second paper is SECY 85-242. It is Mr. Husted's request for a hearing. The Commission

is being asked in this paper to approve a notice of a hearing which would grant the request of Mr. Husted for a hearing on the issue of whether the Appeal Board's condition barring him from supervisory responsibilities insofar as the training of nonlicensed personnel is concerned should be vacated, and on the related question of whether he is barred by concerns about his attitude or integrity from serving as an NRC licensed operator or as a licensed operator instructor training supervisor.

All the Commissioners have approved the notice of hearing which was attached to our September 4 memorandum, which instructed the Chief Judge of the Atomic Safety & Licensing Board Panel to appoint an Administrative Law Judge to preside over the hearing and authorizes the Appeal Board to exercise the authority to perform the review functions which would otherwise be exercised and performed by the Commission.

Would you please affirm your votes.

[Chorus of ayes.]

MR. CHILK: The third document is SECY 85-102(b) entitled "Procedures To Be Followed When a Subpoena or Other Demand for Disclosure of Records or Information is Served on NRC Employees."

In this paper the Commission is being asked to approve as a final rule the addition of Subpart D to

10 CFR Part 9, to proscribe procedures for the production of documents or disclosure of information in response to subpoenas or demands of a court or other judicial authorities in state and federal proceedings.

All Commissioners have approved the rule as recommended by the Solicitor.

Would you please affirm your votes.

[Chorus of ayes.]

MR. CHILK: The item which has been stricken is SECY85-150, and Commissioner Asselstine, I understand, would like to discuss that.

COMMISSIONER ASSELSTINE: I just briefly wanted to find out where we stood on that one. I had thought all the votes were in, and I guess what I was wondering was if people are reconsidering their votes on that one; and if so, I would hope that we could get that one done fairly soon.

I think it is important to give the industry the guidance that we want to provide in combining the SRO and the STA position. And I just wanted to raise it, since it was on for this week, to find out what the situation was. Because it is my understanding that the votes were in, and the only basis I could see for postponing it is if people were reconsidering their vote, or if people wanted time to prepare additional views.

CHAIRMAN PALLADINO: I can speak for myself.

The question of whether or not a PE should be allowed is one that I hadn't really made up my mind on.

The other was that I gather we didn't have a final version, and I always like to see us have a final version.

Tom had made the first request, but --

COMMISSIONER ROBERTS: Well, I just got these yesterday afternoon.

COMMISSIONER BERNTHAL: There was a lot of chopping and hacking in it, I think.

CHAIRMAN PALLADINO: Well, might I suggest that we try to get all this done so we can affirm it next week.

COMMISSIONER ASSELSTINE: Okay. I think it is important to get it out as soon as we can.

CHAIRMAN PALLADINO: Okay. Anything more to come before us at this session?

MR. CHILK: I have nothing.

CHAIRMAN PALLADINO: All right. Then we will stand adjourned.

[Whereupon, at 11:40 a.m., the meeting was adjourned.]

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of: Commission Meeting

Name of Proceeding: Affirmation/Discussion and Vote (Public Meeting)

Docket No.:

Place: Washington, D. C.

Date: Thursday, September 5, 1985

were held as herein appears and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(Signature) Ann Riley

(Typed Name of Reporter) Ann Riley

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RULEMAKING ISSUE
(Affirmation)

July 8, 1985 SECY-85-235

FOR: The Commissioners

FROM: William J. Dircks
Executive Director for Operations

SUBJECT: FINAL 10 CFR PART 2, SUBPART K, "HYBRID HEARING PROCEDURES FOR EXPANSIONS OF ONSITE SPENT FUEL STORAGE CAPACITY AT CIVILIAN POWER REACTORS"

PURPOSE: To obtain approval to publish as a final rule a new subpart K to 10 CFR Part 2, establishing hybrid hearing procedures for licensing expansions of spent fuel storage capacity at reactor sites.

CATEGORY: Major policy question.

ISSUE: Whether the Commission should adopt the final rule.

DISCUSSION: Background

Section 134 of the Nuclear Waste Policy Act of 1982 (NWPA) authorizes the Commission to use a hybrid hearing process for licensing certain spent fuel storage expansions and transhipments. In essence, the hybrid hearing described in the statute is a two stage proceeding. The first stage is intended to identify genuine and substantial disputes of fact through discovery and oral argument. In the second stage, those genuine and substantial disputes of fact are resolved in a full adjudicatory hearing.

On December 5, 1983 the Commission published for comment two versions of a proposed rule for hybrid hearings (48 Fed. Reg. 54499). Option 1 employed less formal procedures in the initial stage of the hearing process and made the use of hybrid procedures mandatory for all proceedings to which section 134 of the NWPA applies. Instead of a valid contention, a petitioner was required to file a list of issues within the scope of the proceeding. Under Option 2, the hybrid procedure was optional and had to be requested by a party with a valid contention. The Statement of Considerations for the final rule (Enclosure A) describes the two options offered for public comment more fully. See also SECY-83-214.

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Summary of Comments The Commission received seventeen letters of comment. A detailed analysis of the comments is included in Enclosure A. In summary, most commenters opposed Option 1. They generally argued that lowering the contention threshold would lengthen rather than expedite the hearing process. Commenters generally preferred Option 2 because it would allow the hybrid procedures to be optional and would retain the need for a valid contention. However, they believed that additional guidance was needed to ensure that the hybrid process would accomplish its intended purpose. They also urged that limitations on discovery be included.

The final rule in Enclosure A responds to the majority of comments by making the hybrid procedure optional at the request of a party, requiring a party to satisfy the existing rule on contentions, and limiting discovery to a 90-day period. Other features of the final rule essentially track Section 134 of the NWPA.

The Final Rule The final rule is described in Part IV of the Statement of Considerations. It adds a new subpart K to 10 CFR Part 2. This format enables the inclusion of sections on the purpose and scope of the hybrid hearing procedures, as well as pertinent definitions not currently included in Part 2. Duplication of the existing rules of practice in Subpart G is avoided. The existing rules apply with respect to standing, intervention, and admission of contentions. If a party requests an oral argument, the hybrid procedures are followed. Discovery will ordinarily be completed within 90 days, although the presiding officer may grant an extension for good cause. Thereafter, an oral argument will be held. The sequence and standards for oral argument in section 134 of the NWPA are closely followed. The oral argument must be based on sworn facts and data. Following oral argument, the presiding officer will designate issues for an adjudicatory hearing only if there is a genuine and substantial dispute of fact which is material to the outcome of the proceeding. The presiding officer may also reserve issues of law that are dependent on further adjudication for resolution. The final rule includes a conforming amendment to 10 CFR Part 72.

Resource Requirements
The final rule involves no new resource requirements.

Recommendation: That the Commission:

1. Approve publication in the Federal Register of a notice of final rulemaking adding 10 CFR Part 2, subpart K (Enclosure A).

2. Note that:
   a. The final rule will become effective 30 days after publication in the Federal Register.
   b. The final rule contains the requisite Regulatory Flexibility Act certification.
   c. The final rule contains no new or amended informa-tion collection requirements reviewable by OMB under the Paperwork Reduction Act.
   d. The rule is subject to a categorical exclusion under 10 CFR 51.22(c)(1) and no environmental impact statement or assessment has been prepared.
   e. A regulatory analysis has been prepared for this rulemaking (Enclosure B).
   f. The Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Sub-committee on Energy and the Environment of the House Interior and Insular Affairs Committee, and the Subcommittee on Energy Conservation and Power of the House Energy and Commerce Committee will be informed of the rulemaking by letter (Enclosure C).
   g. The Federal Register notice of final rulemaking will be distributed to potentially affected licenses.
   h. A public announcement will be issued by the Office of Public Affairs when the final rule is filed with the Office of the Federal Register (Enclosure D).
   i. The final rule reflects comments received from the following non-EDO staff offices: the Office of the General Counsel, the Atomic Safety and Licensing Board Panel, and the Atomic Safety and Licensing Appeal Panel.

Scheduling: This final rule should be scheduled for early approval.

William J. Dircks
Executive Director for Operations

Enclosures:
A. Draft Federal Register Notice (the final rule)
B. Regulatory Analysis
C. Draft Congressional Letter
D. Draft Public Announcement

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, July 25, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Thursday, July 18, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of July 29, 1985. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ENCLOSURE A

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 72

Hybrid Hearing Procedures for Expansions of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to implement the hybrid hearing process set forth in section 134 of the Nuclear Waste Policy Act of 1982. Section 134 permits the use of a modified hearing process in certain contested proceedings on an application for a license or a license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor. The hybrid hearing process would change existing agency practice by employing less formal procedures in the early stage of the hearing process and by designating only genuine and substantial issues for resolution in an adjudicatory hearing.

EFFECTIVE DATE: [30 days after the date of publication]

FOR FURTHER INFORMATION CONTACT: Linda S. Gilbert, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555. Telephone: (301) 492-7678.

ENCLOSURE A

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Section 134 of the Nuclear Waste Policy Act (NWPA) permits the use of a "hybrid" hearing process in certain contested proceedings on an application for a license or a license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor. The hybrid procedures apply to applications filed after January 7, 1983, the date the NWPA was enacted. Section 134 provides, in pertinent part:

> SEC. 134. (a) ORAL ARGUMENT.--In any Commission hearing under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239) on an application for a license, or for an amendment to an existing license, filed after the date of the enactment of this Act, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of high-density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means, the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties. The oral argument shall be preceded by such discovery procedures as the rules of the Commission shall provide. The Commission shall require each party, including the Commission staff, to submit in written form, at the time of the oral argument, a summary of the facts, data, and arguments upon which such party proposes to rely that are known at such time to such party. Only facts and data in the form of sworn testimony or written submission may be relied upon by the parties during oral argument. Of the materials that may be submitted by the parties during oral argument, the Commission shall only consider those facts and data that are submitted in the form of sworn testimony or written submission.
>
> (b) ADJUDICATORY HEARING.--(1) At the conclusion of any oral argument under subsection (a), the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that--
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> > (A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

(2) In making a determination under this subsection, the Commission--

(A) shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute; and

(B) shall not consider--

(i) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a construction permit has been granted at such site, unless the Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or

(ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless (I) such issue results from any revision of siting or design criteria by the Commission following such decision; and (II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility, or activity for which such license application, authorization, or amendment is being considered.

(3) The provisions of paragraph (2)(B) shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations applied for under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) before December 31, 2005.

(4) The provisions of this section shall not apply to the first application for a license or license amendment received by the Commission to expand onsite spent fuel storage capacity by the use of a new technology not previously approved for use at any nuclear power plant by the Commission.

On December 5, 1983, the Commission published for public comment two versions of a proposed rule to implement the hybrid hearing process by

amending Part 2 of its regulations. 48 Fed. Reg. 54499. Either version would have provided for the use of less formal procedures in the early stage of the hearing process and would have designated only genuine and substantial issues for resolution in an adjudicatory hearing. Option 1 would have required the use of hybrid hearing procedures in all proceedings to which section 134 applies. Option 2 would have permitted the use of such procedures at the request of any party to the proceeding. The Commission sought comments on both proposals to aid in its choice of procedures for the final rule.

II. THE PROPOSED RULES

Option 1

In Option 1, the Commission proposed to add subpart K to 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings." The procedures specified in proposed subpart K were limited to the types of applications specified in the statute; i.e., applications filed after January 7, 1983, for a license or license amendment to permit the expansion of spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor. Included within the scope of subpart K were applications filed pursuant to 10 CFR Part 72 for licensing of an independent spent fuel storage installation (ISFSI) located at the site of a civilian nuclear power reactor. In accordance with paragraph (b)(4) of section 134, the provisions of proposed subpart K would not have applied to the first application for a license or license amendment to expand onsite spent fuel storage capacity at a particular

facility by the use of a new technology not previously approved by the Commission for use at any other nuclear power plant.

The hybrid hearing process in proposed subpart K consisted of an informal first stage which culminated in a legislative-type oral argument designed to identify genuine and substantial disputes of fact appropriate for resolution in an adjudicatory hearing. Any party could request an oral argument, but factual issues would not be designated for formal adjudication unless they were found to be genuine and substantial. Thus, the first stage of the hybrid process was essentially a condition precedent to an adjudicatory hearing.

Proposed subpart K closely tracked the NWPA and substantially departed from existing practice in some respects. As under existing procedure, upon receipt of an application within the scope of the subpart, the Commission would publish a notice of proposed action (or other notice, as appropriate) in the Federal Register. 1/ Any person whose interest might be affected could file a request for hearing or petition for leave to intervene that, among other things, identified the specific aspect or aspects of the subject matter of the proceeding on which intervention was sought. Proposed § 2.1103(a). This also accorded with existing practice.

1/ The Commission noted that certain spent fuel expansion proceedings, i.e., those that involve applications for an amendment to a facility operating license under 10 CFR Part 50, would be subject to applicable provisions of the Commission's interim final rule implementing Public Law 97-415 (the so-called "Sholly amendments"). See 48 Fed. Reg. 14864, 14869 (April 6, 1983). This is discussed below in the Commision's response to comments on the proposed rules.

At this point in the proceeding, the proposed hybrid hearing process differed markedly from existing practice. If the petitioner adequately identified a specific aspect of the proceeding on which intervention was sought and otherwise satisfied the interest and standing requirements in proposed § 2.1103(a) and (c) (which were identical to those in § 2.714 of the existing rules), the petitioner would be admitted as party to the proceeding. This differed from existing practice in which a petitioner is not admitted as a party to the proceeding unless the petitioner has specified at least one valid "contention." Because the first stage of the hybrid hearing process established in the NWPA is intended to be informal, a petitioner was not required to identify "contentions" within the meaning of § 2.714 of the existing Rules of Practice at an early stage in the proceeding. Rather, it would be sufficient if, within 10 days after the presiding officer admitted the petitioner as a party, the intervening party filed a comprehensive list of issues it wished to litigate that were alleged to be within the scope of the proceeding. Requests for oral argument were also required to be filed at this time to be considered timely. 2/ After holding such prehearing conferences as might be necessary, the presiding officer would designate in

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2/ Because, under Option 1, the first stage of the hybrid process was in essence a condition precedent to an adjudicatory hearing in those proceedings to which section 134 applies, the Commission assumed that at least one party would request oral argument. If no party requested oral argument, however, the presiding officer would issue an order terminating the proceeding and the staff would process the application in accordance with existing procedures applicable to uncontested proceedings.

writing which issues were within the scope of the proceeding and would establish a schedule for discovery and subsequent oral argument with respect to those issues.

Factual issues raised in the informal stage of the proceeding would not be subject to formal adjudication unless, after discovery and oral argument, they were shown to be genuine, substantial, and material. Prior to oral argument, Licensing Boards would accept issues for purposes of discovery so long as they were clearly within the scope of the proceeding and were reasonably likely to alert the other parties to the subject matter of the intervening party's concerns. Issues would not be required to be supported with a statement of basis as now required for contentions filed under § 2.714. After the presiding officer determined which proffered issues were within the scope of the proceeding, the presiding officer would establish an appropriate schedule for discovery. Proposed § 2.1104(d). Discovery would proceed in accordance with existing discovery rules in §§ 2.720(h), 2.740, 2.740a, 2.740b, 2.741, 2.742 and 2.744, except that discovery would begin and end on a schedule established by the presiding officer. 3/ The Commission recognized that, initially, discovery would be somewhat broader than under existing practice because the issues would be less focused in the early stages of the proceeding; i.e., there would be no contentions admitted to the

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3/ Under existing § 2.740(b)(1), beginning and ending dates for discovery in construction permit and operating license hearings are based on prehearing conference dates. Because proposed § 2.1104(d) gave the presiding officer discretion in calling prehearing conferences, such dates were not necessarily appropriate.

proceeding as under current practice. However, discovery would be limited to those factual issues determined by the presiding officer to be within the scope of the proceeding. As discovery proceeded, the Commission expected the issues to become more focused and specific as each party evaluated the responses of the others and narrowed its inquiries to areas arguably involving matters of disputed fact.

After discovery was completed, an oral argument would be held. The oral argument would be limited to those matters in controversy that the presiding officer determined were within the scope of the proceeding pursuant to § 2.1104(d). Fourteen (14) days before the date set for oral argument, each party, including the NRC staff, would be required to submit to the presiding officer a written summary of the facts, data, and arguments upon which the party proposed to rely that were known to the party at that time. Each party was required to serve its written submission on every other party to the proceeding. Because the purpose of the oral argument was to identify those genuine and substantial disputed issues of fact which had to be resolved in an adjudicatory hearing, each party's submission was to have focused on the specific matters alleged to constitute genuine and substantial disputes of fact and the arguments for or against, as appropriate. During oral argument, the parties could rely only on facts and data contained in sworn written submissions and the presiding officer could consider only those facts and data that were submitted in such form. The Commission emphasized that the oral argument was not an evidentiary hearing, but rather a forum for separating genuine factual issues (for subsequent adjudication) from frivolous factual issues and issues of policy or law. Accordingly, while

parties could call technical experts to support their views, parties were not authorized to cross-examine opposing witnesses. However, the presiding officer could afford the parties an opportunity to suggest in writing questions which they would like the presiding officer to put to opposing witnesses.

Following oral argument, and after due consideration of the various arguments and written submissions, the presiding officer would make the appropriate findings with respect to each alleged dispute of fact. Proposed § 2.1106. The criteria that the presiding officer was to apply in determining which issues, if any, should be resolved in an adjudicatory hearing were identical to the statutory language. The standard was quite strict and was intended to ensure that the resources of all parties to any adjudicatory hearing were focused exclusively on real issues. Appeals from the presiding officer's designation of issues for resolution in an adjudicatory hearing were interlocutory and would have to await the end of the proceeding, except insofar as they were authorized by existing § 2.714a. Except to the extent qualified in proposed subpart K, any adjudicatory hearing would follow the existing adjudicatory procedures set forth in subpart G of 10 CFR Part 2. However, because discovery would precede the oral argument, there would ordinarily be no need for further discovery prior to the adjudicatory hearing. Accordingly, the Commission expected that the adjudicatory phase of the hearing would begin expeditiously after the presiding officer designated the issues meeting the criteria in § 2.1106.

Option 2

In Option 2, the Commission proposed to implement section 134 of the NWPA by adding section 2.749a to 10 CFR Part 2. In essence, this option provided for a form of summary disposition procedure to be employed at the request of any party to the proceeding. Proposed § 2.749a differed from the existing summary disposition procedure in that all parties were required to submit their oral and written positions simultaneously. All other aspects of the hearing process would continue to be governed by the Commission's rules of practice in 10 CFR Part 2, subpart G.

Under Option 2 (as under existing practice), petitioners for intervention were required to specify at least one admissible contention in order to be admitted as a party. Use of the hybrid procedures was optional rather than mandatory, and the procedures were available in all proceedings to which section 134 applies. Any party could request, in writing, a decision by the presiding officer that all or any part of the matters involved in the proceeding need not be heard in an adjudicatory proceeding. Proposed § 2.749a(a). Any such request would be deemed granted upon receipt and the presiding officer would notify the parties of the date, time, and location of oral argument. Prior to oral argument, discovery would be conducted according to existing rules. Fourteen days before oral argument, each party would be required to submit a written summary of the facts, data, and arguments on which the party proposed to rely at oral argument. Proposed § 2.749a(b). Following oral argument, the presiding officer would, by written order, (1) decide all issues of law or fact not designated for adjudication, setting forth all findings, conclusions, and reasons; and

(2) designate any remaining questions of fact or law for resolution in an adjudicatory hearing. Proposed § 2.749a(c).

The standards governing the presiding officer's designation of issues for resolution in an adjudicatory hearing appeared in paragraphs (d) and (e) of proposed § 2.749a. They followed the statutory language quite closely and were essentially the same as those proposed in Option 1. If the presiding officer determined that no issue was to be designated for an adjudicatory hearing, the order required by proposed § 2.749a(c) would be in the form of, and would constitute, an initial decision pursuant to existing § 2.760.

III. RESPONSE TO COMMENTS ON PROPOSED RULES

The Commission received seventeen letters of comment. Nine were from nuclear utilities or their counsel, including one comment filed on behalf of the forty-two member Utility Nuclear Waste Management Group (UNWMG). The remaining commenters were two intervenors, two individuals, an architect engineering firm, a nuclear manufacturer, an industry group, and a federal agency.

No commenters expressly favored Option 1, and eleven were strongly opposed to it. They generally argued that Option 1 was inconsistent with section 134 of the NWPA because it would not expedite the hearing process. Instead, the low threshold for admission of contentions would lead to broad, lengthy discovery on unfocused issues with no means of rejecting frivolous claims at the outset. This would lengthen rather than shorten the time required to license spent fuel expansions and transshipments.

Four commenters expressly favored Option 2. Another eight commenters indicated that Option 2 was preferable but required modification. They generally approved the discretionary nature of Option 2 but suggested raising the threshold for admission of contentions and limiting discovery so as to encourage and expedite spent fuel proceedings. They also indicated that the enhanced summary disposition procedures of Option 2 were insufficient to fully implement the hybrid process.

Two commenters rejected both options on the ground that they were unnecessary and would simply make intervention more difficult. These commenters did not address the fact that Congress has authorized the use of hybrid procedures in section 134 of the NWPA.

The comments received are discussed in more detail below. Although most commenters directed their remarks specifically to either Option 1 or Option 2, they raised many of the same issues in connection with each option. Accordingly, the Commission has organized its response to comments in terms of the issues raised, except where discussion of a particular option is required. 4/

A. Mandatory vs. Permissive Approach

Option 1 would have required the use of hybrid hearing procedures in those spent fuel expansion and transshipment proceedings to which section 134

4/ Some comments addressed minor procedural aspects of Option 1 that do not appear in the final rule. Because these are no longer applicable, they are not discussed here.

of the NWPA applies. Option 2 would have permitted the use of hybrid hearing procedures at the request of any party. Eleven commenters objected to the mandatory approach of Option 1 and one commenter supported it. Another commenter observed that the statutory language could be read either way. Those who were opposed argued that the language of section 134 is permissive, directing the Commission to provide, "at the request of any party, . . . an opportunity for oral argument . . . ." The commenter in favor of a mandatory approach simply noted that the hybrid procedures should be required in all applicable cases.

The Commission believes that both readings of the statutory language are possible. Section 134 provides, in pertinent part, that "the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties." The oral argument can be regarded as the essential first step in the hybrid hearing process. Section 134 does not require that oral argument be held; rather, it requires the Commission to provide an opportunity for oral argument if a party so requests. Under this view, if no party requests an oral argument, the hybrid hearing procedures are not triggered and any hearing, if required under section 189a. of the Atomic Energy Act, will proceed in accordance with the Commission's rules of practice in 10 CFR Part 2, subpart G.

The opposite view is that, under section 134, hybrid procedures are, in essence, a precondition to an adjudicatory hearing. Before an adjudicatory hearing may be held, a party must request and participate in an oral argument. At the time of oral argument, each party must submit a written

summary of the facts, data, and arguments on which it proposes to reply. At the conclusion of oral argument, the Commission will examine the parties' written submissions and designate an issue for adjudication only if it determines that a genuine, substantial, and material dispute of fact exists. This view is based on the mandatory language that is used throughout section 134.

The Commission notes that there is legislative history in support of either view. The Senate Report accompanying S. 1662 describes a predecessor of section 134 as "authoriz[ing] the Commission to use hybrid procedures." S. Rep. No. 282, 97th Cong., 1st Sess. 13 (1981). In contrast, the House Report accompanying H.R. 6598, which also contained a predecessor of section 134, states: "Procedural changes are made to the NRC licensing process to encourage utilities to expand storage capacity at reactor sites." H. Rep. No. 785, 97th Cong., 2d. Sess. 39 (1982).

The Commission has concluded that, on balance, there is no advantage to requiring the use of hybrid hearing procedures if no party perceives any benefit in using them. This would be contrary to the purpose of section 134, which is to encourage and expedite the licensing of onsite spent fuel expansions and transshipments. Accordingly, the final rule is permissive rather than mandatory. If no party requests an oral argument and a hearing is otherwise required under section 189a. of the Atomic Energy Act and the Commission's regulations, the hearing will proceed in accordance with the existing rules of practice in 10 CFR Part 2, subpart G. It should be noted, however, that the hybrid procedures must be used if a party files a timely

request for oral argument. In other words, one party may trigger a hybrid hearing; the consent of all parties is not required.

B. Threshold for Admission of Issues or Contentions

Under Option 1, a petitioner would not have been required to plead contentions but could have simply filed a list of issues within the scope of the proceeding. Option 2 would have required a petitioner to specify at least one admissible contention, as under existing practice. Of the thirteen commenters who addressed the relaxed pleading requirement of Option 1, all objected to it. One noted that although more intervenors would be admitted initially, they would be able to say little because of the expedited hearing process. The remaining ten commenters argued that the low threshold for admission of issues in Option 1 was inconsistent with the NWPA because it would lengthen rather than expedite the hearing process. They generally preferred Option 2 because it would retain the existing contention requirement.

Nine commenters went further, urging that the threshold for admission of contentions be raised. Several suggested a prima facie test or the submission of sufficient evidence to require reasonable minds to inquire further. Two noted that, because in most cases a previously-licensed technology will be involved, there is sufficient publicly available information to require a stronger factual showing in support of contentions.

Option 1 was intended to provide a simpler, less formal alternative to the initial stages of the existing hearing process. It was developed in consideration of the time that is typically spent arguing about the

admissibility of contentions, which could be saved by requiring merely a statement of issues within the scope of the proceeding. It was also designed to provide intervenors with an opportunity to obtain necessary information regarding their concerns through participation in discovery, recognizing that at the oral argument stage they would be required to show the existence of a genuine and substantial dispute of fact in order to trigger a formal adjudicatory hearing. It was believed that, overall, this approach would save time and would enhance the fairness of the hybrid process.

In view of the substantial opposition to this approach to the initial stages of the hybrid hearing process, the Commission has reconsidered and has decided to abandon it. By requiring the degree of specificity embodied in the existing rule regarding contentions, the delay that would inevitably result from conducting discovery on loosely-stated issues can be avoided. Accordingly, intervenors will be held to existing requirements regarding petitions to intervene and the filing of contentions. The Commission does not believe, however, that the threshold for admission of contentions should be raised. The requirement that an intervenor demonstrate the existence of a genuine and substantial dispute of fact is already sufficiently stringent to ensure that only serious questions are considered in a formal adjudicatory context. To impose a higher threshold of admissibility at the outset, prior to discovery, could severely restrict the opportunity to participate in spent fuel expansion and transshipment proceedings. Accordingly, the Commission believes that no change to the existing threshold for admission of contentions is warranted for hybrid hearings.

C. Limitations on Discovery

Either version of the proposed rules would have followed the Commission's existing practice with regard to discovery. Seven commenters urged that the conduct of discovery should not be left entirely to the presiding officer's discretion and that limitations were needed to encourage and expedite spent fuel proceedings. Five suggested that discovery be limited to two rounds and be completed within 90 days unless the presiding officer granted an extension for good cause. One commenter, believing that the time limits throughout the rules were too short, suggested that a minimum of 30 days be allowed for discovery.

The Commission agrees that discovery can be a significant source of delay and that the presiding officer should exercise greater control over the discovery process in hybrid hearings. Some discretion is needed, however, to allow the presiding officer to adjust the schedule to the demands of a particular case. Accordingly, the final rule has been amended to provide that, ordinarily, discovery will be completed in 90 days. The presiding officer may grant an extension for good cause after providing the parties an opportunity to respond.

It is unclear, as a practical matter, how "two rounds" of discovery should be defined. The limitation could be applied per issue, per contention, or per type of discovery, for example. The Commission believes it is preferable to limit the time available for discovery and to allow the parties to decide how best to allocate their resources within that constraint.

D. Prefiled Sworn Testimony and Written Submissions

Seven commenters urged that the Commission require the filing of sworn testimony and sworn written submissions prior to oral argument. They also pointed out that the proposed rule should be modified to make clear that written submissions must be sworn. One commenter added that a provision for responsive pleadings prior to oral argument should be included.

The Commission agrees that parties must prefile both the detailed written summary of their position and all supporting facts and data. The final rule has been clarified to reflect this. The time for filing has been changed to fifteen days prior to oral argument to provide consistency with other time limits in Part 2.

The detailed written summary of a party's position, which is essentially a preargument brief, need not be sworn. The Commission agrees, however, that section 134 requires all supporting facts and data to be in the form of sworn testimony or other sworn written submission. Section 134 provides that, if the supporting facts and data are not sworn, the parties may not rely on them at oral argument and the presiding officer may not consider them in arriving at a decision. Without sworn facts and data, the presiding officer would have no evidence to consider and a party would be unable to demonstrate the existence of a material fact requiring resolution in an adjudicatory hearing. Thus, the final rule requires that all facts and data in support of a party's written summary be sworn.

The Commission has not provided for responsive pleadings in the final rule. Prior to oral argument, each party must disclose all the facts, data, and arguments available to it in support of its position. Based on that

information, the presiding officer must determine whether a genuine and substantial dispute of fact exists and whether an adjudicatory hearing is required. Responsive pleadings would delay oral argument and would not materially aid the presiding officer's decision. For this reason, the Commission has decided that they should not be allowed.

E. Cross Examination at Oral Argument

Under Option 1, parties were permitted to suggest to the presiding officer questions in the nature of cross examination to be posed to opposing witnesses, although they were prohibited from conducting such questioning themselves. (Option 2 made no mention of witnesses at oral argument.) Six commenters objected to this provision, arguing that cross examination at oral argument should not be permitted. One observed that questioning of witnesses by the presiding officer was acceptable, but that the parties should be prohibited from doing so. Two commenters disagreed, arguing that cross examination by the parties should be permitted at oral argument to assist the presiding officer in designating issues for an adjudicatory hearing. One commenter simply noted that if the presiding officer declined to ask a question suggested by one of the parties, the text of the question should be placed in the record of the proceeding.

The Commission agrees that parties should not be permitted to question witnesses at oral argument. Furthermore, in response to comments of the Atomic Safety and Licensing Board Panel on a draft of the final rule, the Commission has reexamined this provision and has concluded that it should be abandoned. Option 1 envisioned oral argument as a sort of legislative-type hearing, affording the presiding officer the discretion to question witnesses

supplied by the parties in order to develop a complete record. This would enable the presiding officer to resolve minor inconsistencies or ambiguities in the sworn testimony or sworn written submissions without the need for a formal hearing. In actuality, however, the legislative model is inappropriate. Unlike a legislator, the presiding officer is not in a position to determine which witnesses should appear or what questions should be asked. Rather, each party will obtain the witnesses needed to provide sworn written testimony in support of its case.

As the Licensing Board Panel pointed out, the procedure set forth in the proposed rule for allowing the parties to suggest questions for the presiding officer to pose to witnesses, while prohibiting the parties from conducting the questioning, is cumbersome and unnecessary. Because all supporting facts and data must be submitted in the form of sworn written testimony or other sworn written submission, there should be no need for the presiding officer to question witnesses at oral argument. Minor matters can still be resolved without formal adjudication by directing the parties to file supplemental sworn testimony or affidavits. If there is a need to hear and examine witnesses, the issue should meet the standards set out in the rule for a genuine dispute of fact requiring resolution in an adjudicatory hearing. For these reasons, the Commission has deleted the provision for questioning of witnesses by the presiding officer at oral argument.

F. Criteria for Designation of Issues for Hearing

The proposed rules followed the statutory criteria for the presiding officer's designation of issues for an adjudicatory hearing. Those criteria

require that there be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing and that the Commission's decision be likely to depend in whole or in part on the resolution of that dispute. In addition, they exclude certain issues relating to the siting, design, construction, or operation of a previously licensed reactor.

Seven commenters urged that additional criteria were needed to guide the presiding officer's designation of issues for an adjudicatory hearing. Five suggested that the Commission adopt, in one form or another, the following criteria:

1. Where an issue has previously been considered in another proceeding regarding the licensing of the same technology for spent fuel storage or transshipment, the party sponsoring the contention must demonstrate the existence of significant new or differing information that is likely to render the earlier findings of the Commission incorrect.

2. A party must make a showing that its contentions will be supported by sworn testimony or exhibits sponsored by a qualified expert.

3. Where a contention involves only differing technical judgments applied to an undisputed set of facts, the Atomic Safety and Licensing Board may determine that adjudication is not necessary where NRC Staff Regulatory Guides or other credible published technical information established a clear concensus of the scientific community regarding the issue raised by such a contention. 5/

The Commission believes that these additional criteria are either unnecessary or go beyond the statutory requirements. Criterion 1 is urged as a sort of presumption of the technical acceptability of a previously licensed

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5/ See, e.g., comment letter no. 10 at 17-18.

technology, which an intervenor would be required to rebut. The criteria set forth in section 134 are adequate to ensure that there is a real issue with regard to the use of a previously licensed technology at the particular site in question. Not only must there be a genuine and substantial dispute of fact, but the dispute must be material; i.e., the decision must be likely to depend on resolution of the dispute. In addition, the dispute must be one that can be resolved with sufficient accuracy only by the introduction of evidence in an adjudicatory proceeding. Resolution of an issue for one site does not necessarily mean that the issue has been conclusively resolved for all other sites. Otherwise, there would be no need for a site-specific licensing action. Accordingly, the Commission declines to adopt proposed criterion 1.

Criterion 2 is unnecessary. At the oral argument, a party must submit a summary of the facts, data, and arguments on which it proposes to rely. Parties may rely only on facts and data in the form of sworn testimony or sworn written submission at oral argument and, of those materials, the presiding officer may consider only facts and data submitted in that form. If a party does not submit facts and data in the form of sworn testimony or sworn written submission, the presiding officer will be unable to find the existence of a genuine and substantial issue of material fact requiring resolution in an adjudicatory hearing. Because the rules already require that a party produce, at oral argument, the sworn facts and data on which it proposes to rely at the hearing, there is no need for the additional showing that the party will produce sworn testimony or exhibits by a qualified expert

in support of its contention at the hearing. Therefore, the Commission has rejected proposed criterion 2.

Criterion 3 is similarly unnecessary and may go beyond the intent of Congress in promulgating section 134. Staff regulatory guides are not regulations and compliance with them is not required. See Porter County Chapter of the Izaak Walton League v. AEC, 533 F.2d 1011, 1016 (7th Cir.), cert. denied, 429 U.S. 945 (1976); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 439, rev'd on other grounds, CLI-74-40, 8 AEC 809 (1974). Accordingly, the Commission may not endorse their use to resolve differences of technical opinion among qualified experts. Similar problems arise with the use of "other credible published technical information" such as technical reports or industry standards. The appropriate evidentiary weight to be given an expert's technical judgment will depend, for the most part, on the expert's testimony and professional qualifications. In some circumstances, it may be possible to make such a determination without the need for an adjudicatory hearing. The presiding officer must decide, based on the sworn testimony and sworn written submissions, whether the differing technical judgment gives rise to a genuine and substantial dispute of fact that must be resolved in an adjudicatory hearing. Under section 134, the focus should remain on this inquiry rather than on the substance of a regulatory guide, industry standard, or perceived "consensus of the scientific community." Thus, the Commission has decided not to adopt proposed criterion 3.

The Commission continues to believe that the statutory criteria are sufficient. As the Commission pointed out in connection with the proposed

rules, the statutory criteria are quite strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards under the Commission's existing rule for determining whether summary disposition is warranted. They go further, however, in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication. In short, the Commission believes that the final rule provides sufficient guidance for the presiding officer's designation of issues for resolution in an adjudicatory hearing.

G. Formal Findings of Fact and Conclusions of Law

Five commenters pointed out that there is no need for formal findings of fact and conclusions of law in the presiding officer's decision disposing of issues or designating them for an adjudicatory hearing. They explained that because the oral argument stage of the hybrid hearing process is intended to be informal, trial-type procedures are not needed. Rather, the presiding officer should simply provide an adequate statement of the reasons for determining whether an issue should be designated for adjudication.

The Commission agrees that formal findings of fact and conclusions of law are not required in the presiding officer's decision designating issues for an adjudicatory hearing. However, section 134(b)(2) requires the presiding officer to designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision is likely to depend on the resolution of such dispute, and the reason why an adjudicatory

hearing is likely to resolve the dispute. For issues not designated for adjudication, all that is required by the Administrative Procedure Act is a brief statement of the reasons for denial of the request. See 5 U.S.C. § 555(e). Thus, the presiding officer may simply dispose of issues not designated for adjudication with an adequate explanation of the reasons why a hearing is not required.

H. License Amendments Involving No Significant Hazards Considerations

In connection with the proposed hybrid hearing rules, the Commission noted that certain spent fuel proceedings, i.e., those involving applications for an amendment to a facility operating license under 10 CFR Part 50, would be subject to applicable provisions of the Commission's interim final rule implementing Public Law 97-415 (the so-called "Sholly amendments"). See 48 Fed. Reg. 14864, 14869 (April 6, 1983). As the Commission explained in connection with that rule, reracking of spent fuel pools may or may not involve significant hazards considerations. Pending reevaluation of that aspect of the rule, the Commission indicated that it intended to make such findings on a case-by-case basis. A notice of proposed action or other notice, as appropriate, would be published in accordance with 10 CFR 2.105 or 2.106. If the Commission determined that a particular license amendment request involved a significant hazards consideration, it would provide an opportunity for a prior hearing; otherwise a hearing could be held after issuance of the amendment. See 10 CFR §§ 50.58, 50.91 and 50.92. In either case, the notice would provide that if a hearing were held, it would be conducted in accordance with the procedures set forth in proposed subpart K.

Six commenters agreed with the Commission's interpretation of the Sholly rule concerning the timing of a hybrid hearing, if held. They also urged the Commission to continue to make its determinations of no significant hazards on a case-by-case basis. One commenter urged that the Commission make a generic determination of no significant hazards for spent fuel proceedings, where appropriate.

With regard to the timing of a hybrid hearing, section 2.1103 of the final rule provides for a notice of proposed action under 10 CFR § 2.105. Because section 2.105 already refers to sections 50.58 and 50.91, the reference to the latter sections that was contained in the proposed rule has been deleted as unnecessary. As stated in connection with the proposed rule, the Sholly provisions will continue to govern the timing of a hybrid hearing, if requested.

Concerning the matter of a generic as opposed to a case-by-case approach, the staff has submitted a report suggesting criteria for determining whether a request to expand the spent fuel storage capacity at the site of a nuclear power reactor involves significant hazards considerations. The Commission is considering those criteria in connection with its final Sholly rule. In the interim, the Commission will continue to make these determinations on a case-by-case basis.

I. Generic Approval of Technologies for Dry Storage of Spent Nuclear Fuel

Five commenters urged that procedures were needed to implement section 133 of the NWPA. That section requires the Commission to establish procedures for the licensing of any technology approved by the Commission

under section 218(a) of the NWPA for use at the site of any civilian nuclear power reactor. Section 218(a) requires the Secretary of Energy to establish a demonstration program for the dry storage of spent nuclear fuel at reactor sites, with the objective of establishing one or more technologies that the Commission may, by rule, approve for use at reactor sites without, to the maximum extent practical, the need for additional site-specific approvals by the Commission.

The hybrid hearing procedures are not an appropriate means of implementing section 133 of the NWPA. Rather, they are intended to encourage and expedite the hearing process when a hearing is requested on an application for a license or license amendment. Implementation of section 133 will proceed in connection with the demonstration program set forth in section 218. Using information obtained through that program, the Commission will initiate a rulemaking to provide for the generic approvals contemplated by the NWPA.

J. Miscellaneous Comments

Five commenters recommended that the rule and supplementary information mention the purpose of the hybrid hearing procedures in order to assist presiding officers in interpreting the final rule. The Commission agrees, and has amended the final rule to state that the purpose of the hybrid procedures is to encourage on site expansion and expedite the licensing of spent fuel storage expansions and transshipments.

One commenter urged the Commission to adopt an interim policy of employing Option 2 in applicable cases, because section 134 applies to

proceedings on applications filed after January 7, 1983. Pending development of the final rule, the Commission provided notice to interested persons of the availability of the hybrid hearing process in applicable proceedings. Initially, this was done in staff pleadings filed in the proceedings if a hearing was requested. More recently, the notices of opportunity for a hearing called attention to the availability of hybrid hearing procedures. See, e.g., 49 Fed. Reg. 23715, 23718 (June 7, 1984)(Turkey Point Plant, Units 3 and 4); 49 Fed. Reg. 26846, 26847 (June 29, 1984)(Virgil C. Summer Nuclear Station, Units 1 and 2). While not expressly adopting Option 2, these notices took a permissive approach, explaining that an opportunity for oral argument would be provided at the request of any party. Accordingly, the Commission's interim policy has been essentially as the commenter suggested.

Option 1 would have applied the hybrid procedures to all issues within the scope of a spent fuel proceeding. In contrast, Option 2 would have permitted a party to request the use of hybrid procedures with respect to one or more issues in the proceeding. One commenter questioned the latter approach, noting that section 134 could be construed as requiring a hybrid hearing for all matters in controversy. The Commission has examined this issue and has concluded that, if requested, an opportunity for oral argument should be provided with respect to all matters in controversy. Section 134 provides that an issue shall not be designated for adjudication unless the presiding officer makes certain determinations and specifies, in writing, the facts in dispute and the reasons why adjudication is required. This indicates that Congress did not intend for an issue to be adjudicated unless the

statutory criteria were met. Therefore, the Commission believes that once a party invokes the hybrid process by requesting an oral argument, all matters in controversy among the parties should be examined for the existence of a genuine and substantial dispute of material fact that can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing. The final rule has been amended to reflect this conclusion.

One commenter urged the Commission to eliminate the prehearing conference from Option 1, arguing that it was unnecessary and contrary to section 134. Because Option 2 was designed to fit into the existing prehearing process in Part 2, it too would have provided for one or more prehearing conferences prior to oral argument, in the presiding officer's discretion. See 10 CFR § 2.752. The Commission believes that it may be necessary for the presiding officer to hold one or more such conferences to consider intervention petitions and the admissibility of contentions. This will enable the presiding officer to establish the "matters in controversy" with respect to which any party may request an oral argument under section 134. Therefore, no change in the final rule is warranted.

Five commenters observed that the proposed rules could be read to preclude the presiding officer from taking official notice of facts, as permitted by 10 CFR § 2.743(i). The Commission agrees that the language of the proposed rule could be so misconstrued, and has clarified the final rule accordingly.

One commenter argued that the restrictions of section 134(b)(2)(B), which preclude the presiding officer from designating certain issues for resolution in an adjudicatory hearing, should also be applied to the

admission of contentions. Section 134(b)(2)(B) provides that in determining whether an adjudicatory hearing is required, the presiding officer shall not consider:

> (i) any issue relating to the design, construction or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a construction permit has been granted at the site, unless the Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or
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> (ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless (I) such issue results from any revision of siting or design criteria by the Commission following such decision; and (II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered.

Section 134(b)(2)(B) applies to the presiding officer's designation of issues for adjudication. It requires the presiding officer to make certain findings if those issues are to be considered. The Commission believes that a party should be free to demonstrate at oral argument that issues relating to reactor siting, design, construction, or operation meet the statutory criteria and should be designated for adjudication. For this reason, it would be inappropriate to apply the section 134(b)(2)(B) criteria to the admission of contentions.

Option 1 would have prohibited the presiding officer from designating sua sponte (i.e., on its own motion) any issues for resolution in an adjudicatory hearing. One commenter objected to the use of the term "sua sponte," finding it overly legalistic. The Atomic Safety and Licensing Board Panel commented that this provision was unnecessary in view of the existing

procedures that must be followed when a Board raises an issue not placed in controversy by the parties. In essence, a serious safety, environmental, or common defense and security question must exist and the Board must inform the Commission of its action. See, e.g., 10 CFR 2.760a; Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-81-54, 14 NRC 918, 922-23 (1981).

The Commission agrees that this provision is unnecessary. Section 134 clearly restricts the designation of issues for adjudication to those genuine, substantial, and material disputes of fact that can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing. Few, if any, issues that a Board might consider raising on its own motion would ever be able to meet the statutory standard. In all likelihood, the staff could satisfactorily examine and resolve any uncontested matters without the need for a formal hearing. Because of the possibility, however remote, that the presiding officer's authority to raise issues sua sponte could be appropriately exercised in a hybrid hearing, the Commission has deleted the prohibition from the final rule.

IV. THE FINAL RULE

The final rule adds a new subpart K to 10 CFR Part 2, with sections numbered 2.1100 to 2.1108. Subpart K establishes the procedure for initiating and conducting the first part of a hybrid hearing. The second part of a hybrid hearing -- the resolution of genuine and substantial disputes of fact -- will be conducted in accordance with procedures already established in 10 CFR Part 2, subpart G.

Section 2.1100 defines the purpose of subpart K, to establish procedures to be used at the request of a party in certain contested proceedings for the expansion of spent fuel storage capacity or transshipment, as authorized by section 134 of the Nuclear Waste Policy Act of 1982. The procedures are intended to encourage and expedite those proceedings.

Section 2.1101 defines the scope of subpart K. It governs applications filed after January 7, 1983 to expand the spent fuel storage capacity at civilian nuclear power plants through the use of (i) high density fuel storage racks, (ii) fuel rod compaction, (iii) transshipment to another facility in the same utility system, (iv) construction of additional spent fuel pool capacity or dry storage, or (v) other means. It includes licensing of an independent spent fuel storage installation under 10 CFR Part 72. Subpart K does not apply to the first application to use a new technology not previously licensed by the Commission.

Section 2.1102 adds two definitions of terms used in the subpart, "civilian nuclear power reactor," and "spent nuclear fuel." These terms are used and defined in the Nuclear Waste Policy Act. A "civilian nuclear power reactor" is a civilian nuclear power plant required to be licensed as a utilization facility under Sections 103 or 104b of the Atomic Energy Act of 1954, as amended. This approximates the NWPA definition but relates it to the term "utilization facility," as used in the Atomic Energy Act and

Commission regulations. 6/ "Spent nuclear fuel" is defined exactly as in the NWPA. It is fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

Section 2.1103 has been considerably shortened to avoid duplicating existing provisions in Part 2. It provides for a notice of proposed action in accordance with 10 CFR § 2.105 if the Commission has not found that a hearing is required in the public interest, a hearing has not already been convened on the application, and a notice of proposed action has not yet been published as of the effective date of subpart K. 7/ The notice specifies that hybrid procedures are available at the request of any party. As noted earlier, section 2.1103 should be read in conjunction with 10 CFR §§ 50.58 and 50.91. Application of the Commission's rules implementing Public Law 97-415 (the so-called "Sholly" amendments) is not affected by the fact that a hybrid proceeding is offered.

Section 2.1104 outlines the procedure for initiating a hybrid hearing. A party must make a timely request for oral argument under subpart K. A timely request must be granted. An untimely request for oral argument will

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6/ A power reactor is commonly understood to be a utilization facility whose primary function is to produce atomic energy for the generation of electricity. A "civilian nuclear activity" is any atomic energy activity other than an "atomic energy defense activity," as defined in sections 2(5) and 2(3) of the NWPA, respectively.

7/ If the Commission finds that a hearing is required in the public interest, a notice of hearing will be published under 10 CFR 2.104 and the hybrid procedures will not be available.

require a showing of good cause for the lateness with an opportunity for other parties to rebut. In either case, the presiding officer shall issue a written order and establish a schedule for discovery and oral argument on admitted contentions. Thus, as noted earlier, present Commission practice requiring at least one valid contention is maintained in hybrid proceedings. Finally, if no request for an oral argument is made or all untimely requests are denied, the proceeding will be conducted in accordance with 10 CFR Part 2, subpart G.

Section 2.1105 provides that discovery shall be conducted according to the schedule set by the presiding officer and is to be completed in 90 days. Additional time will require a showing of good cause. The forms of discovery permitted are those in subpart G. In view of the continued applicability of subpart G under section 2.1108, the list of discovery sections in the proposed rules has been eliminated as unnecessary.

Section 2.1106 establishes the ground rules for oral argument. Fifteen days prior to the oral argument the parties must submit a preargument brief summarizing the facts, data, and arguments on which they will rely at oral argument. The brief must be supported by facts and data in the form of sworn testimony or other sworn written submissions. Only sworn facts and data may be cited during oral argument, and the presiding officer may consider those facts and data only if they are submitted in that form.

Section 2.1107 states the manner in which issues will be designated for adjudicatory hearing under subpart G. After the oral argument, the presiding officer will (1) designate disputed questions of fact and unresolved questions of law for a subpart G hearing, and (2) dispose of all other

issues. To be designated for an adjudicatory hearing an issue must present a genuine and substantial dispute of fact that requires the presentation of evidence in an adjudicatory hearing for its resolution, and the Commission's decision must be likely to be dependent in whole or part on that resolution. For hybrid hearings on any application filed before December 31, 2005, the presiding officer may not consider any issue that was or could have been litigated in any proceeding to issue a construction permit or operating license for the civilian nuclear power reactor at the site. This strict application of the principles of res judicata to hybrid hearings on spent fuel storage expansions may be relaxed, however, if the presiding officer determines that the issue deriving from the spent fuel storage expansion application substantially affects the design, construction, or operation of the facility. For siting and design issues that were actually considered and decided, it must also be shown that the Commission has subsequently revised its siting and design criteria. A presiding officer's decision under section 2.1107 disposing of issues and designating issues for hearing is interlocutory. However, an order disposing of all issues and dismissing the proceeding is final for purposes of filing an appeal.

Section 2.1108 establishes that subpart K is not a substitute for other procedural regulations of the Commission. Rather, it qualifies those regulations for the conduct of hearings on spent fuel storage expansion applications. To the extent not qualified by subpart K, all other relevant procedural rules apply. The section has been revised to state this more clearly.

The final rule also includes an amendment to 10 CFR § 72.34(a). This section of the Commission's regulations provides for public hearings on applications for independent spent fuel storage installations. The amendment adds the procedures of subpart K to those hearings.

PAPERWORK REDUCTION ACT STATEMENT

This final rule contains no new or amended information collection requirements subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

REGULATORY FLEXIBILITY CERTIFICATION

The final rule will not have a significant economic impact upon a substantial number of small entities. Nuclear power plant licensees do not fall within the definition of small businesses found in section 3 of the Small Business Act, 15 U.S.C. 632, or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121. The impact on intervenors or potential intervenors will be neutral. The oral argument may increase case preparation costs by requiring intervenors to demonstrate the existence of a genuine and substantial dispute of fact in order to trigger an NRC adjudicatory hearing. Once the adjudicatory hearing commences, however, an intervenor's costs should decrease because the issues will be more clearly focused than under existing practice. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the NRC hereby certifies that this rule, if adopted, will not have a significant economic impact upon a substantial number of small entities.

REGULATORY ANALYSIS

The Commission has prepared a Regulatory Analysis of the final rule assessing the costs and benefits and resource impacts. It may be examined at the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C.

LIST of SUBJECTS in 10 CFR PART 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

LIST of SUBJECTS in 10 CFR PART 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting requirements, Security measures, Spent fuel.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the Nuclear Waste Policy Act of 1982 and Sections 552 and 553 of Title 5 of the United States Code, the NRC is adopting the following amendments to 10 CFR Parts 2 and 72.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

AUTHORITY: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Section 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239) Section 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Sections 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended. (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1437 (42 U.S.C. 2135).

2. Part 2 is amended by adding a new subpart K to 10 CFR Part 2 to read as follows:

Subpart K - Hybrid Hearing Procedures for Expansions of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

Subpart K - Hybrid Hearing Procedures for Expansions of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

§ 2.1100 Purpose.

The regulations in this subpart establish hybrid hearing procedures, as authorized by section 134 of the Nuclear Waste Policy Act of 1982 (96 Stat. 2230), to be used at the request of any party in certain contested proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant. These procedures are intended to encourage and expedite onsite expansion of spent nuclear fuel storage capacity.

§ 2.1101 Scope.

The procedures in this subpart apply to contested proceedings on applications filed after January 7, 1983, for a license or license amendment under Part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means. This subpart also applies to proceedings on applications for a license under Part 72 of this chapter to store spent nuclear fuel in an independent spent fuel storage installation located at the site of a civilian nuclear power reactor. This subpart shall not apply to the first application for a license or license amendment to expand the spent fuel storage capacity at a particular site through the use of a new technology not previously approved by the Commission for use at any other nuclear power plant.

2.1102 Definitions.

As used in this part:

(a) "Civilian nuclear power reactor" means a civilian nuclear power plant required to be licensed as a utilization facility under sections 103 or 104(b) of the Atomic Energy Act of 1954.

(b) "Spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

2.1103 Notice of proposed action.

(a) In connection with each application filed after January 7, 1983, for a license or an amendment to a license to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant, for which the Commission has not found that a hearing is required in the public interest, for which an adjudicatory hearing has not yet been convened, and for which a notice of proposed action has not yet been published as of the effective date of this subpart, the Commission will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action in accordance with § 2.105 of this chapter. The notice of proposed action will specify that, at the request of any party to the proceeding, any hearing held on the application shall be conducted in accordance with the procedures in this subpart.

§ 2.1104 Requests for oral argument.

(a)(1) Within ten (10) days after an order granting a request for hearing or petition for leave to intervene, any party may request an oral argument. Requests for oral argument shall be in writing and shall be filed with the presiding officer. The presiding officer shall grant a timely request for oral argument.

(2) The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for failure to file on time and after providing the other parties an opportunity to respond to the untimely request.

(b) The presiding officer shall issue a written order ruling on any requests for oral argument and, when a request for oral argument is granted, establishing a schedule for discovery and subsequent oral argument with respect to the admitted contentions.

(c) If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, the presiding officer shall conduct the proceeding in accordance with subpart G of this Part.

§ 2.1105 Discovery.

Discovery shall begin and end at such times as the presiding officer shall order. Ordinarily, discovery shall be completed within 90 days. The presiding officer may extend the time for discovery upon good cause shown and after providing the other parties an opportunity to respond to the request.

§ 2.1106 Oral argument.

(a) Fifteen (15) days prior to the date set for oral argument, each party, including the NRC staff, shall submit to the presiding officer a detailed written summary of all the facts, data, and arguments which are known to the party at such time and on which the party proposes to rely at the oral argument either to support or to refute the existence of a genuine and substantial dispute of fact. Each party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission. Each party's written summary and supporting information shall be simultaneously served on all other parties to the proceeding.

(b) Only facts and data in the form of sworn written testimony or other sworn written submission may be relied on by the parties during oral argument, and the presiding officer shall consider those facts and data only if they are submitted in that form.

§ 2.1107 Designation of issues for adjudicatory hearing.

(a) After due consideration of the oral presentation and the written facts and data submitted by the parties and relied on at the oral argument, the presiding officer shall promptly by written order:

(1) designate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing; and

(2) dispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.

With regard to each issue designated for resolution in an adjudicatory hearing, the presiding officer shall identify the specific facts that are in genuine and substantial dispute, the reason why the decision of the Commission is likely to depend on the resolution of that dispute, and the reason why an adjudicatory hearing is likely to resolve the dispute. With regard to issues not designated for resolution in an adjudicatory hearing, the presiding officer shall include a brief statement of the reasons for the disposition. If the presiding officer finds that there are no disputed issues of fact or law requiring resolution in an adjudicatory hearing, the presiding officer shall also dismiss the proceeding.

(b) No issue of law or fact shall be designated for resolution in an adjudicatory hearing unless the presiding officer determines that:

(1) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(2) the decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

(c) In making a determination under paragraph (b) of this section, the presiding officer shall not consider:

(1) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at the site, or any civilian nuclear power reactor for which a construction permit has been granted at the site, unless the presiding officer determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being considered; or

(2) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at that site, unless (i) such issue results from any revision of siting or design criteria by the Commission following such decision; and (ii) the presiding officer determines that such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being considered.

(d) The provisions of paragraph (c) of this section shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations applied for under the Atomic Energy Act of 1954, as amended, before December 31, 2005.

(e) Unless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's order disposing of issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding.

§ 2.1108 Applicability of other sections.

In proceedings subject to this subpart, the provisions of subparts A and G are also applicable, except where inconsistent with the provisions of this subpart.

PART 72 - LICENSING REQUIREMENTS FOR THE STORAGE OF SPENT FUEL IN AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI)

3. The authority citation for Part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2282); sec. 274, Pub. L. 88-273, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, 202, 206, 88 Stat. 1242, 1243, 1246, as amended (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C.

5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Section 72.34 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154).

4. In § 72.34, paragraph (a) is revised to read as follows:

§ 72.34 Public hearings.

(a) In connection with each application for a license or an amendment to a license under this part, the Commission shall issue or cause to be issued a notice of hearing in accordance with § 2.104 of this chapter, or a notice of proposed action in accordance with §§ 2.105 or 2.1103 of this chapter, as appropriate. Except as provided in paragraph (b) of this section, a hearing may not be held until after 30 days' notice and publication once in the FEDERAL REGISTER.

* * * * *

Dated at Washington, D.C. this _____ day of _____, 1985.

For the Nuclear Regulatory Commission.

_____
Samuel J. Chilk
Secretary of the Commission

ENCLOSURE B

FINAL 10 CFR PART 2, SUBPART K, "HYBRID HEARING PROCEDURES FOR EXPANSIONS OF SPENT NUCLEAR FUEL STORAGE CAPACITY AT CIVILIAN NUCLEAR POWER REACTORS"

REGULATORY ANALYSIS

1. Statement of the Problem

Section 134 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425) authorizes the Commission to use a hybrid hearing process in certain contested proceedings on an application for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor. The hybrid hearing process consists of an oral argument followed by a formal hearing on genuine and substantial issues of fact. Section 134 applies to contested proceedings on applications for a license or license amendment, filed after January 7, 1983, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means. Section 134 does not apply to the first application for such expansion at a particular site thro gh the use of a new technology not previously approved by the Commission for use at any other nuclear power plant. Section 134 changes the initial stage of the hearing process by providing for the use of less formal procedures at the request of any party to the proceeding. The proposed rule is needed in order to implement the provisions of section 134 of the Act.

ENCLOSURE B

2. Objective

The objective of the proposed rule is to establish specific procedures to govern the hybrid hearing process in proceedings subject to section 134 of the Nuclear Waste Policy Act of 1982.

3. Alternatives

a. Broad vs. Narrow Hybrid Rule

Two versions of the proposed rule were published for public comment. Option 1 would have employed less formal procedures in the initial stages of the hybrid hearing process, eliminating the need to specify contentions. Instead, a petitioner would simply file a list of issues within the scope of the proceeding. Option 2 would have employed a more narrow approach, retaining the existing requirement that a petitioner specify at least one admissible contention. Based on the comments received, Option 2 was rejected. The lower threshold for admission of contentions in Option 1 would lead to broad, lengthy discovery on unfocused issues. This would be inconsistent with the purpose of hybrid hearings -- to encourage and expedite the licensing of spent fuel expansions and transshipments.

b. Mandatory vs. Optional Procedures

Option 1 would have required the use of the hybrid hearing

procedures in all proceedings to which section 134 applies. Option 2 would have permitted the use of hybrid hearing procedures at the request of any party. In response to public comments, the optional approach was chosen as more likely to effectuate the purpose of the hybrid hearing process. There is no advantage in requiring the use of hybrid procedures if no party to the proceeding perceives any benefit in using them. This is consistent with the language of section 134, which directs the Commission to provide an opportunity for oral argument at the request of any party. Support for this approach can also be found in the legislative history of section 134. See S. Rep. No. 282, 97th Cong., 1st Sess. 13 (1981) (stating that a predecessor to section 134 "authorizes the Commission to use hybrid hearing procedures"). Cf. H.R. Rep. No. 785, 97th Cong., 2d Sess. 39 (1982) (stating that "[p]rocedural changes are made to the NRC licensing process to encourage utilities to expand storage capacity at reactor sites").

c. Existing Rules vs. Additional Limitations on Discovery

The proposed rules would have employed the existing rules regarding the conduct of discovery. Many commenters urged that discovery should not be left entirely to the presiding officer's discretion and that certain limitations were needed to encourage and expedite spent fuel proceedings and

transshipments. Discovery can be a significant source of delay. Accordingly, the final rule provides that, ordinarily, discovery will be completed in 90 days. However, the presiding officer may grant an extension for good cause after providing the parties an opportunity to respond. This will permit the presiding officer to exercise greater control over the discovery process and to adjust the schedule, if necessary, to the demands of a particular case.

4. Consequences

a. Benefits

The final rule will allow increased public participation in the informal, early stage of the licensing process in the form of an oral argument. The final rule will also help to ensure that only genuine factual disputes are designated for resolution in a formal adjudicatory hearing.

b. Costs

The proposed rule will increase case preparation costs somewhat for all parties prior to oral argument because of the need to demonstrate whether a genuine factual dispute exists. These costs will be offset by the savings realized by litigating fewer and more clearly-focused issues in the adjudicatory phase of the hybrid process.

5. Decision Rationale

In light of the statutory objectives and the preceding analysis, the alternatives represented by the final rule were selected.

6. Implementation

Section 134 of the NWPA applies to proceedings on applications filed after January 7, 1983. Pending the effective date of the final rule, the Commission will continue to provide notice of the availability of the hybrid hearing procedures in applicable cases.

ENCLOSURE C

Dear Chairman _____:

Enclosed for your information are copies of a notice of final rulemaking to be published in the Federal Register and a public announcement concerning that rulemaking.

The Commission is adding a new Subpart K to 10 CFR Part 2, entitled "Hybrid Hearing Procedures for Expansions of Spent Nuclear Fuel Storage Capacity at Civilian Power Reactors." The final rule establishes procedures to implement the hybrid hearing process in section 134 of the Nuclear Waste Policy Act of 1982. That section applies to proceedings on applications for a license or license amendment, filed after January 7, 1983, to expand the spent fuel storage capacity at the site of a civilian nuclear power reactor.

The final rule follows the statutory language very closely. The hybrid hearing process consists of an oral argument, which is designed to identify issues appropriate for resolution in an adjudicatory hearing, followed by a formal hearing on genuine and substantial issues of fact. The final rule requires that a party request an oral argument before Subpart K is invoked. The existing rules apply with respect to standing, intervention, and the admission of contentions. Discovery must be completed within 90 days. Only genuine and substantial disputes of fact and related issues of law that are material to the decision will be held over for adjudicatory hearing after oral argument. The final rule should expedite the hearing process in those proceedings to which it applies.

Sincerely,

Guy H. Cunningham, III
Executive Legal Director

ENCLOSURE C

ENCLOSURE D

NRC CHANGES HEARING RULES FOR
SPENT NUCLEAR FUEL STORAGE

The Nuclear Regulatory Commission is amending its regulations to implement certain provisions of the Nuclear Waste Policy Act of 1982 (Public Law 97-425). These provisions deal with the conduct of public hearings on applications to license expansion of used nuclear fuel storage capacity at individual power reactor sites as well as shipments of used nuclear fuel from one power reactor site to another.

These provisions apply to license applications filed after January 7, 1983. They do not apply, however, to the first-ever application to use a new expansion technology not previously approved by the NRC for use at another power reactor site.

The final rule establishes a so-called "hybrid" hearing process, which consists of an oral argument, designed to identify issues appropriate for resolution in an adjudicatory hearing, followed by a formal hearing on genuine and substantial issues of fact.

Any person requesting a hearing must submit at least one valid contention to be admitted as a party to the proceeding. Any party can invoke the new procedures by requesting an oral argument. The presiding officer will then schedule discovery and oral argument.

Enclosure D

After the oral argument, the presiding officer will determine which issues, if any, should be resolved in an adjudicatory hearing. Those issues must present a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing. In addition, the decision of the NRC must be likely to depend, in whole or in part, on the resolution of that dispute.

The final rule also excludes issues relating to the design, siting, construction, or operation of a reactor already licensed to operate or for which a construction permit has been granted at the site, unless the NRC makes certain required findings.

The final rule is effective on (insert date 30 days after publication in the Federal Register).

RULEMAKING ISSUE

(Affirmation)

August 6, 1985 SECY-85-102B

For: The Commissioners

From: William H. Briggs, Jr.
Solicitor

Subject: PROCEDURES TO BE FOLLOWED WHEN A SUBPOENA OR OTHER DEMAND FOR DISCLOSURE OF RECORDS OR INFORMATION IS SERVED ON NRC EMPLOYEES

Purpose: To obtain final Commission approval of the rule presented in SECY-85-102A

Prior History: The Commission approved, by a vote of 3-2, the final rule submitted in SECY-85-102A. Three Commissioners, however, disapproved the application of the proposed rule to former employees. Accordingly, we have rewritten the rule to eliminate its application to former NRC employees. The vote sheets also contain some questions and comments which are discussed below. Some changes to the rule have been made in response to the comments and questions.

Discussion: The rule has been redrafted to exclude former employees from its scope. As suggested by Chairman Palladino and

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Theresa W. Hajost, OGC
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Commissioner Zech, changes (underlined) were made to the Supplementary Information and to the rule to clarify the Commission's intent to exclude federal grand jury proceedings from the coverage of this rule.

Commissioner Zech raised the issue of the appropriateness of OGC representing NRC employees from whom information was sought when their interests might differ from those of the Commission. We anticipate that in most instances the interests of the employee and the Commission will be the same. However, in those rare instances where the interests of the Commission diverge from those of its employee, the attorney to whom the employee is referred will ascertain whether he/she is able to represent the employee consistent with his/her duty to represent the Commission. If the attorney is unable to represent the employee, the employee will be informed of this and given such general guidance as he/she may be given without creating a conflict of interests.

Commissioner Roberts questioned the Commission's authority to issue these rules in light of the limitations of Section 146(b) of the Atomic Energy Act which reads: "The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law."[1]

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[1]Although sketchy, the legislative history of Section 146(b) shows that the Congress wanted to encourage the declassification and dissemination of formerly classified information to the fledgling industry and the public. (In

[Footnote Continued]

These rules do not attempt to limit the dissemination of information which the Commission has no legal basis to control. They are solely intended to establish an orderly procedural mechanism for processing requests for official NRC information. While most requesters are undoubtedly seeking only information that they may lawfully obtain, it should be recognized that there is a large body of NRC information which the agency is either required to withhold by law or authorized to lawfully withhold if it is in the agency's interest to do so. The line between what may lawfully be withheld and what may not be withheld is not always a bright one and clearly is a

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[Footnote Continued]

the section analysis of S. 3690, the committee-approved revision of S. 3323, Section 146(b) appears in Chapter 12, "Control of Information," which sets forth provisions for "the protection of secret information relating to atomic energy.") S. Rep. No. 1699, 83d Cong., 2d Sess. 23 (1954). See also Hearings on S. 3323 and H.R. 8862, To Amend the Atomic Energy Act of 1946: Hearings before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. 49-50 (1954)(statement of J.D. Luntz, editor of Nucleonics); Id. at 402 (statement of O.M. Rubenhausen, Chairman of the Special Committee on Atomic Energy of the Association of the Bar of the City of New York). The Atomic Energy Commission in its testimony before the Joint Committee expressed its concern that the broad language of the Section might interfere with the Commission's control over information such as medical records, personnel files, or investigative reports, which it may wish to retain as confidential for administrative reasons. Hearings, supra at 605 (statement of the Atomic Energy Commission). Congress did not share the AEC's concern, nor did it suggest that such concerns would be realized by the passage of Section 146(b). Since the passage of the Act, both the AEC and the NRC have continued to assert, when appropriate, these and other privileges in litigation.

scrutinized by the agency's attorneys. All this proposed regulation seeks to do is to establish a structure to assure that this scrutiny is done in a prompt, orderly fashion. The Atomic Energy Act in no way prohibits such a procedural regulation.[2]

The types of material that may lawfully be withheld as a result of agency review of requests for NRC information involve a wide range of information. The Atomic Energy Act itself, Sections 147 and 148, gives the Commission explicit authority to control the dissemination of restricted and safeguards information. As for other types of information which will be withheld under the review procedures proposed by the rule, lawful authority to support such a withholding can be found outside the Atomic Energy Act.

The Government can lawfully refuse access to documents sought in litigation on several grounds: statutes allowing or requiring that specified material be kept confidential (i.e., the Trade Secrets Act, 18 U.S.C. § 1905), various privileges available to any litigant, such as the attorney-client and work product privileges, F. R. Civ. P. 26(b), certain privileges available only to

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[2]A number of other agencies already have such regulations or are currently in the rulemaking process, including the Department of Commerce, the Department of Defense, the Department of Energy, the Department of Housing and Urban Development, the Department of Justice, the Department of Labor, the Commodity Futures Trading Commission, the Federal Trade Commission, the Equal Employment Opportunity Commission, and the Executive Office of the President.

it--the so-called "governmental" privileges,[3] or other general objections such as burdensomeness or relevance. Fed. R. Civ. P. 45(b).

Particularly with regard to Government privileges, the law is complex and disclosure decisions require careful legal analysis.

The courts have recognized distinct governmental privileges protecting state secrets, the deliberative processes of Government, the identity of Government informants, and certain information given to the Government on a pledge of confidentiality.

The state secrets privilege encompasses matters whose disclosure would harm our national security or the conduct of our international relations. The privilege has long been recognized at common law, see 8 Wigmore, Evidence § 2378 at 794, and was upheld by the Supreme Court in United States v. Reynolds, 345 U.S. 1 (1953).

The Government also may assert a privilege to protect opinions, recommendations, and advice generated in the process of formulating policies and making decisions--the so-called "deliberative processes" of the Government. The privilege rests in part on the same need for uninhibited communication that underlies the attorney-client privilege. See 2 Weinstein's Evidence ¶ 509(09) at

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[3]For a listing of governmental privileges, see Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977).

509-35. It is thought that frank and open discussions within the Government will be stifled if disclosure of policy materials is compelled in litigation, see, e.g., Kaiser Aluminum & Chemical Corporation v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), cert. denied 389 U.S. 952 (1967), and that, as a result, the quality of Government decisionmaking will decline. See NLRB v. Sears Roebuck & Company, 421 U.S. 132, 151 (1975).

A third privilege allows the Government to withhold the identity of persons who furnish information about violations of the law to officers charged with law enforcement. E.g., Roviaro v. United States, 353 U.S. 53 (1957); Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F2d 762 (D.C. Cir. 1965).

Investigatory files compiled for law enforcement purposes are also privileged. See, e.g., Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1970); Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977); Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973). The privilege is necessary to protect the law enforcement process. Disclosure of investigatory files would undercut the Government's efforts to prosecute criminals by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the Government's case.

Whether the agency's claim of such a privilege is lawful or not will be a

Whether the agency's claim of such a privilege is lawful or not will be a matter for the courts to decide. Similarly, the courts will decide whether any qualified privilege is overcome by a litigant's need for the information. This is the situation without the proposed rule and it will be the situation if the rule is passed.

In conclusion, the Commission is on firm legal ground in issuing these rules. They are, in every sense of the word, purely for housekeeping purposes and necessary to the orderly processing of discovery request for NRC information.

Recommendation: The Commission should approve the revised final rule for publication.

William H. Briggs, Jr.
Solicitor

Attachment:
Final Rule

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, August 20, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Tuesday, August 13, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for consideration at an Open Meeting during the Week of September 2, 1985. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:

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ATTACHMENT

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR PART 9

Procedures for Production or Disclosure of Records or Information in Response to Subpoenas or Demands of Courts or Other Authorities

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) has added Subpart D to Part 9 of Chapter 10 of the Code of Federal Regulations to prescribe procedures with respect to the production of documents or disclosure of information in response to subpoenas or demands of courts or other judicial or quasi-judicial authorities in State and Federal proceedings (excluding Federal grand jury proceedings). This rule clarifies Commission procedures regarding subpoenas or other judicial or quasi-judicial demands on NRC employees to produce NRC records or to disclose information through testimony or depositions. The rule also ensures that the responsibility for determining the response to the demands is placed on the appropriate Commission official.

EFFECTIVE DATE:

FOR FURTHER INFORMATION CONTACT: Theresa W. Hajost, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (202) 634-1493.

SUPPLEMENTARY INFORMATION:

I. Background.

Over the past several years there has been a substantial increase in the Nuclear Regulatory Commission's inspection and investigation functions resulting in enforcement actions taken against NRC licensees. As a result of this activity, and in the wake of many cancellations of nuclear power plants, there are now increasing demands for access to NRC records and for testimony by NRC employees by parties in litigation to which the NRC is not a party. This regulation is limited to situations where the NRC is not a party. NRC personnel have been and are expected to be subpoenaed for depositions or testimony in private actions and called upon to produce NRC records or to disclose information relating to licensing and enforcement activities. The NRC had no uniform written policies or procedures for dealing with these demands. It is the purpose of these amendments to prescribe a uniform policy to provide NRC personnel with clear guidance on how to respond to subpoenas or other demands for disclosure.

Following the lead of other Federal agencies that have established a "clearinghouse" or centralized decisionmaking approach to subpoenas, the amendments establish that copies of all subpoenas or other demands served on NRC employees will be referred to the General Counsel. A minor change requiring simultaneous service of such demands on the General Counsel was made in order to expedite this process and ensure efficient internal administration of subpoenas or other demands for production or disclosure. The General Counsel is to review the proposed discovery, ascertain the scope of the proposal, and decide on the

approach to be followed in each case, including authorizing litigation, if necessary, to resolve disputes between the NRC and the party seeking the discovery. In addition, the amendments set forth the procedures to be followed in the event a response to a subpoena is required before instructions from the General Counsel are received. If a court or other authority declines to stay its demand pending the employee's receipt of instructions, the regulations direct the employee to invoke the case of United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) and these regulations. Touhy holds that government agencies may lawfully establish housekeeping procedures to facilitate the orderly processing of requests for agency information. It further provides that a requesting party's failure to follow those procedures may be valid grounds for an agency and its employees to refuse to provide the requested information.

In deciding whether and to what extent to make documents or testimony available pursuant to a demand, the General Counsel is to consider, among other things, whether the discovery would be proper under the general provisions governing discovery set forth in Fed. R. Civ. P. 26(b) and under the rules of procedure governing the case or matter in which the demand arose. The General Counsel must also consider whether disclosure is appropriate under the relevant substantive law concerning various discovery privileges, including those unique to the government and its agencies, general statutes and regulations governing possession and use of government and corporate information; laws governing trade secret or proprietary information; policies governing ongoing investigations or concerning investigative

methods, informants, or similar considerations. The General Counsel will advise the party seeking discovery of the results of the NRC's deliberations in writing as far in advance of the response date as is practicable. Any claim of privilege or assertions of unreasonable burden which cannot be resolved by the General Counsel and the requesting party will, as always, ultimately be reviewed and resolved by the appropriate court.

II. Comments

Four letters of comment were received, each containing several comments and suggestions. The individual comments and suggestions were considered by NRC and are discussed in terms of two categories: (A) those that led to a change in the regulations as proposed and (B) those that did not lead to any changes.

A. Comments That Led to a Change in the Regulations as Proposed

1. Former employees should not be included within the scope of the rule.

Each of the four commenters responded to Commissioner Asselstine's request for comments on the desirability of applying these regulations to former employees. All four commenters opposed applying the rule to former employees. The Commission has decided not to extend these regulations to cover former employees.

2. Before disclosing documents in its files which were submitted by contractors, applicants, or licensees and which may contain trade secrets or other privileged information, the NRC should contact the submitter.

In order to ensure that before disclosure of any information or production of documents the material is reviewed to see if it contains any trade secrets or proprietary information, the words "trade secrets or proprietary information" have been added to the list of items for the General Counsel to consider when he or she is deciding whether and to what extent to make documents or testimony available pursuant to a demand. The NRC already has a general policy of contacting the submitter of proprietary information before releasing such information. See 10 CFR 2.790.

B. Comments Which Did Not Lead to Any Changes in the Final Rule

1. The NRC has no legal authority to promulgate rules dealing with demands for testimony of its employees.

The authorities relied on in the publication of the proposed rule were sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201) and sec. 201, Pub. L. 93-438, 88 Stat. 1242 (42 U.S.C. 5841). Section 201 of the Energy Reorganization Act of 1974 establishes the Nuclear Regulatory Commission and transfers to it all the licensing and regulatory functions of the Atomic Energy Commission. 42 U.S.C. 5841(f). Section 161 of the Atomic Energy Act of 1954 details the general duties of the Atomic Energy Commission, including promulgating such rules as necessary to carry out the purposes of the Act. 42 U.S.C. 2201(p). The Courts have found this section to be a broad grant of rulemaking authority paralleling the discretion given NRC in its broad regulatory scheme

which enables it to achieve its statutory objective. See Public Service Company of New Hampshire v. Nuclear Regulatory Commission, 582 F.2d 77, 82 (1st Cir.), cert. denied, 439 U.S. 1046 (1978); Westinghouse Electric Corp v. Nuclear Regulatory Commission, 555 F.2d 82, 83 (3d Cir. 1977); Siegel v. Atomic Energy Commission, 400 F.2d 778, 783 (D.C. Cir. 1968). Proper protection of classified and safeguards materials, e.g., 42 U.S.C. § 2167, proprietary and trade secrets data, e.g., 18 U.S.C. § 1905, and various types of privileged information is necessary if the NRC is to carry out its statutory duties. Thus, the NRC has clear authority to promulgate these rules.

2. Touhy v. Ragen does not apply to the NRC because it is an independent, not an executive, agency.

The Department of Justice regulations which were upheld in Touhy v. Ragen, 340 U.S. 462 (1951), were promulgated under the Federal housekeeping statute, 5 U.S.C. § 22 (now 5 U.S.C. § 301), which applies only to executive and military departments. Although the Federal housekeeping statute does not apply to the NRC, 42 U.S.C. 2201(p), one of the statutes under which these regulations were promulgated, gives the NRC the authority to promulgate such rules as it believes are necessary to carry out the Atomic Energy Act. In Touhy, the Supreme Court's inquiry focused on the validity of the Department of Justice's rule suggesting that as long as the agency regulations are validly promulgated under a statutory grant of authority, the Touhy rationale will apply. Thus, applying the reasoning of the Supreme Court in Touhy, the independent status of the NRC would be irrelevant as long as the rule was valid. The case cited in the comment, General Engineering,

Inc v. National Labor Relations Board, 341 F.2d 367 (9th Cir. 1965), held that the National Labor Relations Board (NLRB) was not an executive agency and, therefore, could not promulgate rules based on the Federal housekeeping statute. The court, however, did not strike down the NLRB's rule which was also promulgated under the general authority given it to promulgate such rules as would further its mission. After some preliminary observations on the validity of the rule, the court considered whether the NLRB's claim of privilege was valid. 341 F.2d 367 at 375. In another case concerning the NLRB and assertion of privilege, the court recognized that "[A]n agency has a legitimate and tidy housekeeping objective in centralizing the determinations of when to assert and when not to assert a privilege." National Labor Relations Board v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961).

Although the facts in Touhy dealt solely with written records, the Court's analysis is equally applicable to information contained in NRC files which is sought by a demand for oral testimony. Lower courts have applied Touhy to oral testimony. See United States v. Winner, 641 F.2d 825 (10th Cir. 1981); United States v. Allen, 554 F.2d 399, 406 (10th Cir. 1977); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966). It would be too easy to circumvent an agency's valid claim to withhold certain information if all that need be done to gain access to the desired information would be to rephrase a demand to request oral testimony.

3. Incorporate additional language recognizing that these regulations do not provide any new or additional authority to withhold information or testimony.

These regulations do not give the Commission any new substantive bases for claims of privilege; they do not purport to do so; and thus there is no need to state this fact in the body of the regulations. Failure to follow the procedures set forth in the regulations, however, may be grounds for not providing the requested information. See Touhy v. Ragen, 340 U.S. 462 (1951).

4. The General Counsel should be required to inform the Commission of any adverse determination under these regulations.

The Commission does not believe this is necessary. The NRC manual delegates to the General Counsel the responsibility of representing and protecting the interests of the NRC in various court proceedings. NRC-0115-032.[1]

5. The proposed regulations could delay or withhold information from State Public Utilities Commissions and State Utility Consumer Advocates.

The new regulations are merely procedural and give the NRC no new authority to withhold either information or records. The Commission feels that any slight delay which may be caused by compliance with these regulations is more than offset by the benefits of allowing the Commission the opportunity to better protect privileged information.

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[1] 10 CFR 1.2 states: "The definitive statement of the NRC's ... delegations of authority is in the Nuclear Regulatory Commission Manual and other elements of the NRC's Management Directives System ..." The NRC Manual is available in NRC Public Document Rooms.

6. The rule should contain a policy statement that the NRC intends to cooperate fully with other tribunals in the production of the requested documents and testimony.

The purpose behind this rule is to allow the NRC to respond to such requests expeditiously. The NRC is in the same position as any other entity from which discovery is requested and owes the same duties of cooperation. The Commission does not believe such a statement is necessary. Its objections to discovery or claims of privilege will be treated like those of any other governmental entity.

7. The rule's requirement that litigants submit an outline or plan with their demand for oral testimony is inappropriate.

One comment suggested that the Commission's requirement for a plan or summary of the oral testimony desired will affront other tribunals. The Commission disagrees. The NRC requires that a plan of the oral testimony desired be submitted only so that the General Counsel may ascertain whether the proposed testimony will lead to the disclosure of privileged information or will be unnecessarily burdensome. The Commission has acknowledged that any claim of privilege or assertion of unreasonable burden will ultimately be reviewed by a court. The opportunity for judicial review of the General Counsel's decision makes more explicit guidelines for the decision, as suggested by another comment, unnecessary.

Another comment suggested that the NRC's requirement of a plan will require divulgence of attorney work product. The requested information need not include material which would be subject to the attorney work product privilege. It merely must provide the NRC with details in order

to allow it to determine whether to oppose the discovery request on grounds of privilege or burden. The NRC has a legitimate interest in obtaining this information.

PAPERWORK REDUCTION ACT STATEMENT

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget Approval number 3150-0043.

REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this final rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This rule affects only those activities which involve NRC regulatory, licensing, or enforcement activities. The companies that own, build, or design these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

LIST OF SUBJECTS IN 10 CFR PART 9

Freedom of information, Penalty, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Part 9.

PART 9 - PUBLIC RECORDS

1. The authority citation for Part 9 continues to read as follows:

Authority: Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201, Pub. L. 93-438, 88 Stat. 1242 (42 U.S.C. 5841). Subpart A also issued under 5 U.S.C. 552; Subpart B also issued under 5 U.S.C. 552a; Subpart C also issued under 5 U.S.C. 552b.

2. Section 9.1 is revised to read as follows:

§ 9.1 Scope.

The regulations in this part: (a) Implement the provisions of the Freedom of Information Act, 5 U.S.C. 552, with respect to the availability to the public of Nuclear Regulatory Commission records for inspection and copying; (b) implement the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, with respect to disclosure and availability of certain Nuclear Regulatory Commission records maintained on individuals; (c) implement the provision of the Government in the Sunshine Act, 5 U.S.C. 552b, with respect to opening Commission meetings to public observation; and (d) describe procedures with respect to the production of agency records, information, or testimony in response to subpoenas or demands of courts or other judicial or quasi-judicial authorities in State and Federal proceedings.

3. Section 9.1a is revised to read as follows:

§ 9.1a Subparts.

Subpart A sets forth special rules applicable to matters pertaining to the Freedom of Information Act. Subpart B sets forth special rules applicable to matters pertaining to the Privacy Act of 1974. Subpart C

sets forth special rules applicable to matters pertaining to the Government in the Sunshine Act. Subpart D sets forth Commission procedures regarding subpoenas or other judicial or quasi-judicial demands on current or former employees for the production of NRC records or the disclosure of information through depositions or testimony.

4. In § 9.12, paragraph (b) is revised to read as follows:

§ 9.12 Production or Disclosure of Exempt Records.

* * * * *

(b) NRC personnel and NRC contractors from whom a record exempt from disclosure is sought by non-judicial means shall follow the procedure specified below. Where the record is sought by judicial or similar process, NRC personnel and contractors shall follow the procedure specified in Subpart D:

(1) If an exempt record is sought from NRC personnel by non-judicial means, the request shall promptly be forwarded to the Director, Office of Administration, who shall process the request as provided in this Part or take such other action as may be appropriate.

(2) If an exempt record is sought from an NRC contractor by non-judicial means, the request shall promptly be forwarded to the NRC contracting officer administering the contract who will then follow the procedure specified in paragraph (b)(1) of this section.

5. Subpart D (§§ 9.200 thru 9.204) is added to read as follows:

Subpart D - Production or Disclosure in Response to Subpoenas or Demands of Courts or Other Authorities

Sec.

9.200 Scope of Subpart

9.201 Production or disclosure prohibited unless approved by appropriate NRC official.

9.202 Procedure in the event of a demand for production or disclosure.

9.203 Procedure where response to demand is required prior to receiving instructions.

9.204 Procedure in the event of an adverse ruling.

Subpart D - Production of Disclosure in Response to Subpoenas or Demands of Courts or Other Authorities

§ 9.200 Scope of Subpart.

(a) This subpart sets forth the procedures to be followed when a subpoena, order, or other demand (hereinafter referred to as a "demand") for the production of NRC records or disclosure of NRC information, including testimony regarding such records, is issued by a court or other judicial or quasi-judicial authority in a proceeding, excluding Federal grand jury proceedings, to which the NRC is not a party. Information and documents subject to this subpart include:

(1) Any material contained in the files of the NRC;

(2) Any information relating to material contained in the files of the NRC.

(b) For purposes of this subpart, the term "employee of the NRC" includes all NRC personnel as that term is defined in § 9.2, including NRC contractors.

(c) This subpart is intended to provide instructions regarding the internal operations of the NRC and is not intended, and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the NRC.

§ 9.201 Production or disclosure prohibited unless approved by appropriate NRC official.

No employee of the NRC shall, in response to a demand of a court or other judicial or quasi-judicial authority, produce any material contained in the files of the NRC or disclose, through testimony or other means, any information relating to material contained in the files of the NRC, or disclose any information or produce any material acquired as part of the performance of that employee's official duties or official status without prior approval of the General Counsel of NRC.

§ 9.202 Procedure in the event of a demand for production or disclosure.

(a) Prior to or simultaneous with a demand upon an employee of the NRC for the production of material or the disclosure of information described in § 9.200, the party seeking production or disclosure must serve the General Counsel of the NRC with an affidavit or statement as described in paragraphs (b)(1) and (2) of this section. Whenever a demand is made upon an employee of the NRC for the production of material or the disclosure of information described in § 9.200, that employee shall immediately notify the General Counsel. If the demand is made upon a regional NRC employee, that employee shall immediately notify the Regional Counsel who, in turn, shall immediately request instructions from the General Counsel.

(b)(1) If oral testimony is sought by the demand, a summary of the testimony desired must be furnished to the General Counsel by a detailed

affidavit or, if that is not feasible, a detailed statement by the party seeking the testimony or the party's attorney. This requirement may be waived by the General Counsel in appropriate circumstances.

(2) The General Counsel may request a plan from the party seeking discovery of all demands then reasonably foreseeable, including but not limited to, names of all NRC personnel from whom discovery is or will be sought, areas of inquiry, length of time away from duty involved, and identification of documents to be used in each deposition, where appropriate.

(c) The General Counsel will notify the employee and such other persons, as circumstances may warrant, of his or her decision on the matter.

§ 9.203 Procedure where response to demand is required prior to receiving instructions.

If a response to the demand is required before the instructions from the General Counsel are received, a U.S. attorney or NRC attorney designat d for the purpose shall appear with the employee of the NRC upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate NRC official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions. In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of a U.S. or NRC attorney on the employee's

behalf, the employee shall respectfully request the demanding authority for sufficient time to obtain advice of counsel.

§ 9.204 Procedure in the event of an adverse ruling.

If the court or other judicial or quasi-judicial authority declines to stay the effect of the demand in response to a request made in accordance with § 9.203 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing these regulations and United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

Dated at Washington, DC, this ____ day of _____, 1985.

For the Nuclear Regulatory Commission.

_____
SAMUEL J. CHILK,
Secretary of the Commission.