SECRETARY

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

July 22, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-006

TITLE: RE-EXAMINATION OF THE NRC HEARING PROCESS

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of July 22, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission, and the SRM of July 22, 1999.

Annette Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-99-006

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DICUS	X				X	2/18/99
COMR. DIAZ	X				X	5/21/99
COMR. McGAFFIGAN	X				X	4/26/99
COMR. MERRIFIELD	X				X	2/5/99

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on July 22, 1999.

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER DICUS

SUBJECT: **SECY-99-006 - RE-EXAMINATION OF THE NRC HEARING PROCESS**

Approved __X__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

I approve Option 4. See attached comments.

Greta Joy Dicus
SIGNATURE

February 18, 1999
DATE

Entered on "AS" Yes __X__ No ____

Comments of Commissioner Discus on SECY-99-006

I approve Option 4, calling for commencement of rulemaking while pursuing legislation that would establish unequivocally that NRC has the discretion to choose the hearing methods it desires in carrying out its responsibilities. By way of general guidance, I believe the rulemaking should modify subpart G, and eliminate subpart L, so that all hearing requests will follow a similar path, with the exception of hearings on enforcement matters which should not be modified. I believe such a draft rule should have the following attributes:

1. A single presiding officer appointed from the ASLBP shall consider petitions to intervene and requests for hearings, issuing a ruling on wehther a hearing has been properly requested and whether requirements relating to standing and admissibility of contentions has been met. OGC should consider whether it is appropriate in this rulemaking to codify some of the precedent relating to standing issues.

2. When the Presiding Officer has issued a final ruling on standing and contentions, if there is a denial of a hearing request there should be provisions for appeal to the Commission. If contentions are admitted, OCAA should review the issues and make a recommendation as to whether the hearing should proceed with a single Presiding Officer or whether a three member Licensing Board would be appropriate due to the number and complexity of the technical issues admitted. Absent a significantly complex technical set of admitted contentions, the normal course would be to proceed through the hearing process with a single Presiding Officer. The Commission's decision will be provided in the form of an Order. The OCAA recommendation should include target schedules to be incorporated into the Commission's order.

3. Document discovery will consist only of a requirement that all documents a party intends to rely on in the hearing must be made available to all other parties and that the NRC staff will maintain a hearing file with all NRC docketed materials as is currently done in Subpart L proceedings. One round of written questions should be allowed with a numerical limit on the number of questions. I would contemplate something on the order of a limit of 20-30 single part questions. No further discovery of any kind will be allowed.

4. Testimony will be pre-filed, but there will be a live hearing for conducting cross-examination unless all parties agree to have a fully "paper" hearing. Prior to filing of testimony, the rule shall require the parties to document before the Presiding Officer what attempts have been made to settle the admitted issues.

5. The decision of the Presiding Officer will follow current procedures for appeals to the Commission.

6.The Presiding Officer should be required to promptly notify the Commission if at any time it reasonably appears that the established target
schedule will not be met.

7. On other aspects of the hearings not specifically addressed here, the rulemaking should utilize and codify Commission guidance in its previous policy statements on adjudication, to the maximum extent practicable.

gjd
2-18-99

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-99-006 - RE-EXAMINATION OF THE NRC HEARING PROCESS**

Approved XX with comment Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

SIGNATURE

5.21.99
DATE

Entered on "AS" Yes XX No ____

COMMISSIONER DIAZ'S COMMENTS ON SECY-99-006

I commend the Office of General Counsel for its excellent review of the Commission's latitude and options regarding adjudicatory hearing procedures. As explained more fully below, I support a move toward rulemaking even as we pursue legislation confirming NRC's discretion in the choice of hearing procedures. In addition to this variation of option 4, I believe the Commission's direction should embrace aspects of option 1, except for its *exclusion* of major changes to the hearing process, that call for continuation of the Commission's current course as set out in its recent Policy Statement Conduct of Adjudicatory Proceedings, strong case management and Commission oversight with disciplined adherence to procedures and milestones, and modification of our procedural regulations to adopt appropriate features of the Commission's recent policies.

LEGISLATION

As the Commission has already indicated in the SRM for SEC-98-197 (Sept. 4, 1998), it would be useful to have legislative confirmation of the Commission's flexibility in choice of hearing procedures under section 189a(1)(A). There is no obvious reason why the Commission should not have the same clear and unequivocal authorization as it has been given for combined construction permit and operating license cases under 189a(1)(B)(iv). Continuing deliberation about this question -- despite the Commission's adoption of less than full trial-type procedures for certain kinds of cases and the judicial approval of the Commission's action -- is a potentially inhibiting factor in setting adjudicatory policy. It can also be a source of confusion and uncertainty for those parties that would be affected by new hearing procedures.

RULEMAKING

It is appropriate that the Commission now follow up its recent actions for improvement of the adjudicatory process with a move toward rulemaking that would further enhance the efficiency and fairness of the process. The Commission has already taken strong steps toward the assurance of disciplined case management and oversight. I refer not only to our Policy Statement, but also the case specific orders in license renewal cases and the promulgation of procedures for license transfer cases. As originally envisioned in COMNJD-97-004/COMEXM-97-004, effort should also be directed toward review and improvement of the procedural regulations.

As we move toward rulemaking, the Commission should exercise care to ensure the overall promise of major changes. The many steps the Commission has taken over the years to ensure efficient and fair hearings, in combination with recent actions, may go far toward addressing many concerns. In addition, OGC cautions that informal proceedings, such as those conducted under 10 CFR Subpart L, are no guarantee of a speedy and uncomplicated proceeding as evidenced by past cases under Subpart L in which live hearings may have expedited the proceeding substantially. Thus, I believe it would be useful to obtain stakeholder views on experience with Subparts G and L and options for change, either through a facilitated stakeholder meeting or an advance notice of proposed rulemaking, or both.

The Office of General Counsel has identified several options worth exploring. These include the "Fast Track Option." I would also support further evaluation of a standard hybrid set of procedures (modifying the current Subpart G and eliminating a separate subpart L) that would

limit motions, formal discovery, and cross-examination by the parties. For example, the Commission could consider adoption of a requirement, along the lines of Rule 26(a) of the Federal Rules of Civil Procedure, that would require parties to make disclosures – without written demand -- of knowledgeable individuals, relevant documents, and expert testimony.

A broad issue to explore is whether the Commission should continue to dictate paths for certain types of cases. There are benefits and disadvantages in that approach as well as in an approach permitting the presiding officer to determine the appropriate path or justify deviations from limitations on trial-type procedures. I believe we must recognize rather full trial-type procedures will continue to be appropriate or required in some cases, particularly enforcement cases. For example, cross-examination may be desirable or necessary for purposes of efficient fact-finding on such matters as the perception, bias or assumptions of a witness. I am not inclined to alter the basic standing and contention requirements, but I am inclined to support codification of a standard for discretionary intervention. Again, early receipt of the views of stakeholders should be extremely beneficial as the Commission refines its course on this important subject.

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER MCGAFFIGAN

SUBJECT: **SECY-99-006 - RE-EXAMINATION OF THE NRC HEARING PROCESS**

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: See attached comments. I am approving Options 4 and 5.

Edward McGaffigan Jr.
SIGNATURE

April 26, 1999
DATE

Entered on "AS" Yes X No ____

Commissioner McGaffigan's Comments on SECY 99-6:

OGC's thorough and useful research and analysis has confirmed that the law gives us considerable flexibility to adopt hearing policies that we think makes sense. OGC has also given us useful advice about a wide range of policies. In light of this material, I believe we should retain formal adjudication for enforcement cases, through rulemaking pursue informal procedures for licensing cases, and seek legislative confirmation of our interpretation of the law. In the meantime, with the help of the licensing boards, we must maintain the agency's increased discipline in adjudications.

Enforcement: We should retain formal processes for enforcement cases. The main use of formal processes throughout federal agencies is for just such cases, because formality affords the accused the means of active self-defense.

Rulemaking: We should make use of the flexibility given us by current law to institute by rulemaking informal procedures in all licensing cases, both materials and reactors. Historically, some have thought that formal procedures assured more complete resolution of complex issues, built public confidence, and produced licensing actions that were more defensible. However, at this point it is not clear that any of these three things is true. First, complex technical issues, especially at our fellow technical agencies, are well decided all the time in government and the private sector without the use of cross-examination and discovery. Pointing to the statutes that subject EPA to "citizens' suits," some have argued that if the agency doesn't do formal adjudication of technical issues, the courts will do it for us. I don't agree. "Citizens' suits" are enforcement driven; they parallel our 2.206 process, not our licensing actions, and therefore do not "make up" for an absence of adjudication. Pointing to litigation of technical questions in common law courts, especially in negligence cases, some have argued that there is nothing unusual about adjudication of technical questions. Again I disagree. Negligence litigation is not piled on top of multi-million dollar reviews by expert technical staff, and negligence litigation takes the shape of a trial not because trials are the best way to settle technical issues but because the main issue in the trial is whether the stigma of negligence should be imposed on the defendant; the litigation therefore adopts many of the procedures designed to protect defendants in a criminal proceeding. Moreover, it is widely recognized that trials are a particularly expensive, and far from ideal, way to decide who pays for the costs of accidents.

Second, I have not heard expressions of great confidence in an adjudicatory system that brings the public in after the staff has largely completed its review, and that pits the staff and the applicant against the intervenor. (I am not criticizing the Licensing Boards, which have a tradition of fair-dealing with all the parties, but rather the system within which the Boards operate.) Third, licensing actions do not have to be adjudicated to be defended; rules or actions on 2.206 petitions are not adjudicated, and, despite having been subjected frequently to appellate court litigation, they have seldom been criticized by the courts for inadequate records (the rules on fire protection being memorable exceptions).

APA and cross-examination: At the very least, the rulemaking I am calling for should not commit us to more formality in licensing hearings than the APA requires for "on the record" adjudication. That means no discovery, and no separation of functions in initial licensing, where the Commission's separation from its most knowledgeable staff is likely to be felt most keenly.

However, I do not think that the APA model of formality should be our standard model. I continue to think that we need a notion of standing based less on "interest" (a legitimate guard against useless trials) and more on ability to contribute to thorough discussion of the issues facing us. I remain skeptical of the uses of cross-examination; I do not want to rule it out entirely, but I also do not want to hold it up as the ideal form of inquiry. We have, as yet, no clear theory of its proper role. We all agree that it has a place where issues of credibility arise, but why we think that is not clear; after all, in the recent trial in the Senate, a trial in which there were issues of credibility, such examination of witnesses as took place was neither a legally mandated part of the proceeding nor conducted under judicial discipline. I've also heard it said that cross-examination is useful where the issues are complex, and I understand that well-framed questions are useful in revealing the connections among things and isolating from a complex array the key points, but why the particular form of questioning called cross-examination should be used, rather than questions from the presiding officer, is not clear; the members of the ASLBP have established a reputation for persistent and thorough questioning (see, e.g., Meehan, *The Atom and the Fault*, MIT, 1984). It is said that cross-examination empowers the parties and subjects the staff to greater scrutiny, but the staff is already subject to the scrutiny of the ACRS, NRC judges, those members of the public who follow a given licensing review, the Commission, the IG, the courts, and the Congress; the public surely can be empowered in other ways that bring them into the process at an earlier stage.

NEPA: I would also ask OGC's help in reviewing the status of NEPA in our hearings. Regulations implementing NEPA already provide full public participation in the preparation and consideration of environmental impact statements, but, partly as a result of a nearly 30-year-old case in one federal court of appeals, *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), NRC presiding officers must also consider NEPA issues, in some cases whether the issue is in controversy or not. Thus, in construction permit proceedings, the presiding officer acts as another layer of review for environmental impact statements, and even in operating license proceedings, even if a party has already fully participated in the public scoping meetings and notice and comment periods leading up to an final environmental impact statement, the party gets yet another opportunity, in the hearings, to make its case on the statement. This double system, without parallel that I know of, provides intervenors incentive to delay their engaging the Commission on licensing actions, at the same time that it risks making their engagement less effective because it comes later.

I would ask OGC whether intervening cases that emphasize our flexibility under 189a, and the agency's own intervening history of full consideration of NEPA issues, haven't weakened the authority of *Calvert Cliffs*. For example, in *UCS v NRC*, 920 F.2d 50 (D.C..Cir., 1990), the court says that *Calvert Cliffs* "does not establish ... an absolute right to a hearing on the documents that Act requires agencies to compile." (See footnote 6.) Moreover, at the time of *Calvert Cliffs*, NEPA was new and the court was not persuaded that the agency was committed to its implementation. The agency had taken a little over a year to issue its NEPA rules, a short time by our standards (unfortunately), but apparently not by 1971 standards, for the court said, "The period of the rules' gestation does not indicate overenthusiasm on the Commission's part." (449 F.2d 1116.) Reviewing the same regulations today, a court might not be so anxious to search for devices to assure that the agency paid adequate attention to environmental matters. I would invite OGC's legal and prudential advice on alternatives to our existing treatment of NEPA in hearings.

Legislation: Making use of the high interest from all sides in shifting the agency toward a new paradigm of regulation, we should seek legislative confirmation of the flexibility we believe we have under section 189a of the Atomic Energy Act. We should ask to be explicitly given, for all licensing hearings under 189a, the same flexibility 189a explicitly gives us for Part 52 hearings between construction and operation under a combined license (see 189a(1)(B)(iv)). Also, section 193 of the Act should be revised so that it does not require "on the record" hearings. .

More generally: It will not be enough to change our hearings. I am not out simply to shorten and informalize hearings. Rather, I would like to see us transform the ways in which we deal with the public. In responding to SECY 99-06 we are moving away from imposing the trappings of trials on citizens who seek to participate in licensing actions, but we should also increase our efforts to engage with the public more generally and less formally. We are less often using the label "predecisional" to keep from the public documents that would generate useful discussion. Both the staff and the Commission are more often engaging in early, frequent, and useful discussion with public interest groups that, before, we faced largely only through the formal devices of litigation or petitions for rulemaking or enforcement. I hope that our rulemaking on hearings, and our pursuit of legislation on the same, will make clear that we are not trying to push the public away but instead are actively seeking to engage the public in what we hope will be more timely, useful, and satisfying ways.

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER MERRIFIELD

SUBJECT: **SECY-99-006 - RE-EXAMINATION OF THE NRC HEARING PROCESS**

Approved X w/cmts. Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

SIGNATURE

2/5/99
DATE

Entered on "AS" Yes ✓ No ____

COMMENTS OF COMMISSIONER MERRIFIELD ON SECY-99-006

I recommend that the Commission retain formal adjudications for enforcement proceedings. For all other proceedings, I suggest establishing an innovative adjudicatory process that would require at a minimum the opportunity for informal hearings, but which would contemplate the use of more formal procedures, where appropriate. In this way the Commission would retain the maximum flexibility to use all available tools to resolve adjudicatory matters.

To this end, I would suggest replacing Subparts G and L with a new informal hybrid process, accompanied by vigilant monitoring by the Commission (the Office of Commission Appellate Adjudication) to ensure that proceedings are progressing efficiently and fairly. The new process would not distinguish between materials and reactor licensing proceedings. I recognize the litigation risk associated with moving forward with such an extensive change, but I believe strict adherence to our present procedural rules for adjudications would be inconsistent with the Commission's goals to achieve regulatory efficiency. Many of our stakeholders, including Congress, believe we must act to provide a more transparent, predictable, and streamlined method of resolving adjudications. Thus, I think it is time rethink the hearing process.

I would envision a complete review of the two Subparts to determine the best way to proceed. I offer the following suggestions as starting point:

I. Prehearing Matters

A. Who should preside? - At the prehearing stage, I would prefer the Chief Judge of the Atomic Safety and Licensing Board Panel assign the case to a either a Presiding Officer or a Board, to initially resolve prehearing matters. A Board could consist of Administrative Law Judges (we currently have no ALJ's on staff), Administrative Judges, staff attorneys from the Office of the General Counsel, or staff technical experts. The Presiding Officers similarly would not have to be Administrative Judges.

B. Parties - Intervenor(s) and the licensee. Our present informal procedures do not require the staff to be a party. I would continue that practice. I would prefer the NRC staff to assist in adjudications by presiding over hearings, resolving appellate issues, and appearing as witnesses at the discretion of the Presiding Officer, Board or Commission.

C. Standing and Contentions - I would retain the basic framework of the procedures for standing and contentions in Subpart G. I would modify the procedures to expressly permit discretionary intervention, which is intervention by a party who does not meet the expressed requirements for standing, but whose input would aid the Commission in making sound decisions. I would codify the Commission's long-standing practice of considering factors annunciated in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976), to determine whether to permit discretionary intervention. Codifying this longstanding practice would be supported by the stakeholders because it would signal that the Commission is interested in a greater

exchange of information and participation by parties who would otherwise be excluded from our proceedings. I would also clarify and shorten the Subpart G procedures.

D. Prehearing Conferences - Prehearing conferences would not be required. However, the Presiding Officer or Board would be free to hold prehearing conferences to expedite the decision on standing and contentions. Prehearing conferences seem to be especially useful in difficult standing cases and where there are many contentions. But prehearing conferences seem to be unnecessary in uncomplicated cases, e.g., where the standing determination is obvious and there are few contentions.

E. Prehearing Order - This would be a new monitoring tool used by the Commission to ensure that proceedings are on track and would give the Commission an opportunity to determine whether to hear a case itself. A Presiding Officer would issue a Prehearing Order after it had decided standing and all contentions. The order would explain the Board's ultimate ruling on intervention, would set out the particular hearing procedures to be used, would set milestones for resolving the merits, and establish a final date for resolving the case. The Presiding Officer would decide, with input from the parties, whether a formal oral hearing would be most fair and efficient or whether a written record would suffice. The Board would be encouraged to seek Commission guidance on novel issues. The Prehearing Order rulings would be referred to the Commission. At that time the Commission would review the rulings and decide whether to preside over the hearing itself. The Commission could also comment on standing, the admissibility of contentions, milestones, and the date for issuing its final order resolving the controversy. The Commission could also offer guidance at that time on any novel or particularly difficult issues. The parties would be permitted to challenge rulings on standing and admissibility of contentions, as is now the case, but would not be permitted to seek review of other rulings in the Prehearing Order.

F. Alternative Dispute Resolution - If it is clear that a case is going to hearing, whether before the Commission or Board, I think the parties should be required to go through some type of alternative dispute resolution within a specified time frame. It is not uncommon for the Board to encourage settlement in licensing matters and if the staff is not a party, there is no risk of compromising the Commission's position on safety issues. This is consistent with President Clinton's May 1, 1998, Memorandum encouraging agencies to use alternative methods of dispute resolution and with our own policy on such matters. See 57 Fed. Reg. 36678 (1992).

G. Discovery - Formal discovery by the parties in the proceeding would not be permitted. However, the Presiding Officer or Board could encourage voluntary disclosure of documents in order to narrow the issues for hearing. The staff would be required to make licensing documents available consistent with the disclosure provisions in Subpart L. The Commission, Board or Presiding Officer would also be free to request documents or other information relating to the proceeding.

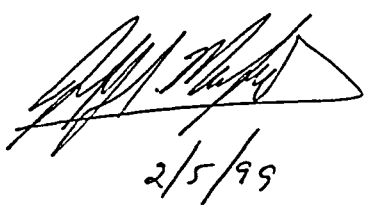
II. Hearing Procedures

A. Who should preside? - Either the Commission, a Presiding Officer, or a Board. Ultimately, the Commission would make this determination, but the Commission would have the benefit of the Licensing Board's packaging of the issues, recommended procedures, expected milestones, and a date for finally resolving the controversy, provided in the Prehearing Order.

B. Cross Examination - As a general matter, I would prefer to follow the basic procedures set out in Subpart M, which would in this context permit only the Commission, the Presiding Officer, or the Board to ask the parties questions at hearings. Subpart M does not permit one party to ask questions of another. However, I would continue the practice under Subpart M, of permitting the parties to submit questions to the Presiding Officer, Commission, or in this context a Board, in advance of the hearing. This having been said, I recognize that cross examination may be a statutory requirement for certain proceedings and the regulations should recognize this Congressional intent.

C. Oral or Written Record - Oral hearings would not be required. However, the Commission would use oral hearings to aid in fair and efficient decision making and will encourage the Boards and Presiding Officers to do the same. Although in instances where the Commission chooses not to hear the case itself, the Commission will leave the details of how best to conduct a hearing to a Board or Presiding Officer. Under this mechanism, the Commission would still be able to monitor the proceedings to ensure that the Presiding Officers and Boards remain on target to meet the dates of issuing their final decisions.

D. Witnesses - The Commission, Board, or Presiding Officer on its own motion, could call witnesses, including staff experts, to appear at the hearing to provide assistance in resolving difficult issues.



2/5/99