

February 16, 2001

MEMORANDUM TO: Karen D. Cyr
General Counsel

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

SUBJECT: STAFF REQUIREMENTS - SECY-00-0017 - PROPOSED RULE
REVISING 10 CFR PART 2 -- RULES OF PRACTICE

The Commission has approved publication of proposed rulemaking on Changes to the Adjudicatory Process in the Federal Register allowing 90 days for public comment, as amended by the memorandum from Karen Cyr dated March 21, 2000, and subject to the attached comments.

(OGC)

(SECY Suspense:

3/30/01)

Attachment: Comments and Changes to Federal Register Notice in SECY-00-0017

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
EDO
CIO
CFO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR

Comments and Changes to the Federal Register Notice in SECY-00-0017

1. Proceedings on an application for construction of a high-level waste geological repository operations area or an application to receive and possess high-level waste at a geological repository operations area should be undertaken using formal procedures. With respect to subsequent applications for amendment to a construction authorization or amendment to a license to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission should retain the flexibility to choose which procedures to use in those cases consistent with the proposed rule's approach to other licensing proceedings.
2. The proposed rule should be revised to address the timing of hearing requests in situations in which a Federal Register notice of opportunity for hearing on an application is not published, and is not required by law or regulation. The proposed rule should balance the interest in assuring an affected person with an opportunity for a hearing with the interest of an applicant in obtaining finality. OGC should explore whether placement of a notice on the NRC website of an application could constitute notice for the purposes of starting the clock on when a request for a hearing must be submitted. Specifically, the notice should ask for comments on the potential utilization of alternative notification methods such as on NRC's Web page for receipt of applications (such as materials license amendments) where NRC has not traditionally published a notice of receipt and right to request a hearing in the Federal Register.
3. Proposed section 2.336 should be amended to require the responsible representatives for each party to certify (by sworn affidavit) that all relevant materials required by the section have been furnished.
4. The background section of the proposed rule notice should be revised to request comment on an alternative approach that would provide one formal procedure, one informal procedure, and to comply with a statutory requirement, a single hybrid procedure. As part of this approach, the presiding officer would have flexibility to adapt the process to suit the case. For example, in the case of a formal proceeding, the presiding officer could be authorized to limit discovery and to constrain duplicative testimony and non-productive cross-examination. Similarly, in connection with a matter subject to the informal process, the presiding officer could be empowered to allow limited discovery in appropriate cases.
5. The background section of the Federal Register notice on the proposed rule should explicitly state the Commission is seeking comment on criteria to define those cases for which formal or informal procedures are appropriate. Specifically, the background section of the proposed rule notice should be revised to request comment on whether the proposed category of cases to which formal hearing procedures would apply is too narrow. Comment should be requested on whether such cases should include proceedings that present complex issues, that raise difficult disputed issues of material fact or of expert opinion, or (in order to capture significant cases) that involve matters for which the preparation of an environmental impact statement was necessary.

6. Part 52 allows the Board to request that a formal Subpart G hearing be convened “on specific and substantial disputes of fact that cannot be resolved with sufficient accuracy except in a formal hearing.” Specific comment should be sought on using this approach more generally. That is, should the complexity criterion (§ 2.310(c)) be deleted and instead start with an informal Subpart L hearing in all except specifically designated Subpart G cases, and transfer a proceeding from Subpart L to Subpart G only on the recommendation of a Presiding Officer with Commission concurrence?
7. The background section of the proposed Federal Register notice should invite comment on the use of cross-examination in the hearing processes, including whether Subpart L should retain traditional cross-examination as a fundamental element of any oral hearing.
8. The Federal Register notice on the proposed rule should specifically request public comment on modifying the third provision of Section 2.700 in the proposed rule to provide for Subpart G proceedings in all initial power reactor construction and operating license proceedings, rather than in "reactor licensing proceedings" involving a "large number" of "complex" issues.
9. Section 2.311, should be modified to retain the current practice that permits interlocutory review as of right only when the appellant can establish that the challenged ruling will wholly dispose of a case or would allow a hearing that would otherwise not occur. 10 C.F.R. section 2.714a
10. With respect to discovery for informal hearings, require the production of a copy of the document rather than simply a description. The following change should be made to proposed section 2.336(a)(3):

2.336(a)(3)(i) a copy, or a description by category and location, of all documents and data compilations in the possession, custody or control of the party that are relevant to the contentions, and (ii) a copy or description by category and location of all tangible things (books, publications or treatises) in the possession, custody or control of the party that are relevant to the contention. If only a description is provided pursuant to subsection (i), a party shall have the right to request copies of any identified document and/or data compilation.
11. The background section of the proposed rule notice should be revised to request comment on section 2.309 and whether it should follow the current practice of requiring the filing of a request for a hearing within 30 days, so as to provide staff and the applicant with timely notice as to whether an application will be challenged, but allow 75 days from the notice for the development of contentions. Comment should also be sought on expansion of the proposed time limits for answers to hearing request and replies thereto (proposed Section 2.309(f)). Comment should also be sought on the issue of selection of hearing procedures and whether the procedures should be addressed by the requestor (proposed section 2.309(d)) at the deadline for filing contentions.
12. A specific question should be added to emphasize that the Commission specifically seeks comments on the appropriate time frame for filing a request for a hearing and contentions.

13. Section 2.709. Delete the sentence: "The presiding officer shall not consider a motion for summary disposition or answers thereto except upon finding that the motion will likely substantially reduce the number of issues to be decided or otherwise expedite the proceeding." Replace with the following sentence: "The presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted." Specific comment should also be sought on the staff's proposed standard.
14. Page limits for petition for review and answers should be enlarged from 10 pages to 25 pages (Section 2.340(c)(1)). Parties should also be given the right to file short (5 page) reply briefs (Section 2.340(b)(3)).
15. Proposed section 2.336(e)(2) should be revised to give the presiding officer the discretion to impose sanctions, rather than the obligation to impose them.
16. Consistent with the jurisdiction of the presiding officer in proposed section 2.318, current section 2.107, "Withdrawal of application," should be revised to permit a presiding officer to dismiss the proceeding if the application is withdrawn, regardless of whether a notice of hearing has been issued.
17. Review the reconsideration provisions and determine whether all three provisions (sections 2.323(e), 2.340(d), and 2.344(a) are necessary and consistent. The background section of the proposed Federal Register notice should request comment on whether proposed section 2.323(a) should be revised to delete the requirement that 'compelling circumstances' for leave to file a motion for reconsideration may be shown by 'the existence of a clear and material error in a decision, which could not have reasonably been anticipated, which renders the decision invalid.' Comment should also be requested on whether proposed section 2.323(a) should be revised to provide a time limit of 10 days for filing motions under that section.
18. The revisions to proposed sections 2.327, 2.1013, 2.1405 provided by the Atomic Safety and Licensing Board Panel in their memorandum of February 10, 2000, should be adopted to take into account digital recording media and other technological advances.
19. Proposed section 2.1207(c) should be revised to require the filing of proposed findings of fact and conclusions of law.
20. The sentence in proposed section 2.340(a) that provides that a petition for review "shall be deemed denied" if not acted upon within 40 days should be eliminated.
21. Proposed section 2.336(a)(5) should be modified so as to require that the list of privileged or protected documents includes sufficient information as to enable an assessment of the basis for withholding the document.
22. On page 32 and 44 there is a reference to the proposed rule codifying the discretionary intervention provisions from the Commission's Pebble Springs decision. A short discussion describing what standards are being codified should be included the first time the reference to Pebble Springs is made to allow the public to understand what is being done.

23. On page 61 there is a reference to ADAMS as ensuring access for parties to Commission documents. Rather than referencing ADAMS, it should just refer to the NRC's general policy of making all available documents public subject only to limited restrictions, (i.e., restrictions to protect enforcement, proprietary information, classified information, etc.).
24. Specific attention and comment should be requested on the Subpart L proposed procedures regarding identification of contentions, the offer of an oral hearing, and the examination of witnesses.
25. The staff should ensure the Commission vote sheets on this paper are readily available to the public on the NRC web site for insight on the issues considered by the Commission, and reference to their location should be provided in the Federal Register.
26. For Subpart L hearings, the notice should be changed to allow the possibility of three judge panels on a case-by-case basis. Specific comment should be sought on this matter.
27. Specific comments should be requested on making the Subpart L, or even the new Subpart N hearings, more like legislative-style hearings. For example, the Commission could provide a fast track that considers a full range of issues. The Commission itself would ordinarily be the presiding officer, as in Subpart M (Section 2.1319), and render the decision; determinations of standing would be based less on judicial standards and more on ability to contribute to the discussion of the issues; written submissions would be expected as a matter of course, as would oral presentations, both types being limited by regulations on length; and most questioning would be by the Commission itself, with some room for limited cross-examination.
28. Comments should be sought on standing to intervene in NRC proceedings, specifically on the possibility of simplifying the proposed standard so that it allows for discretionary intervention where another party has established standing and the discretionary intervener "may reasonably be expected to assist in developing a sound record."
29. OGC should place the immediate effectiveness provisions for HLW repository licensing in the appropriate subparts consistent with the type of hearing procedures the Commission has chosen (e.g., formal for initial licensing actions and flexibility to choose procedures for amendments) relating to HLW repository licensing. In addition, section 2.1202(a)(2) should be revised as follows:
 - (2) an application for an amendment to a construction authorization at a geologic repository operations area falling under 10 CFR 60.32(c)(1);
30. Delete the third criterion for interlocutory review for novel questions (section 2.340).
31. The last sentence of the description of 2.336 on p. 55 of the proposed FR notice should be deleted and the first sentence modified to read: "Proposed section 2.336 would impose a disclosure requirement on all parties (and the NRC staff) in all proceedings under Part 2, except for proceedings using the procedures of Subparts G and J, and the discovery required by section 2.336 constitutes the totality of the discovery that may be obtained."

32. The Federal Register notice should seek comment on the overall approach that is embodied in the proposed rule for informal hearings. The elimination of cross-examination is a prime example of the proposed approach. The effect of this is to place greater responsibility on the Presiding Officer, rather than on the parties, to establish the record on which the decision is to be based. Specific comments should be sought on whether this is the strategy that the Commission should follow.