

November 13, 2003

MEMORANDUM FOR: Karen D. Cyr
General Counsel

John F. Cordes, Director
Office of Commission Appellate Adjudication

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

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 10:15 A.M., THURSDAY, NOVEMBER 13, 2003,
COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO
PUBLIC ATTENDANCE)

I. SECY-02-0072 - Final Rule Revising 10 CFR Part 2 - Rules of Practice

The Commission approved a final rule amending 10 CFR Part 2 to substantially modify the NRC's regulations governing the conduct of hearings, subject to the changes provided in the attachment.

Following incorporation of these changes, the *Federal Register* notice should be reviewed by the Rules Review and Directives Branch in the Office of Administration and forwarded to the Office of the Secretary for signature and publication.

(OGC)

(SECY Suspense: 12/19/03)

OGC should continue its consideration of the use of a generic set of milestones for the principal licensing tracks. Perhaps these can be appended to 10 CFR Part 2 or the Statement of Policy on the Conduct of Adjudicatory Proceedings. Because OCAA's function is to advise the Commission on all adjudicatory matters, OGC should undertake the development of milestones in consultation with OCAA.

II. SECY-03-0156 - Sequoyah Fuels Corp. (Gore, Oklahoma Site); Answer to Presiding Officer's Certified Question Regarding Classification of Waste as AEA Section 11e(2) Byproduct Material

The Commission approved a Memorandum and Order responding to the Presiding Officer's certified question related to consideration of Sequoyah Fuels Corporation's front-end waste as byproduct material under section 11e(2) of the Atomic Energy Act. The Memorandum and Order answers the Presiding Officer's certified question and states that Sequoyah Fuels Corporation's front-end waste can be considered as Atomic Energy Act section 11e(2) byproduct material and remands this matter to the Presiding Officer for action consistent with this decision.

(Subsequently, on November 13, 2003, the Secretary signed the Memorandum and Order.)

III. SECY-03-0192 - Private Fuel Storage (Independent Spent Fuel Storage Installation) Docket No. 72-22-ISFSI

The Commission approved an Order calling for appeals of interlocutory Board orders now in order to expedite this proceeding. The Order advances the deadline for interlocutory appeals in this case.

(Subsequently, on November 13, 2003, the Secretary signed the Order.)

Attachment: [Changes to the final rule in SECY-02-0072](#)

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

Comments and Changes to the Final Rule in SECY-02-0072

1. Add rule language and a discussion in the Statement of Considerations that would make Subpart I (procedures for handling Restricted Data and/or National Security Information) generally applicable to all adjudicatory proceedings (subparts G, J, K, L, M and N) (as provided in SECY-02-0072A)
2. Modify § 2.1210(a)(ii) of the draft final rule to make clear that the Commission will assess each initial decision under Subpart L to determine if it is inconsistent with the staff's action on the subject proceeding and will determine whether an inconsistency warrants Commission review. (See Note from J. Gray to M. Zabler, et al., dated October 23, 2002 (10/23/02 Note)).
3. Insert OGC's suggested clarifications regarding application of § 2.309(f)(2) - Late Filing Criteria, and § 2.323 and late filed motions (see 10/23/02 Note).
4. In Subpart C, § 2.310(d), as to the criteria for use of Subpart G procedures on a particular contention or matter in controversy, change "past event" in § 2.310(d)(1) to "past activity."
5. The draft final rule proposes a different standard for permitting parties to conduct cross-examination in a Subpart L, M, or N proceeding (if "necessary to ensure the development of an adequate record for decision") than the standard for Subpart G procedures reflected in § 2.310(d)(1). The SOC should explain these differences and should state that the Commission expects that the use of cross examination in Subpart L, M, or N proceedings will be rare.
6. The Statement of Consideration for the draft final rule should discuss the relevant importance of the discretionary intervention factors. The discretionary intervention procedures require a petitioner to address six factors, but do not rank or contain any indication of which factors are most important. Past case-law and Commission policy make it clear that foremost among the factors in favor of granting discretionary intervention is whether the intervenor will assist in developing a sound record. Portland General Electric Co., et. al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977); Public Service Co. (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143 (1977). The most important factor weighing against intervention is the potential to inappropriately broaden or delay the proceeding. See Pebble Springs at 617 (intervention should prove more readily available to petitioners who have the ability to significantly contribute and who justify the time necessary to consider their contribution); and see generally, Id. at 615 n.6.
7. The draft SOC and final rule (§ 2.1202(a)) require the NRC staff, when not a party to a Subpart L proceeding, to notify the presiding officer of the staff's action on the license application or the underlying regulatory matter that is the subject of an ongoing hearing. The draft SOC and final rule contain language to the effect that the NRC staff, in its notice to the presiding officer, should provide its position on the "matters in controversy." This could be construed as requiring the non-party NRC staff to advocate its position on the contested issues in the adjudication, which would raise obvious issues as to separation of functions. Therefore, the SOC and final rule should be revised to make clear that the non-party NRC staff's notice to the presiding officer should in no event advocate the staff's position on any of the contested matters being adjudicated in the ongoing hearing.
8. On page 8, last paragraph, revise lines 1 and 2 to read '... second appearance, ~~but this time, it was the AEA, rather than the APA, that presented the issue.~~ In that'
9. On page 27, last paragraph, line 9, correct the spelling of "of".
10. On page 29, revise lines 2 through 4 from the top to read '~~These criteria will be applied to appropriately allow d~~
Discretionary intervention
, however, will not be allowed unless when at least one other petitioner has established standing and has raised at least one
admissible contention, so that a hearing will be held.'
11. On page 29, in the 2nd full paragraph (Response), revise line 2 to read '~~This~~
The threshold standard is necessary to ensure that hearings cover
only genuine' In line 7, delete "likely".
12. On page 33, last paragraph, next to last line, correct the spelling of "presiding".
13. On page 35, revise line 4 from the top to read '... for
such that contention
would be'
14. On page 38, 1st full paragraph, revise the next to last line to read '... procedures raise

s no'

15. On page 53, paragraph 1, revise lines 7 through 9 to read ' ... believes that

strong case management and control by the ASLBP and its presiding officers - using the tools and reflecting the policies in recent hearing practice reflects the effectiveness of the Commission's Policy Statement on the Conduct of Adjudicatory Proceedings and in the rules of practice -and the Commission's ongoing oversight of presiding officers and the Licensing Boards are key to the efficient and effective conduct of hearings. Accordingly, the final' Add the following sentence at the end of the paragraph: "In particular, the Commission will consider further whether general sets of milestones for the principal adjudicatory tracks can be developed and added to the rules as an appendix or provided as guidance by other means."

16. On page 54, 1st full paragraph, revise line 7 to read ' ... Commission has

considered concerns over the adequacy of the 45 day period and has decided to provide'

17. On page 55, last paragraph, line 7, delete "is also".

18. On page 57, 1st full paragraph, revise line 1 to read '

A change in this provision is warranted since ~~After publication of the proposed rule, the Commission has learned that not all'~~

19. On page 60 1st full paragraph, lines 7 and 12, and page 63, last paragraph, line 3, "Federal Register" should be in italics.

20. On page 65, 3rd full paragraph, revise line 1 to read 'While ~~the NRC is not constrained by~~ Article III of the Constitution

does not constrain the NRC hearing process and our hearings, therefore, are not'

21. On page 67, last paragraph, revise line 2 to read ' ... rule to allow

consideration of discretionary'

22. On page 68, revise line 14 from the top to read ' ... NRC regulatory action

. The discretionary' Revise line 17 to read ' ... citizen groups commenter's' suggestion' Revise line 19 to read ' ... most likely be ~~met~~ in every'

23. On page 72, 2nd full paragraph, modify the second half of the paragraph to either delete § 2.309(f)(4) on adoption of the contentions of others, or reformulate a provision that actually would accomplish the stated goal of ensuring "that parties do not adopt the contentions of originally sponsored by other parties solely to avoid dismissal of those contentions." Revise the rule text on page 193 accordingly.

24. On page 74, 1st full paragraph, revise line 6 to read ' ... that this

is an appropriate and reasonable timeperiod for'

25. On page 77, revise line 2 from the top to read ' ... highly contested. ~~If~~

The' Revise line 4 to read ' ... is has been upheld by Congress. The adjudication is' In line 5, capitalize the first "S" in "States". In line 11, delete the hyphen.

26. On page 82, paragraph 3, revise line 2 to read ' ... that Subpart L

applies ~~apply~~ to licenses'

27. On page 83, 1st full paragraph, revise line 6 to read ' ... nuclear power plant

licensing proceedings'

28. On page 84, revise line 7 from the bottom of the page to read ' ... small material

s license
es'
29. On page 86, paragraph 1, last line, replace "G" with "M".
30. On page 86, paragraph 2, last line, replace "2.311" with "2.313".
31. On page 90, 2nd full paragraph, delete the sentence in lines 5 through 7 (The Commission has no ... is necessary.)
32. On page 93, revise lines 8 and 9 from the top to read ' ... proposed action ~~and the environmental impacts of the proposed federal action.~~'
33. On page 93, 2nd full paragraph, revise line 3 to read ' ... hearing delay

s due to the'
34. On page 94, last paragraph, revise line 5 to read ' ... chosen not

to participate as' In line 7, delete the extra space after "parties".
35. On page 99, footnote 15, line 3, replace "81874" with "41874".
36. On page 101, 3rd full paragraph, line 5, start a new paragraph after "§ 2.704." and insert the heading for "Section 2.705". Revise line 5 (prior to inserting the previous change) to read ' ... footnote in

proposed former § 2.706(b)(1) did'
37. On page 112, paragraph 2, revise line 11 to read ' ... involving small

materials licenses, licensees, where the'
38. On page 115, footnote 16 (con't), line 1, delete "also". In line 2, replace "F2d" with "F.2d".
39. On page 125, last paragraph, lines 6 and 7 discuss licensing of a high-level radioactive waste repository. Should this be phrased in terms of a construction authorization/ license to receive and possess radioactive waste for consistency? Make same change on page 187, paragraph (2).
40. On page 129, 2nd full paragraph, line 2, delete "which is".
41. On page 132, last line, correct the spelling of "Licensing".
42. On page 134, paragraph 3, line 3, replace "presiding officer" with "Commission".
43. On page 137, last paragraph, revise line 2 to read ' ... repetitious, irrelevant

, unreliable, and'
44. On page 143, delete the 1st full paragraph and update the statement of considerations and the text of the final rule to reflect the amendments to § 2.790 that were published on April 17, 2003 (68 FR 18836).
45. On page 143, 2nd full paragraph, line 3, delete the comma.
46. On page 161, insert the missing ML number in the table.
47. On page 162, paragraph 2, revise line 5 to read ' ... procedures tailored

to the type'

48. On page 177, paragraph 1, line 2, change the 1st "or" to "of".
49. On page 189, paragraph (i), revise line 5 to read ' ... body
or of affected'
50. On page 198, 2nd full paragraph, line 4 refers to paragraph (b), but paragraph (b) discusses "disqualification".
51. On page 218, paragraph (b), revise to read ' ... repetitious, cumulative,
unreliable, or'
52. On page 221, last paragraph, revise line 1 to read '
Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, tThe NRC staff shall,'
53. On page 222, paragraph (4), revise line 2 to read ' ... or protected status)
representing the NRC staff's determination which act on the application'
54. On page 248, 1st full paragraph, line 8, delete the comma at the end of the sentence.
55. On page 291, paragraph 44., replace "2.111" with "2.1111" and move the "\$ 2.1111 [Reserved]" from above to beneath this paragraph.
56. On page 298, paragraph (iii), revise line 2 to read ' ... questions must
be kept by'
57. On pages 303 and 304, paragraphs 51. through 59., move the "\$ 2.1XXX [Reserved]" from above to beneath the appropriate paragraph.
58. On pages 305 and 306, paragraphs 63. through 66., move the "\$ 2.1XXX [Reserved]" from above to beneath the appropriate paragraph.
59. On page 320, in the table, check the dates and regulation references. For example, should 2.1014(a)(1) be 2.309(b)(2). 2.309(i)(1) should be 2.309(h)(1) and 2.309(i)(2) should be 2.309(h)(2). Day 985 appears to be an error. Data is missing for the Day and Regulation in the last line.
60. In the responses to comments not addressed in the SOC, page 15, 2nd full paragraph, revise line 3 to read ' ... and
should is not
bereluctant to'
61. In the responses to comments not addressed in the SOC, page 49, last paragraph, revise line 1 to read '
At this time, tThe Commission' Revise line 2 to read ' ... the regulations
shouldprovide for'