

New NRC Hearing Rules: Hard Lessons Learned from the Trenches

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Abstract – *The U.S. Nuclear Regulatory Commission (NRC) has recently promulgated amendments to its rules of practice in 10 C.F.R. Part 2 intended to streamline NRC adjudication by establishing a relatively informal hearing process for most NRC licensing actions. The practical effect of these amendments is yet to be seen and unexpected pitfalls remain even under the new rules. This paper explores these potential pitfalls from the perspective of the lengthy licensing proceeding for the Private Fuel Storage (PFS) facility, which has been ongoing since 1997. Under the new rules, the PFS licensing proceeding would have been conducted under the informal hearing provisions in Subpart L rather than the formal adjudication procedures of Subpart G. This could have had a significant beneficial effect in streamlining the licensing process. However, rule changes alone will not assure expeditious NRC licensing. The experience gleaned from complex licensing proceedings like the PFS case illustrates that applicants must take care to assure that the potential benefits from the rules are not undercut by the potential pitfalls that remain.*

I. INTRODUCTION

In January 2004, the U.S. Nuclear Regulatory Commission (NRC) published amendments to its rules of practice in 10 C.F.R. Part 2 which significantly modify the rules applicable in most NRC licensing proceedings.¹ The intent of the new rules is to improve and streamline NRC licensing by establishing a relatively informal process with limited discovery and simplified hearing procedures for most contested licensing actions.² The practical effect of these amendments remains to be seen, however, and pitfalls remain even under the new rules. It is useful in this respect to explore the practical effect of the amended rules from the perspective of the lengthy licensing proceeding for the Private Fuel Storage (PFS) facility.

II. OVERVIEW OF THE NRC LICENSING PROCEEDING FOR THE PFS FACILITY

The PFS facility is an away from reactor Independent Spent Fuel Storage Installation (ISFSI) proposed by a consortium of private utilities to be lo-

cated on the Reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, approximately 60 miles southwest of Salt Lake City. At capacity, the facility will be capable of storing up to 40,000 metric tons of spent nuclear fuel utilizing dry cask storage. The facility is currently in the final stages of licensing by the NRC, and a decision by the Atomic Safety and Licensing Board (Board) on the last outstanding issue is scheduled for mid-January 2005. A favorable decision by the Board would allow issuance of the license.

The licensing process for the PFS facility has been arduous. The initial license application for the facility was filed more than seven years ago, in June 1997. The licensing proceeding for the facility has been subject to formal adjudication under Subpart G of 10 C.F.R. Part 2. Seven parties filed petitions to intervene in the proceeding, including the State of Utah. The State has strongly opposed the facility from its inception and has been the primary litigant seeking to stop the project.

The State of Utah and the other intervenors filed approximately 100 original "contentions" (factual and legal challenges to the licensing of the facility) asserting a broad range of safety, environmental, financial, and legal issues, as well as numerous late-filed contentions. Among other issues, the contentions questioned the NRC's authority to license the facility; the seismic site characterization and seismic design of the facility; the potential effects of the facility on the hydrology of the region; the transportation of spent fuel to and from the facility; the adequacy of the thermal design of the casks; the sufficiency of the

¹ *Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182 (2004). The new NRC rules are currently being challenged. *Citizens Awareness Network, Inc. v. NRC*, No. 04-1145 (1st Cir., June 7, 2004).

² The provisions of the new NRC hearing rules are described in a companion paper, *Using the New NRC Hearing Rules to Maximum Advantage*, authored by Blake J. Nelson and Matias F. Travieso-Diaz.

PFS quality assurance program, site emergency plan, facility security and safeguards, and training of employees; the impact on the facility of natural phenomena (*e.g.*, flooding), and man-made phenomena, (*e.g.*, activities of nearby military testing and training grounds); the NEPA cost benefit analysis and need for the facility; and numerous other health and safety and environmental matters. In short, the intervenors launched a wide-ranging attack on virtually every aspect of the facility's design and operation. The initial contentions and responses thereto were hundreds of pages in length and the prehearing conference at which the parties argued the admissibility of the proposed contentions took several days.

In total, the Board admitted for litigation 28 original and subsequently-filed contentions. The litigation of these contentions involved extensive production of documents, written discovery and depositions, numerous motions, and several rounds of evidentiary hearings. In addition, the NRC Commissioners intervened from time to time to resolve issues that warranted immediate Commission action – such as ruling on whether license conditions could be used to satisfy NRC financial assurance requirements.

Discovery in the PFS case was generally done in parallel with the NRC Staff's safety and environmental reviews of the PFS license application. The Staff's reviews took over four years to complete (including reviews of amendments to the original application). This four year duration was due to several factors, including additional site investigations that the applicant needed to undertake to respond to Staff questions and the identification of new seismic information relatively late in the process, which triggered further analyses followed by additional Staff review and questions.

The discovery phase of the case started with approximately nine months of informal discovery during which the parties produced the bulk of the documents used in the case and conducted informal interviews of each side's witnesses. This informal discovery phase was followed by formal discovery, including document production, the serving of written interrogatories and requests for admissions, and the taking of depositions.

For purposes of scheduling formal discovery and hearing, the contentions were divided into three groups. Included in the first group were those safety issues for which the Staff projected early completion of its review; a second group consisted of the remaining, more complex safety issues (*e.g.*, seismic and geotechnical issues); environmental issues made up the third group. The reason for dividing the contentions into three groups was to allow discovery and

hearings to proceed on issues as the Staff completed its review of them in order to avoid having the hearing on all the issues at the end of the process.

The formal discovery period for each group of contentions lasted approximately two to three months. (Additional similar short periods of formal discovery were scheduled for late-filed contentions admitted during the course of the proceeding.) During each of these discovery periods, the parties requested and produced additional documents beyond those provided during informal discovery, propounded and responded to written interrogatories and requests for admissions, and prepared for and took depositions. In total, the parties took more than 60 depositions, which required in total approximately 50 days. Upon completion of formal discovery, the applicant filed motions for summary disposition, which led to the dismissal or settlement of most of the contentions and the holding of evidentiary hearings on the remaining ones.

The evidentiary hearing under Subpart G on the first group of contentions, lasting approximate five days, was held in June 2000. The evidentiary hearings on the remaining two groups of contentions were held two years later (April to July of 2002) and required approximately 40 days of hearing. The Board issued a series of partial initial decisions ruling on the various contentions heard at the evidentiary hearings, the bulk of which were issued in March and May of 2003.

The Board's ruling on one of the contentions (rendered March 10, 2003) resulted in PFS conducting additional technical analyses concerning the safety consequences of an F-16 fighter aircraft crashing into the site. These additional studies were submitted by PFS to the NRC in July 2003. The Staff performed a technical review of PFS's studies and of technical studies performed by the State of Utah which predicted different results. The Staff's review was followed by limited discovery, the preparation of pre-filed testimony, and evidentiary hearings. The parties spent approximately three weeks (15 deposition days) deposing each side's experts; 16 days of formal evidentiary hearings were required to litigate this issue. The hearings were completed September 15, 2004 and the Board's decision on this last remaining issue is scheduled for mid-January 2005.

III. THE NEW NRC RULES OF PRACTICE VIEWED FROM THE PERSPECTIVE OF THE PFS LICENSING PROCEEDING

Under the NRC's previous rules of practice, licensing proceedings for nuclear power plants and spent fuel storage facilities were generally conducted as formal adjudications under Subpart G of 10 C.F.R.

Part 2. The informal hearing provisions of Subpart L were generally limited to material licenses. The new rules establish the informal hearing provisions in a revised Subpart L to 10 C.F.R. Part 2 to be the nominal hearing format. Under the new rules, licensing proceedings for nuclear power plants and spent fuel storage facilities would be conducted under the informal hearing provisions of revised Subpart L.

This paper focuses on the new rules of practice from the perspective of their practical application to a large, complex proceeding, such as the PFS licensing proceeding. It discusses the benefits that could be obtained under the new rules as well as the potential pitfalls. The discussion is divided into the four basic phases of an NRC licensing proceeding: intervention, discovery, hearing, and post hearing findings, but it will focus on the discovery and hearing phases, as the largest changes have occurred in those areas.

Intervention

The new NRC rules of practice provide uniform rules for intervention in NRC licensing proceedings. Under the new rules, an intervenor must file admissible contentions with its petition to intervene in order to be permitted to intervene in the proceeding. In this respect, the new rules adopt the pleading requirements previously used for Subpart G proceedings, which require an intervenor to proffer adequately supported contentions raising specific, genuine issues of material fact or law.³ In contrast, under former Subpart L, petitioners needed only to assert “areas of concern” that were “germane” to the licensing activity that was the subject matter of the proceeding in order to be admitted as intervenors. By extending the pleading requirements used for Subpart G to all NRC licensing proceedings, the “Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation.” 69 Fed. Reg. at 2,202. Because the new rules adopt the pleading requirements of Subpart G, they effect no substantive changes in this respect for nuclear power plant or ISFSI licensing.⁴

Because intervenors characteristically state their contentions in broad terms that are much more en-

compassing than their supporting bases, applicants will need to be vigilant under the new rules, as before, to limit any admitted contention to the specific controverted issues of fact or law asserted in the contention’s bases. In PFS, the applicant’s responses to the contentions reworded each contention to clearly identify the specific factual and legal assertions underlying a broadly worded contention and then responded to each assertion. In so doing, PFS was able to limit the litigation of broadly worded contentions to the specific factual or legal allegations that the Board found adequately supported in their bases. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 199-201 (1998) (Board ruling on Utah Contention V).⁵ The rewording of the contentions to make them more specific and consistent with their bases should be encouraged in all proceedings.

Discovery

One of the major changes under the NRC’s new rules of practice concerns discovery. For most NRC proceedings, the entire discovery process is now limited to identifying potential witnesses and to disclosing relevant documents and data compilations (including analyses and other technical support relied upon by expert witnesses).⁶ No written discovery (requests for the production of documents, interrogatories or requests for admissions) or depositions are provided for under the new rules. This is the case for nuclear power plant and ISFSI licensing proceedings as well as for material licensing proceedings.

Effect on Licensing Costs and Schedule

Using the PFS proceeding as a yardstick, the new discovery rules will certainly have a significant impact on the legal and technical resources expended to litigate intervenor claims. In PFS, the parties utilized the full panoply of available discovery devices – i.e., requests for the production of documents, written

³ These pleading requirements are now set forth in Subpart C (Rules of General Applicability) of 10 C.F.R. Part 2.

⁴ The new rules of practice do make one procedural change to the intervention process. Previously, under Subpart G, a petitioner could file its contentions in a supplemental pleading subsequent to its intervention petition. The new rules require that the contentions be included with the petition to intervene.

⁵ The Board adopted the applicant’s rewording for those contentions (e.g. Utah Contention V) on which the applicant and the petitioners could agree, with some small changes to the proposed rewording of the contention. For the relatively small number of contentions on which no such agreement could be reached, the Board kept the contention as originally filed, although it obviously had before it the applicant’s proposed rewording to guide its review of the contention.

⁶ The discovery provisions of the new rules and potential issues concerning their interpretation and application are discussed in the Nelson and Travieso-Diaz paper on *Using the New NRC Hearing Rules to Maximum Advantage*, *supra*, note 2.

interrogatories, requests for admissions, and depositions. This discovery consumed extensive legal and technical resources. As discussed above, approximately 65 days were spent in depositions (not counting preparation or travel time). Similarly, extensive legal and technical resources were expended in responding to written interrogatories and requests for admissions.

While significantly affecting the expenditure of legal and technical resources, the curtailment of discovery provided for by the new rules would probably have had only a minimal effect on the length of the PFS licensing proceeding. As a practical matter, litigation of the intervenors' contentions did not drive the PFS licensing schedule. Rather, it was the NRC Staff's technical and environmental reviews – including additional technical studies and analyses that PFS had to undertake in order to respond to requests for additional information (RAIs) from the Staff. Formal discovery did not begin for almost a year after the Board's ruling on the admission of contentions and, as discussed above, formal discovery was conducted during relatively compressed timeframes for the various groups of contentions.

In promulgating its new rules of practice, the Commission recognized that the timing of the hearing process is dependent on the Staff's completion of its reviews. In the Statement of Considerations, the Commission states:

[T]o avoid delays where litigation of a contention is dependent upon some NRC staff action, the Commission will direct the NRC staff to develop internal management guidance and procedures in support of timely NRC staff participation in hearings, including early preparation of testimony and evidence to support the NRC staff's position on a contention/controverted issue.

69 Fed. Reg. at 2,209.

Such internal management guidance directing early Staff preparation of testimony and evidence on controverted issues should be beneficial. But, as the Commission itself recognizes, hearings on certain issues cannot be undertaken until the Staff has completed its review. For example, hearings on environmental issues would typically need to await the issuance of the Final Environmental Impact Statement (although discovery and motions could generally be completed before hand).⁷ Further, the Board and the

parties in the PFS case attempted to expedite the hearing process by prioritizing for hearing those issues for which the Staff contemplated completing its review earlier in the licensing process. Following this approach did allow certain of the safety issues to be heard earlier in 2000, while the Staff continued its review of the remaining issues which were not heard until 2002. But, as would be expected, the more complex issues that required longer Staff review time were also the issues that required greater hearing time. Thus, while it was beneficial to hear some of the issues earlier in the hearing process, the overall duration of the PFS licensing process probably was not appreciably shortened by doing so.

Thus, in order to ensure an expeditious licensing process, an applicant must still take whatever steps it can to minimize NRC Staff review time. The most direct way is to communicate with the Staff before filing the license application to identify what the Staff expects in the application and to make the application as complete as possible. Without these and other steps to expedite Staff review, the changes made by the NRC's new rules of practice regarding discovery are unlikely to have an appreciable effect on the duration of NRC licensing proceedings.

Issues Concerning Practical Application of the New Discovery Rules

Several points are worth highlighting concerning the practical application of the new discovery rules based on experience from the PFS proceeding. First, under the new rules, document disclosures must be completed within 30 days of the admission of contentions.⁸ In a large, complex case, such as the PFS proceeding, the only way this 30-day requirement could be met would be to begin collecting documents prior to the Board's ruling on the admissibility of the proposed contentions.⁹ Such an approach is likely to result, however, in some unnecessary expenditure of resources, as some or most of the contentions may not be admitted. (The majority of the contentions in

⁸ See *Using the New NRC Hearing Rules to Maximum Advantage*, *supra*, note 2. These disclosures must be updated within 14 days of obtaining or generating new documents. *Id.*

⁹ As part of the informal discovery process in the PFS proceeding, PFS did conduct a general review of its files and produce documents relevant to the admitted contentions generally analogous to that required under the new rules. This review and production process, once initiated, took approximately three months to complete. This initial production was supplemented by periodic updates.

⁷ In PFS, the applicant moved for summary disposition on the environmental contentions following the Staff's issuance of the Draft Environmental Impact Statement.

the PFS proceeding were not admitted.) One reasonable compromise could be to identify classes of relevant documents and to otherwise begin planning for the production prior to a ruling on contention admissibility, as well as to begin gathering documents for those contentions likely to be admitted. This might entail modifying the applicant's document management system to electronically capture and organize (or allow for the subsequent organization of) project records so as to enable sorting by contention. Also, the presiding officer has the authority to modify the times for the document and witness disclosures required by the new rules. 10 C.F.R. § 2.332(a)(1). Such a modification could be appropriate for large cases such as the PFS licensing proceeding.

The related requirement under the new rules to prepare a log within 30 days for documents being withheld on grounds of privilege may also be infeasible in large proceedings. To log each document on which a party claims privilege is a time consuming process. To minimize this burden, the parties in the PFS proceeding agreed that communications to and from legal counsel did not need to be listed in the privilege log.¹⁰ Parties should seek to reach similar agreements in the future to minimize the burden of preparing privilege logs. The presiding officer would have the authority to approve any such agreement among the parties. *See* 10 C.F.R. § 2.336(a).

The new rules also require that all disclosures be accompanied by a certification that "all relevant materials" have been disclosed and that "the disclosures are accurate and complete as of the date of the certification." 10 C.F.R. § 2.336(c). However, whether certain documents are relevant or not is often the subject of dispute among the parties. For example, some of the largest discovery fights in the PFS proceeding were over whether certain classes of documents were relevant to litigating a contention. Thus, the certification would necessarily have to be based on those documents that a party reasonably believed to be relevant to litigating an admitted contention. Further, one can expect challenges to whether a party has in fact produced "all relevant documents" and practices will need to be developed to efficiently resolve such challenges.

With respect to witnesses, the new rules require a party to identify those persons, including experts,

"upon whose opinion the party bases its claims . . . and may rely upon as witness," as well as to provide "a copy of the analysis or other authority upon which that person bases his or her opinion." 10 C.F.R. § 2.336(a)(1). Again, these disclosures are to be made within 30 days of the ruling on the admissibility of contentions.¹¹ In a case the size of the PFS proceeding, it would be very difficult to do so. Thus, either the parties' initial disclosures could simply state that their testifying witnesses had not yet been identified and that the disclosures would be supplemented upon doing so, or, alternatively, the parties could request the presiding officer to establish a different schedule for witness disclosures.¹²

The most important part of the witness disclosure requirement is a "copy of the analysis or other authority" upon which the witness bases his or her opinion. It is very important to find out the bases of an opposing expert's opinions so that your experts are able to review and challenge them. In PFS, the parties generally relied upon written interrogatories and depositions to identify and flush out an opposing expert opinions and the bases therefor. However, the NRC's new rules do not provide for written interrogatories or depositions. The lack of these avenues of discovery places a very high premium – particularly for an applicant who bears the burden of proof – on being able to obtain under the disclosure requirements copies of the analyses or other authority upon which opposing experts base their opinions.

Further, in most cases an applicant would have developed the technical and other bases underlying its position as part of the license application and such information (*e.g.*, design calculations or site investigation studies) would have been made available to intervenors as part of the initial disclosure process. However, an applicant is unlikely to have available the same level of detailed information on an intervenor's position. While some information would be provided by the bases to a contention, the experience in the PFS proceeding was that the level of detail provided by an intervenor's contention was generally far less than that later developed to support its case.

¹⁰ In the recent North Anna Early Site Permit Proceeding, the parties similarly agreed to waive the requirement to prepare a privilege log, and obtained an order from the Licensing Board modifying the disclosure obligations to reflect this agreement.

¹¹ *See Using the New NRC Hearing Rules to Maximum Advantage, supra*, note 2. These disclosures must also be updated within 14 days of obtaining or developing new information. *Id.*

¹² In the North Anna Early Site Permit Proceeding, both the applicant and the intervenor stated that they had not yet identified their testifying witnesses and that they would supplement their disclosures upon doing so.

Accordingly, for any witnesses that an intervenor identifies, an applicant would want to vigorously pursue as part of the disclosure requirements a “copy of the analysis or other authority” on which the witnesses base their opinion. An applicant would not want to find out such information for the first time in an intervenor’s testimony. At that point in the process, an applicant would have little time to respond (only 20 days are provided by the rules for preparing rebuttal testimony). Further, any extension of time at that point in the licensing process would very likely extend the licensing proceeding, since the filing of testimony would most likely occur only after the Staff had completed its technical review and taken a position on the controverted issue. It is imperative, therefore, that the technical information and basis underlying an intervenor’s position be sought assiduously as part of the disclosure process provided by the new rules so that an applicant is not ambushed by an intervenor’s testimony and faced with the choice of either an inadequate response or a delay in the proceeding. Moreover, such vigorous pursuit would lay the groundwork for a potential motion to strike should new information be contained in a party’s testimony that should have been provided in discovery.

As support for the nature of the technical information to be disclosed under the new rules, an applicant can refer to the expert witness disclosure requirements in Rule 26 of the Federal Rules of Civil Procedure (FRCP). As discussed in the companion paper,¹³ the Commission’s disclosure requirements in the new rules generally track those found in Rule 26 of the FRCP. Rule 26 requires experts to provide “a written report” which is to contain a “complete statement of all opinions to be expressed” by the expert and “the basis and reasons therefor; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions” While the Commission’s new rules do not require a formal written expert report, FRCP 26 would provide guidance as to the nature of the substantive information to be disclosed under the new rules.¹⁴

¹³ *Using the New NRC Hearing Rules to Maximum Advantage*, *supra*, note 2. Additionally, the Statement of Considerations states that the “mandatory disclosure provisions” of the new rules were “generally modeled on Rule 26 of the [FRCP].” 69 Fed. Reg. at 2,194.

¹⁴ Presumably, the parties could, with approval of the presiding officer, meet their disclosure obligations under the new rules by exchanging formal expert reports. In the last phase of the PFS proceeding concerning the structural consequences of an F-16 impacting the facil-

There are also some alternative mechanisms that an applicant might consider for obtaining information other than that provided for under the new disclosure process. The most readily available alternative would be for an applicant to move for summary disposition on the contention. Such a course of action definitely should be followed if it appears from the contention and the initial disclosures that an intervenor has minimal technical support for the contention or has raised issues that are easily answerable. In the PFS proceeding, summary disposition was used effectively to obviate a need for hearing on many issues. Of the 28 admitted contentions, 20 were resolved by summary disposition or through subsequent settlement after the issues had been limited or defined by a summary disposition motion. Further, on those contentions on which summary disposition was not obtained, the intervenor’s position was more clearly defined such that it could be better addressed in the pre-filed testimony.

Another alternative method would be for an applicant to agree to or to seek depositions of expert witnesses. While the new rules do not provide for depositions, a presiding officer has the authority to “[o]rder depositions to be taken as appropriate.”

10 C.F.R. § 2.319(f). Depositions are very resource intensive and costly, and therefore should be sought and undertaken only for good reason, and on a limited basis, particularly since they are inconsistent with the simplification of discovery that is at the heart of the new rules. On the other hand, depositions of opposing experts can provide very useful information that may not otherwise be available in advance of the hearing itself.

For example, in the PFS proceeding, depositions of testifying experts proved useful in several respects. First, depositions often laid the groundwork for summary disposition by revealing the lack of any credible technical basis for the contention.¹⁵ Second, one could often identify significant areas of agreement among the experts that could be used to focus

ity, the parties did exchange expert reports which formed the focus of the subsequent litigation.

¹⁵ In PFS, the applicant generally did not move for summary disposition until after depositions and other discovery had been completed because an intervenor could defeat summary disposition under the old rules by claiming a need for discovery (which included depositions). Under the new rules, which do not provide for depositions, the better strategy may well be for an applicant to move for summary disposition absent any depositions and to consider possible depositions only if the motion is denied.

the hearing on areas of genuine dispute or obtain other useful admissions (*e.g.*, limitations on an expert's areas of expertise or experience) that otherwise would not be highlighted by an intervenor. Third, depositions provided a better understanding of an opposing expert's opinion and the underlying technical bases so as to enable preparation of a better response in the pre-filed testimony to an intervenor's claims.

Obviously, absent unusual circumstances, depositions would be allowed only on a reciprocal basis. Therefore, an intervenor would obtain some of the same benefits from deposing testifying experts. Accordingly, an applicant would want to closely weigh the pros and cons in deciding whether it should pursue depositions of testifying experts. In this respect, an applicant would certainly want to avoid wide ranging depositions that would only serve as a fishing expedition for the intervenors.

Exactly how an applicant would go about obtaining the necessary information about an intervenor's case would depend upon the nature of the claims raised by the intervenor and the surrounding circumstances. In many cases, the more extensive the intervenor's technical support on a contention, the more important it becomes for the applicant to develop a comprehensive understanding of the intervenor's case. However this understanding is accomplished, the ultimate goal must be to obtain the necessary technical information concerning intervenor claims in order to enable an applicant to appropriately respond in its pre-filed testimony.

Hearing

The new rules establish the informal hearing provisions in a revised Subpart L to 10 C.F.R. Part 2 as the most commonly used hearing format. These provisions call for the parties' simultaneous filing of a written statement of position and pre-filed direct testimony followed 20 days later by simultaneous filings of written responses and rebuttal pre-filed testimony. The hearing may be oral, or solely on the papers.

If an oral hearing is held, no cross-examination of witnesses by the parties is allowed at the hearing, except by order of the presiding officer.¹⁶ Rather, the

parties are limited to supplying suggested questions to the presiding officer prior to hearing. Proposed questions with respect to the initial testimony are due 20 days after its filing (the same date on which rebuttal testimony is due) and proposed questions on the rebuttal testimony are due seven days after its filing. No additional proposed questions can be submitted to the presiding officer at the hearing, "except upon request by, and in the sole discretion of, the presiding officer." 10 C.F.R. § 2.1207(b)(6).

On the whole, these new provisions should be a great improvement over the potentially open-ended hearings possible under Subpart G. The elimination of cross-examination by the parties should reduce significantly the length of a hearing as well as the related expenditures for legal and technical resources. As noted by the Commission in the Statement of Considerations, "cross-examination conducted by the parties often is not the most effective means for ensuring that all relevant and material information with respect to a contested issues is efficiently developed in the record of a proceeding." 69 Fed. Reg. at 2,195. Indeed, cross-examination can often result in muddying a record on immaterial matters that require subsequent clarification and hence additional hearing time as well. Also, the introduction of new exhibits on cross-examination, permissible in formal adjudication under Subpart G, can lead to surprise at the last instant.

There are, however, potential pitfalls inherent in the new process, particularly for an applicant on whom the burden of proof rests. Of particular concern is the lack of any avenue for a party to respond to new information or arguments introduced in another party's rebuttal testimony or in response to the presiding officer's questioning of witnesses at the hearing. In the PFS proceeding, there typically was additional rebuttal both to another party's written pre-filed rebuttal testimony as well as to the oral hearing testimony of the other party's witnesses. (There was also redirect examination following cross to clarify or elaborate on points made during cross-examination.) The inability to provide such additional testimony at the hearing would weigh heaviest against the applicant, who has the burden of proof. An intervenor only needs to raise sufficient doubt, whereas an applicant needs to sufficiently resolve such doubt so that the evidence weighs in its favor.

Impartial questioning by the presiding officer would not necessarily obviate the need for a party to supply additional evidence at the hearing. In the latest round of PFS hearings held this past summer, the Board asked numerous questions of its own, more than in the previous PFS hearings. The Board's questions were very useful as they raised and clari-

¹⁶ The Statement of Considerations to the new rules states the Commission's expectation that cross-examination by the parties is expected to occur "only in the rare circumstance where the presiding officer finds in the course of the hearing that his or her questioning of witnesses will not produce an adequate record for decision" 69 Fed. Reg. at 2,196.

fied key issues on which the Board was focused. However, the Board could not be expected to know the case as well as the parties, and there were often points of elaboration or clarification that the parties would make following up on the Board's questions. Further, Board questions to one party's witnesses often led opposing parties to introduce oral rebuttal testimony from their witnesses.

An applicant would have several potential options to respond to new information contained in an intervenor's rebuttal testimony. An applicant might (1) move to strike the testimony (*e.g.*, if it were improper rebuttal, or based on information not timely disclosed), (2) submit cross-examination for the presiding officer to ask of the witness at the hearing, or (3) move for leave to present surrebuttal testimony, either pre-filed or orally at the hearing. Because requesting to present additional testimony would create the potential for delay, an applicant would presumably choose this option only if its benefits outweighed the risks of delay. Of course, the potential for delay would depend on the breadth of the testimony.

With respect to new information provided in testimony responding to questions of the presiding officer, the Statement of Considerations emphasizes that the presiding officer is not responsible for developing the record. Rather, the parties "are responsible for ensuring that there is sufficient evidence in the record to meet their respective burdens," and the presiding officer's role is to oversee "the compilation of the record" and to "ensur[e] that the record is sufficiently clear and understandable" such that the presiding officer "can reach an initial decision." 69 Fed. Reg. at 2,213. Thus, any new substantive evidence elicited through questions at the hearing should be subject to a motion to strike.

Of course, what constitutes clarification as opposed to new substantive testimony could be the subject of controversy. Further, often the purpose of rebuttal testimony (as well as redirect) is to clarify testimony discussing substantive evidence already in the record, and it was often used for this purpose in PFS. Thus, even if no new substantive evidence is adduced by a presiding officer's questions, there may be a need for subsequent clarification or explanation. While this need should be less in the absence of cross-examination by the parties, based on the PFS experience there are likely to be occasions where clarification would be necessary or appropriate. The new rules for informal hearings provide no mechanism by which a party could adduce a clarification. But since the hearing's purpose is to ensure a clear and understandable record, the need to clarify the record should be brought to the attention of the presiding officer. As noted above, the presiding officer has

discretion under the new rules to solicit additional questions from the parties during the hearing, or provide alternative means for clarifying the record.

Thus, while an informal hearing process provides obvious benefits, it is also clearly subject to potential pitfalls. Over time "case law" will develop that will provide guidance for litigants. In the meantime, at least in the initial cases under the new rules, an applicant may well want to be more inclusive in its pre-filed testimony than it might otherwise be because of potential limitations on being able to adduce additional evidence at the hearing, even at the risk of inviting questions on tangential issues.

Findings of Fact and Conclusions of Law

In accordance with well-established Commission practice, the new rules provide for the parties to file post-hearing findings of fact and conclusions of law. 10 C.F.R. § 2.1209. While the rules provides only for the filing of simultaneous findings, presumably the parties and the presiding officer (or licensing board) could agree to the filing of simultaneous reply findings as well, which has been the practice throughout the PFS licensing proceeding. In a lengthy, complex proceeding, such as that for the PFS facility, reply findings are generally desirable from the applicant's view in order to be able to fully address the specific points in the record relied upon by the intervenors.

IV. CONCLUSIONS

The new NRC procedural rules appear to provide a real opportunity for facilitating nuclear licensing by streamlining the discovery and hearing process, thus reducing both time and costs. Document discovery is streamlined and done up front and other costly and time-consuming discovery is significantly limited. Similarly, hearings are streamlined by having the presiding officer question witnesses.

However, the new rules will not by themselves assure expeditious completion of NRC licensing proceedings. For example, a major factor in the extended duration of the PFS licensing proceeding was the length of the NRC Staff's safety and environmental reviews. The new rules only tangentially address Staff reviews, so it remains up to the applicant to work with the Staff to facilitate and expedite its review.

Also, some of the streamlining of the discovery and hearing process creates potential pitfalls that could impair an applicant's ability to make its case. Careful strategic planning needs to be undertaken to guard against and avoid these pitfalls while at the same time taking advantage of the potential benefits offered by the new rules.