COMMENTS ON PROPOSED AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (76 FED. REG. 10781)

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INTRODUCTION[1]

When the current version of Part 2 was adopted in 2004 the Commission stated:

> The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient.

69 Fed.Reg. 2182 (Changes to Adjudicatory Process) January 14, 2004 ("2004 SOC"). No fair observer of the contested hearings that have occurred since that time, particularly those involving license renewal, would say that the current version of Part 2 achieves that laudable goal. Rather, the process is marked by a chaotic hurricane of pleadings addressed, for the most part, not to the merits of the safety and environmental issues that are the appropriate focus of such hearings, but to the whether issues sought to be raised by the public meet procedural requirements such that the issues are appropriate for consideration in a hearing. The meat of the hearing, i.e. the activities that address the merits of issues such as pre-filed testimony, proposed areas of cross-

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examination, motions for summary disposition and the hearings themselves, consume relatively little time compared to the time spent on addressing contention admissibility and the timeliness of new or amended contentions.

When the Commission announced the current proposed amendments to Part 2 it stated:

> This proposed rule would make changes to the NRC's adjudicatory process that NRC believes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

76 Fed.Reg. 10781 (February 28, 2011). However, while that goal is laudable, the proposed changes do little, if anything, to achieve it and fail to address the fundamental problems that plague the NRC licensing hearing process. License renewal hearings provide ample proof of the failure of the current Part 2 regulations to "promote fairness, efficiency, and openness" and, in fact demonstrate that the current Part 2 regulations are unfair, inefficient and lack transparency.

For example, the Indian Point relicensing proceeding, commenced on August 1, 2007 with the filing of a Notice of Opportunity for Hearing in the Federal Register. 72 FR 42134. However, the portion of the hearing that will address the merits of the issues raised will not begin until June 19, 2011 when under the ASLB Scheduling Order, pre-filed direct testimony from the intervenors will be due. *Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010). Thus, the preliminary, essentially non-substantive, skirmishing over the admissibility of contentions and amended or new contentions took 46 months. By contrast, from the point where the real meat of the hearing begins - filing of testimony - until completion of the hearings and filing of all post-hearing pleadings will take approximately 11 months assuming the hearings last three weeks and do not begin until 60 days after all pre-hearing filings occur. *Id*. The time spent on the preliminary matters related to

admissibility of contentions and the timeliness and appropriateness of new or amended contentions is not substantively productive - i.e. resolution of such issues as to whether an amended basis is timely or a contention contains sufficient specificity and basis to be admitted - and represents an enormous expenditure of time and money by all parties, an expenditure that falls particular hard on the public which does not have an economic incentive to justify expenditures and is not funded by taxes and licensing fees.

The core of the problem is that hearings are noticed when the application is still in a state of flux and before any of the work by Staff has been completed. As the applicant refines and completes the application - often adding dozens of application amendments - and as the Staff publishes draft and final impact statements and draft and final safety evaluations - new documents are disclosed and new issues are raised, compelling the conscientious intervenor to seek to amend existing contentions and their bases or to add new contentions. No one suggests that the additional work done by the applicant or by the Staff is not valuable. However, each of those changes by applicant and staff are done without any limitation or adverse consequence to them. Thus, for example, an applicant is not penalized for waiting until long after its application has been accepted for filing by Staff, to identify the particular elements of an aging management plan that it has known for years it would have to provide but that was not particularized in its application. Staff uses requests for information (RAIs) to fill in gaps in the application and each response can raise new and previously unknown issues. Again, no one suggests Staff should not seek this information or that their efforts are not productive. But, since there is no adverse consequence to either Staff or applicant when relevant information is produced in dribs and drabs during the hearing process and such serialized production of data forces an intervenor to refine

existing contentions or file new ones - a process which produces immediate objections from Staff and applicant as to virtually every proposed new or amended contention - intervenors are compelled to expend their limited resources to make their case over and over again because of the application and review process utilized by applicants and Staff.

A glaring example of the chaos created by the current system is well-summarized by the Commission in its opinion last year in *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-10-17 (July 8, 2010) where it noted:

> The procedural history of Contentions 2, 2A, 2B, and 2C is lengthy and muddled – due, in large part, to Entergy's multiple revisions to the relevant portions of its license renewal application as it responded to multiple Staff inquiries and, in a related vein, Entergy's apparent lack of precision as to the specific subsection of section 54.21(c)(1) with which it sought to comply for the components at issue.

Id. at 23. Entergy's "multiple revisions" and "lack of precision" compelled the intervenor to file four separate versions of essentially the same contention, each of which filings was vigorously opposed as either untimely, failing to meet the requirements of 10 C.F.R. § 2.309(f)(1), or both. But Entergy suffered no consequences for its sloppy and dilatory tactics while the intervenor was forced to expended a substantial amount of its limited resources just to get one issue heard and eventually had to abandon legal representation and pursue the case *pro se*. Such a result, which is repeated over and over again in hearings under the current version of Part 2, is not consistent with the Commission's oft expressed commitment to full and effective public participation. This commitment was acknowledged by former Chairman Dale Klein, who stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are

made in consultation with the public, our Congress, and other stakeholders."[2] He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."[3]

The adverse effect of the current process on effective public participation cannot be overstated. When virtually every contention and every amendment to a contention produces a deluge of opposition from both applicants and Staff, all focused on whether the procedural technicalities of 10 C.F.R. § 2.309(f) have been met, the ability of the public to participate effectively is essentially destroyed and the value of their contribution on the merits of relevant issues is diminished dramatically. For a general analysis of the inherent unfairness of the current Part 2 regulations see "Regulating Nuclear Power in the New Millennium (The Role of the Public)" Roisman, *et al.* Pace Environmental Law Review, Volume 26 (Summer 2009) Number 2 at pp. 317-363 which is incorporated herein by reference and attached hereto.

The following proposal offers a solution to some of the problems created by the current Part 2 regulations without abandoning the Commission's goal of making the"hearing process more effective and efficient". Unlike the proposed amendments currently before the

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[2] Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), http://www.nrc.gov/reading-rm/doc-collections/commission/; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/.

[3] Klein, *supra* note 1, at Slide 11.

Commission, these proposed amendments address fundamental problems with Part 2. The essence of these proposals is to initiate the opportunity for public participation in the process at the same time as the applicant initiates its efforts to obtain a license, license amendment or any other relief or benefit from the NRC, but to postpone the date on which contentions must be filed until both applicant and Staff have completed their work and attested to that fact. The only criteria for admission as a party would be "standing" and once admitted a party would be entitled to see all documents relevant to the application whether in the possession of Staff or the applicant, to attend all meetings, to listen in on all phone calls and to initiate its own meetings and phone calls with the Staff. Within 30 days after applicant and Staff have attested to the completion of their work, contentions would be due. The current rules for contention admissibility would be tightened to require essentially all bases and all supporting evidence, except expert witness reports, to be submitted with a proposed contention. Shortly after contentions, if any, had been admitted, direct testimony, including expert witness reports, would be due and the current practice for moving from that point to hearings would be followed.

Under this approach there would be no incentive for an applicant to delay submitting all the information it intends to use to support its application and no reason for Staff to publish draft and final impact statements or safety reports until they had finished all of their work. Intervenors, having had access to all the relevant data would have no excuse for not fully presenting their case at the time they file their contentions, with the exception of expert witness reports which would await, but only by 30 days, the Board ruling on admissibility of a contention. The net effect would be that resources of intervenors, applicant and Staff would be devoted primarily to the merits of concerns raised by intervenors and much less money would be

spent on lawyers arguing over substantively irrelevant procedural technicalities. By involving intervenors in the process from the outset and imposing upon them the obligation to be knowledgeable about all the information developed during the completion of the application and NRC Staff review, there is a greater probability that issues raised as contentions will be focused on real substantive concerns and not merely on the lack of details in an application which is now often the basis for initial contentions. In addition, intervenor participation in the application and Staff review process provides ample opportunities for concerns to be addressed directly among the parties and without the formality of the hearing process, thus saving the hearing process for those issues on which the parties genuinely are unable to reach agreement.

One added advantage of the approach proposed is that the ASLB will not spend its resources on resolving non-substantive disagreements about timing of filings and the admissibility of multiple iterations of essentially the same contention. The ASLB, once it rules on standing, might be called upon to resolve a dispute about access to data during the completion of the application and Staff reviews, but such disputes are unlikely to occur if the final regulation is clear and the Commission's Statement of Considerations expresses the Commission's strong policy in favor of open access to all relevant documents. In addition, such disputes could be handled by a single ASLB member performing much the same function as a Federal Magistrate does in Federal District Court litigation.

What follows are proposed regulations to accomplish the goals outlined above. If the Commission is favorably inclined to the basic approach proposed here, these proposed regulations would benefit from more careful drafting that 1) makes the language more precise and 2) modifies other regulations that would be impacted by these proposed changes. In

addition, should the Commission decide to proceed along the lines suggested, republishing the proposed amendments to Part 2 to allow fuller participation from industry, public and governmental intervenors and NRC Staff licensing hearing participants would be beneficial. No participant in the current licensing process favors the current chaos. These proposals offer one, but not the only, option to address that chaos. For now, these are the only proposals before the Commission that address the most pressing fundamental problems in Part 2.

At the end of these proposed changes are a few comments on the current proposed changes to Part 2.

PROPOSED CHANGES TO 10 C.F.R. PART 2

PROPOSED
10 C.F.R. § 2.100A

Prior to filing an application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval and prior to contacting any employee or contractor of the NRC regarding such an application, an applicant shall file a formal notice with the NRC of its intention to file such an application, including the nature of the intended application and scope of the application, and shall publish at least a ½ page notice of intent in all daily newspapers of general distribution within the area where the facility involved is, or may be, located, with at least three national daily newspapers and on its website for a period of at least one month. The content of the notice shall be prescribed by NRC Staff and shall have as its purpose the widest possible disclosure of the applicant's intent and the nature of the intended application.

PROPOSED 10 C.F.R. § 2.100B

Upon receipt of a notice of intent pursuant to 10 C.F.R. § 2.100A, NRC Staff shall determine if the notice meets all the requirements and intent of that Section and once such a determination is made it shall have published in the Federal Register and in the same newspapers as those used by the applicant in complying with 10 C.F.R. § 2.100A, and as frequently, at least a ½ page notice of opportunity to participate in the NRC regulatory process with regard to such proposed action. The notice shall require that all persons who wish to participate in any way in the regulatory process with regard to such proposed action must file, within 30 days of the publication of the notice in the Federal Register and the newspapers, a request to participate. Such a request to participate must demonstrate that the proposed participant meets the requirements of 10 C.F.R. § 2.309(d).

PROPOSED 10 C.F.R. § 2.308A

Upon filing of the Federal Register Notice prescribed by 10 C.F.R. § 2.100B, the Commission shall designate an Atomic Safety and Licensing Board Panel to determine whether any request for participation filed is 1) timely and 2) meets the requirements of 10 C.F.R. § 2.309(d). Any person that meets those requirements shall be deemed a "participant" and shall have all the rights and responsibilities identified in 10 C.F.R. § 2.308B. The Atomic Safety and Licensing Board Panel may consider untimely filings for participant status but shall not grant such requests unless good cause is shown why the proposed participant could not have learned of the proposed action and filed a timely request to participate and, if granted participant status, the participant must take the proceeding as it finds it including the need to meet any filing requirements regarding documents and the need to comply with any time limits imposed by these regulations or the Board.

PROPOSED 10 C.F.R. § 2.308B

Once a person is determined to be a participant within the meaning of 10 C.F.R. § 2.308A, they shall have the following rights and responsibilities:

1. The participant shall receive a copy of all documents generated, received, reviewed or relied upon by an applicant, its employees, contracts or experts and by the NRC Staff or any contractor of the NRC Staff, with regard to the intended application or any issues relevant to the determination of the application within one week of when the document was generated, received, reviewed or relied upon;

2. The participant shall receive advance notice of all meetings and phone calls between the applicant, the NRC Staff or any contractor of the NRC Staff or the applicant, with regard to the intended application or the application itself and the participant shall have the right to listen in on any such call or be an attendee at any such meeting. NRC Staff may limit the number of representatives of the participant who may attend such meetings but not to less than two. These rights shall not include the right to actively participate in the call or meeting unless NRC Staff or the applicant request such participation.

3. The participant shall provide a copy to NRC Staff and the applicant of all documents with regard to the intended application or any issues relevant to the application generated, received, reviewed or relied upon by it, its employees, experts or contractors within one week of their generation, receipt, review or reliance upon the document.

4. The participant shall have the right to request either phone calls or meetings with NRC Staff with regard to the intended application or any issues relevant to the application and such requests shall be granted absent good cause for denial. An applicant may participate in any of

these meetings or calls to the same extent a participant can participate in meeting or calls pursuant to 2. above.

PROPOSED 10 C.F.R. § 2.308C

A notice of opportunity for a hearing shall be filed within 30 days after the following conditions have been met. If there is a dispute regarding whether conditions have been met, an Atomic Safety and Licensing Board Panel shall resolve the dispute:

1. Applicant files a final and complete application for the requested action, files a certification, signed by a duly authorized officer of the applicant, that the applicant has no present intent to file any additional information in the form of amendments to the application AND NRC Staff files a final Safety Evaluation Report (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to any safety issues related to the proposed application; AND

2. Applicant files a final and complete Environmental Report for the requested action, files a certification, signed by a duly authorized officer of the applicant, that applicant has no present intent to file any additional information in the form of amendments to the Environmental Report AND NRC Staff files a Final Environmental Impact Statement or Supplemental Final Environmental Impact Statement (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to, or amendments to, the FEIS or FSEIS regarding any environmental issues related to the proposed application.

PROPOSED 10 C.F.R. § 2.308D

After the Certification required by 10 C.F.R. § 2.308C an Applicant or the NRC Staff may file an amendment to the documents specified there only by leave of the Atomic Safety and Licensing Board and only upon demonstrating that it meets all of the following requirements:

(i) The information upon which the amendment is based was not previously available and could not have been previously available;

(ii) The information upon which the amendment is based is materially different than information previously available; and

(iii) The amendment has been submitted within 15 days of the availability of the subsequent information or the subsequent information has been made available to the participants in the proceeding within 15 days of its availability and a request for an extension of time to file the amendment has been filed within 10 days of availability of the subsequent information with the Atomic Safety and License Board.

PROPOSED AMENDED 10 C.F.R. § 2.309(a)

(a) General requirements. *Within 45 days of the filings required by 10 C.F.R. § 2.308C, any person who has been determined to be a participant pursuant to 10 C.F.R. § 2.308A may request a hearing on the proposed application. The request shall specify the contentions which the person seeks to have litigated in the hearing. A person who has not been determined to be a participant pursuant to 10 C.F.R. § 2.308A may also seek a hearing but must meet all the requirements applicable to a participant and must take the proceeding as it exists.* In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of

paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition limited to the contentions it determines meet the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party. (Proposed changes shown in *italics*).

PROPOSED 10 C.F.R. § 2.309(c)(3)

If an untimely request for a hearing is accepted, the requestor shall take the hearing as it finds it and shall comply with all the obligations and time requirements applicable to a participant.

PROPOSED AMENDED 10 C.F.R. § 2.309(b)(3)

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than *forty-five (45) days* from the date of publication of the notice in the Federal Register; (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(e)

(e) Discretionary Intervention. The presiding officer may consider a request for *discretionary participation* when at least one requestor/petitioner has established standing. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to *lack standing to participate as a matter of right under paragraph § 2.308A* and (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek *participation* as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance: (Proposed changes shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(1)

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

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(ii) Provide a *full explanation* of the basis for the contention;

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(v) Provide a *full statement* of the alleged facts which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to *all the specific sources and documents that were produced pursuant to 10 C.F.R. §*

2.308B on which the requestor/petitioner intends to rely to support its position on the issue and *identify all experts to be used in support of the position on the issue along with a copy of the CV of the expert and all publications by the expert relevant to the position to be taken by the expert*;

(vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee *and/or NRC Staff* on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) and *the Final Environmental Impact Statement or Final Supplemental Environmental Impact Statement* that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application, FEIS or FSEIS fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief;

(vii) No contention of omission or failure to comply with NRC regulations or federal statutes may be filed unless either the alleged omission or failure has been identified by the Petitioner in written comments filed with regard to the Application, the draft Safety Evaluation Report, the draft Final or Final Supplemental Environmental Impact Statement during the time allowed for such comments or the Petitioner demonstrates it could not have known of the omission or failure until the filing of the final Application or the Final SER or the FEIS and FSEIS. (Proposed changes are shown in *italics*).

PROPOSED AMENDED 10 C.F.R. § 2.309(f)(2)

(2) Contentions must be based on *all* documents or other information *made available pursuant to 10 C.F.R. § 2.308B*, at the time the petition is to be filed. The petitioner may amend contentions or file new contentions only with leave of the presiding officer upon a showing

that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In the event of an amendment to the Application, Safety Evaluation Report, Final or Final Supplemental Environmental that is allowed pursuant to 10 C.F.R. § 2.308D, amended or new contentions solely based on the § 2.308D amendment will be considered timely if filed within 90 days of the Board's Order allowing the § 2.308D amendment. (Proposed changes in *italics*).

COMMENTS ON CHANGES PROPOSED BY THE COMMISSION

Most of the proposed changes are technical modifications that will generally improve the hearing process. There are other similar changes that could be made to further clarify the process and improve fairness and efficiency. The following are a few examples of such potential improvements.

1. There is little reason to have separate language to describe the summary disposition process under Part G and Part L. It would be preferable to state that one set of criteria and one set of filing obligations applies regardless of the Part under which summary disposition is sought.

2. There is considerable confusion about the requirements of 10 C.F.R. § 2.323 regarding the time when motions need to be filed. The language would appear to apply to all motions but it

has been argued that the provision regarding the latest date by which a summary disposition motion must be filed allows summary disposition to be filed long after the "occurrence or circumstance from which the motion arises". 10 C.F.R. § 2.323(a). Summary disposition motions have the potential to considerably delay the hearing process if filed late in the proceeding. *See Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010) at 9("The Board finds that such motions for summary disposition, if filed late in the proceeding when the parties are heavily engaged in other tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serve to narrow the scope or expedite the resolution of the adjudicatory proceeding"). Thus, such motions should be filed as early as possible. However, the 10 day filing date for motions is much too short even for routine motions, much less for summary disposition. For example, the obligation to consult imposed by § 2.323(b), if taken seriously, would be difficult to meet if a total of 10 days are allowed. The language of § 2.323(a) should be amended to set the time for filing motions at 30 days after the "occurrence or circumstance from which the motion arises" and it should be made clear that it applies to all motions. If there are motions that do not warrant that much time or need more time, the Board has the inherent authority to adjust the deadlines.

3. A problem has arisen with disclosures from the Staff in Subpart L proceedings. Staff obligations to provide document disclosures in Subpart L proceedings are controlled by 10 C.F.R. §§ 2.336(b), 2.1202(c) and 2.1203. Under these provisions the Staff is required to produce or identify by readily available location all the documents filed by the applicant, all the

documents - either pro or con - used in the review of the application and all the documents relevant to any admitted contention on which the Staff chooses to participate.[4] Contrary to these clear obligations, Staff takes the position that documents generated by consultants to NRC are not subject to disclosure. The problem is well-illustrated by the experience in the *Indian Point* relicensing proceeding. First, Staff has chosen to participate as a party on all admitted contentions in the proceeding. Nonetheless, Staff document disclosures are limited to what it perceives to be its obligations under § 2.336(b) and do not include all documents and data compilations relevant to the contentions. For example, one of the admitted contentions relates to the AMP for buried piping. Staff has numerous activities ongoing regarding the problems with leaking underground pipes.

http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html. However, Staff has produced, at most, only the underground piping documents that its reviewers are looking at as part of the Indian Point license renewal process. Not only does that practice violate the clear mandate of § 2.1202(c) but it also rewards the Staff if its review is inadequate by allowing it to avoid producing or identifying a larger group of documents relevant to the contention which it reviewers should have examined.

Moreover, Staff often does not even meet its obligations, as narrowly defined by it in §

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[4] 10 C.F.R. § 2.1202(c) provides that once Staff chooses to participate as a party as to any contention it "shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate". All parties are subject to the disclosure obligations of 10 C.F.R. § 2.336(a) which include the obligation to produce or identify by location "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions" and thus, once Staff elects to participate as a party with respect to a contention, the obligations under § 2.336(a) apply, but only with regard to that contention. Pursuant to 10 C.F.R. § 2.3, the specific provisions of § 2.1202(c) supersede the language in § 2.336(a) that excludes Staff from § 2.336(a) obligations.

2.336(b). In a recently released FSEIS for Indian Point Staff referenced work done for it by Sandia Laboratories in responding to an admitted contention related to deficiencies in the analysis of clean up costs associated with the SAMA analysis. *See* NUREG-1437, Supplement 38, Vol. 1 at 5-4 and Vol. 3 at Appendix G pp. G-22 to G-29. Sandia not only consulted with Staff but participated actively in the review of the information and prepared reports. Staff did not list any documents generated by Sandia in the course of this work in its Hearing File Index and has failed to produce any of the relevant documents for several months. *See Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), State of New York Motion to Compel NRC Staff To Produce Documents Relied upon in Staff's Final Supplemental Environmental Impact Statement (4/22/11). Finally, at an earlier time in the hearing process, an intervenor had to resort to a Motion to Compel to require Staff to produce the computer code used by it, its consultants and applicant to conduct the SAMA analysis because Staff first refused to produce the code and then insisted it would only produce the code if the intervenor paid the $1000 licensing fee imposed on commercial users of the government-developed and funded MAACS2 Computer Code. *See Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), State of New York's Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee In Compliance with the National Environmental Policy Act and NRC Disclosure Regulations (1/10/10).

The Commission should clarify the discovery obligations of Staff in contested proceedings making clear that 1) Staff must comply with all the disclosure obligations 10 C.F.R. § 2.336(a), just like all other parties, with respect to any contention on which NRC Staff chooses to participate as a party; and 2) with regard to its obligations under 10 C.F.R. § 2.336(b)(3) Staff

must produce all documents in its possession or the possession of its experts or consultants that were reviewed and/or generated as part of the analysis of the application.

4. Under current hearing practice all parties are allowed to respond to any motion or pleading filed by any other party unless they have been consolidated with that party pursuant to 10 C.F.R. § 2.309(f)(3). This practice has created unnecessary pleadings that delay the resolution of issues. NRC Staff is never consolidated with another party, even if they are on the same side of an issue, and thus is allowed to file a brief in support of a pleading of any other party. Public and government intervenors who have not adopted contentions are also free to file briefs in support of the pleadings of other parties. These "support" pleadings are either redundant, merely stating, in slightly different form, what the proponent has already stated or raise new arguments, in which case the opponents of the initial pleading are given an opportunity to file a supplemental opposition, thus prolonging the process. However, in light of the consultation obligations imposed by 10 C.F.R. § 2.323(b), all parties are aware of a pleading before it is filed and have an opportunity to consult regarding the merits of the pleading. A party that supports a proposed pleading can provide its input and suggestions to the proponent before the pleading is filed, thus obviating the need for a separate filing. The regulations should be amended to indicate that pleadings in support of motions are allowed only if the support pleading is making a new point and only if the filer of the supporting pleading attests that it attempted to have the proponent of the motion include the point in the initial pleading. A similar rule should apply to pleadings in opposition, requiring parties who are taking the same position in opposition to a pleading to file a single brief. This will cut down on redundant pleadings and substantially eliminate the need for supplemental pleadings.

RESPONSE TO SPECIFIC QUESTIONS

(a) Would applying NRC staff disclosures under § 2.336(b)(3) to documents related only to the admitted contentions aid parties other than the NRC staff by reducing the scope of documents they receive and review through the mandatory disclosures?

As the previous discussion indicates, NRC Staff is not currently meeting its disclosure obligations. Reducing those obligations so that their current disclosure practices more closely conform to the regulations is unwarranted. In addition, no documents are actually "produced" but merely listed on logs with ML numbers and members of the public are only burdened by Staff failure to fully produce all relevant documents and by the production of documents on logs that are often excessively cryptic. If NRC Staff would improve the quality of the information provided on the logs, the task of reviewing Staff disclosures would be simplified and expedited.

NRC Staff has a public function which will only be further diminished by reducing their disclosure obligations. Staff antipathy to disclosing the documents it generates, reviews and relies upon in doing its work is inconsistent with the Commission's frequently expressed desire for improved public participation and transparency. If Staff would organize its efforts around discrete issues and maintain running logs of the documents being used by personnel addressing those issues, whether within licensing activities or not, a task made much easier as a result of computers and electronic documents, the burden on Staff would be reduced and the disclosures to the public would be improved. Part of the reason Staff perceives that it is burdened by document production is its failure to integrate public disclosure of all, non-confidential and non-privileged, documents into its routine work. The alternative, if disclosure obligations for

hearings are reduced and if Staff continues its crabbed interpretation of its disclosure obligations, is for public participants in the NRC process to file weekly requests under FOIA for all NRC Staff documents. That is not a desirable, but it may be a necessary, process. It would be far preferable for Staff and the public if Staff embraced its duty of operating in the open and facilitated public access to relevant documents related to specific issues of public concern.

(b) Is the broad disclosure obligation imposed on the NRC staff by current Section 2.336(b) warranted in light of (a) the other parties' more limited disclosure obligations and (b) the parties' ability to find these same documents in an ADAMS search?

Since the Staff does not fulfill the disclosure obligations under Section 2.336(b) as currently written, the premise of the question is not correct. In addition, anyone who uses ADAMS on a regular basis knows that ADAMS is neither a comprehensive nor a reliable source of NRC documents. The search capabilities, while improved over the last year, are still a far cry from search capabilities with WestLaw and LEXIS. Thus, finding documents is laborious and it is difficult to effectively narrow searches to the precise information being sought. This necessitates reviewing hundreds of irrelevant documents in order to find the documents being sought. In addition, the disclosure of documents on ADAMS is inconsistent. For example, documents dated months, or even years, earlier suddenly appear on ADAMS without explanation for the delay. That makes it impossible to rely on ADAMS as a source of all relevant documents on any subject. In addition, documents are sometimes on ADAMS but, for some reason, cannot be opened or downloaded.

To be candid, the entire electronic production of documents at NRC is a mess. The

Electronic Hearing Docket is often incomplete and there is no standardized protocol for when documents will be on the EHD or which documents will be posted. For example, some of the monthly disclosure of documents by NRC Staff with regard to a particular licensing proceeded are posted to the EHD and some are not. The time after a pleading is filed and before it appears on the EHD is not standardized. Documents posted to the Hearing File by Staff are incomplete. For example, a review of the Hearing File for Indian Point relicensing lists document disclosures by Staff but do not include any privilege logs. In addition the document disclosures are merely ML numbers with no document description, not even the description provided in the monthly disclosure itself. In short, the present ongoing electronic disclosure of documents by NRC is in disarray, is not comprehensive or reliable and thus cannot be a substitute for full disclosure of documents in individual licensing proceedings by Staff.

(c) Would a shorter, more relevant privilege log aid parties to the proceeding?

This question is confusing. If it is asking would it be preferable for Staff to claim fewer documents are privileged, then the answer is certainly less. If it is asking should Staff withhold the same number of documents but disclose only some of them on a privilege log, the answer is obviously no. If it is asking should Staff be given more discretion to decide what is relevant, the answer is no, at least until the Staff has demonstrated that it is actually committed to full disclosure of all relevant documents. An improved privileged log, with more description of the nature of the document being withheld would be helpful. In addition, privilege logs used by Staff in the *Indian Point* proceeding, with the exception of the initial disclosures, have not included the recipients of the documents for which a privilege is claimed, making it hard to determine if the

privilege is validly asserted. There are many improvements that could be made to the privilege claim process by Staff but the question does not really address those. Consulting with persons who are more readily engaged in discovery in routine court litigation might improve the quality of the privilege log process. There are numerous law professors in the Washington, D.C. area who could be consulted to assist NRC in developing a more efficient and effective process for disclosing documents. The Sedona Conference would also be a good source of expertise. The present process of disclosure and privilege claims does not appear to be benefitting from persons with substantial experience with such processes outside the NRC.

(d) Would potential parties prefer to maintain the status quo?

As the preceding discussion indicates, the status quo with regard to Part 2 in general and discovery of Staff in particular, is not working. It needs to be changed in major ways.

(e) Would limiting the mandatory disclosures of documents as described in Federal Rule of Civil Procedure 26(a)(1)(A)(ii) be the preferred option?

No. A better implementation and enforcement of those obligations would be a preferred option. If, as suggested above, the entire Part 2 process were changed to provide for public intervention at the outset of the NRC process when the first suggestion of an application for a license or amendment is received by NRC, much of the disclosure problem would go away as the public participant would be able to be actively involved in the process from the outset and documents relevant to the proposal would be routinely available to the public. Thus, when a hearing notice was finally issued the obligations of disclosure that track the federal rules would

have been largely already met.

CONCLUSION

The current system does not work. Major changes, not minor adjustments, are needed to make it work. Until that happens, the NRC hearing process will not "promote fairness, efficiency, and openness".

Respectfully submitted,

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