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Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (72FR32139)

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UniStar NUCLEAR

DOCKETED
USNRC

June 22, 2007 (11:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

June 20, 2007

UN# 07-006

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

Subject: UniStar Nuclear Comments on "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," 72 Federal Register 32139 (June 11, 2007)

UniStar Nuclear appreciates the opportunity to comment on the "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," published in volume 72 of the Federal Register (FR), page 32139, on June 11, 2007. UniStar Nuclear may have additional comments beyond those in this letter. In that case, we will submit an additional comment letter on or before August 10, 2007. While UniStar Nuclear generally supports the NRC's efforts to craft a fair and efficient framework for litigation of disputed issues and to implement the NRC's goal of avoiding duplicative litigation through consolidation to the extent possible, UniStar Nuclear considers that certain aspects of the policy statement appear to be inconsistent with the NRC's policy objectives for new reactor license applications.

UniStar Nuclear currently intends to submit a phased Combined License (i.e., COL) application as permitted under both the existing and proposed 10 C.F.R. 2.101, "Filing of application," paragraph (a)(5) by the end of June, 2007. However, the comment period on the draft policy statement does not close until August 10, 2007. As a result, the NRC will not have published its final policy statement until after UniStar Nuclear submits its partial COL application under section 2.101(a)(5). Accordingly, UniStar is submitting these comments early in the comment period so that the NRC may consider them in advance of UniStar Nuclear's submittal.

In accordance with section 2.101(a)(5), an applicant for a COL may submit the required information for a COL in two parts: (1) one part shall be accompanied by the necessary environmental information — that is, the Environmental Report (ER), and (2) one part shall include the necessary safety-related information — that is, the Safety Analysis Report. According to the rule, whichever part is submitted first should also include certain other information (e.g., fees, financial qualifications, decommissioning funding information). Under the current rule, one part may precede or follow other parts by no more than six months. Under

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the proposed changes in the Limited Work Authorization (LWA) rulemaking, that time limitation would be extended to 18 months. The NRC will accept for docketing an application for a COL where one part of the application as described above is complete and conforms to the requirements of 10 C.F.R. 2.101(a)(5). Each additional part will be docketed upon a determination by the NRC that it is complete. This is a phased COL submittal process.

If the NRC determines that a submitted application for a construction permit or operating license for a utilization facility, and/or any ER, "or part thereof as provided in paragraph (a)(5)" are complete and acceptable for docketing, a docket number will be assigned to the application or part thereof, and the applicant will be notified of the determination.

Once an application is docketed, the NRC must establish a schedule for its review of the application, specifying the key intermediate steps from the time of docketing to the completion of its review as specified in 10 C.F.R. 2.102, "Administrative review of application," paragraph (a). Because an application is considered "docketed" as soon as one part of the application is complete, the NRC will establish a schedule and begin its review immediately, without awaiting the submission of the remaining part of the application.

The draft Policy Statement suggests that the NRC will delay publication of a notice of hearing until both complete portions of a COL application are docketed, even if the two complete portions are submitted 18 months apart. UniStar Nuclear has concluded that the NRC should instead issue a separate notice of hearing for each "complete" part of an application submitted under 10 C.F.R. 2.101(a)(5) and docketed. This approach lessens the resource, schedule, and litigation burden on NRC Staff, the Licensing Board, applicants, and potential intervenors. This approach also promotes the NRC's stated goals in the draft Policy Statement of increasing effectiveness and efficiency in the licensing review and hearing processes. Contrary to the conclusion in the draft policy statement that it is most efficient to issue a Notice of Hearing only when the entire application has been docketed, the publication of two notices of hearing under 10 C.F.R. 2.101(a)(5) has the following advantages.

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- Provides an earlier opportunity for public participation on environmental matters that are typically of greater interest to intervenors.
- Distributes NRC Staff and Licensing Board resources more efficiently by "smoothing" the peak resource demands on the NRC.
- Reduces the number of simultaneous hearing requests under consideration by the Licensing Board.
- Offers the NRC Staff an early opportunity to consider and address those environmental issues that are unique to COL applications so that those lessons can be applied to later COL application reviews.
- For UniStar Nuclear, this approach helps lessen the potential for the NRC's environmental review to be the "critical path" for licensing.
- Focuses all parties on results, not process.

- Does not eliminate or reduce any opportunities to request a hearing or create any new or different NRC Staff or Licensing Board reviews. NRC Staff support of a hearing request on an early ER submittal is no different than for a complete COL application.

- This approach is also consistent with the NRC's intent to publish separate notices of hearing for LWA requests and requests for early review of site suitability issues.

As a practical matter, it is not difficult to segregate the environmental findings that would be identified in the first Notice of Hearing from the matters of radiological health and safety that would be included in the second Notice of Hearing. This is because those findings are clearly identified in Part 2, specifically 10 C.F.R. 2.104, "Notice of hearing," notes 2 and 3 that list the findings required under the Atomic Energy Act and those required under the National Environmental Policy Act. Moreover, the treatment of environmental and safety issues on separate hearing tracks is not even unusual; indeed it is normal practice. Licensing Boards have a long-standing practice of treating environmental and safety issues separately. Most recently, in the LES proceeding, the Commissioners directed (LES Hearing Order, n. 3) the Board to adopt separate schedules for the safety and environmental reviews. (See also, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132 (1983)).

It is unlikely that the approach suggested by UniStar Nuclear would have significant unintended consequences for future submittals. However, failure to adopt this approach — that is, adopting the draft Policy Statement as written — would foreclose achieving the benefits discussed above.

Taken together, the approach suggested in these comments achieves the stated goals of the draft Policy Statement: consolidation of reviews to the extent practicable without any duplication of NRC Staff, Licensing Board, applicant, or intervenor resources. By initiating an early review of all environmental issues in a single proceeding (i.e., avoiding the piecemeal litigation of separate LWA and full-scope environmental documents), the NRC will be able to more efficiently meet the resource and timing challenges of the anticipated COL application submissions and more effectively conduct those licensing reviews. This approach does so without duplication of NRC Staff, Licensing Board, applicant, or intervenor resources. In short, the suggested change to the draft Policy Statement clarifies that a simpler, comprehensive approach is available for those applicants that have prepared an ER and are ready to begin the adjudicatory process.

If you have any questions, please contact me at (410) 864-6441.

Respectfully,

R. M. Krich
UniStar Nuclear Development, LLC

cc: Chairman Dale E. Klein, U.S. NRC
Commissioner Edward McGaffigan, Jr., U.S. NRC
Commissioner Jeffrey S. Merrifield, U.S. NRC
Commissioner Peter B. Lyons, U.S. NRC
Commissioner Gregory B. Jaczko, U.S. NRC
Luis A. Reyes, Executive Director for Operations, U.S. NRC
Karen D. Cyr, Office of General Counsel, U.S. NRC
R. William Borchardt, Director, Office of New Reactors, U.S. NRC

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COUNSELORS AT LAW

Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (72FR32139)

(2)

August 10, 2007

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

Re: Comments on "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," 72 Fed. Reg. 32,139 (June 11, 2007)

On behalf of Duke Energy, Entergy Nuclear, Exelon Generation, Luminant (formerly TXU Power), South Carolina Electric & Gas Company, Southern Nuclear Operating Company, and South Texas Project Nuclear Operating Company, Morgan, Lewis & Bockius LLP respectfully submits the following comments regarding the NRC's "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," which was published in the *Federal Register* (72 Fed. Reg. 32,139) on June 11, 2007.

We commend the Commission for developing the Draft Policy Statement and issuing it for public comment. We generally agree with much of the Draft Policy Statement, and believe that it could provide substantial improvements to the hearing process, particularly with respect to resolution of generic issues. We strongly urge the Commission to finalize the Policy Statement and to use it in new reactor licensing proceedings.

Nonetheless, we believe that the Draft Policy Statement could be enhanced to provide more efficient and effective docketing and hearing processes for the upcoming new reactor licensing proceedings. Therefore, we respectfully submit the comments outlined below and request the corresponding changes to the Draft Policy Statement.

All of our comments and requested changes are consistent with the Atomic Energy Act of 1954, as amended, the Administrative Procedure Act, and the applicable NRC regulations. Therefore, the Commission is free to make our requested changes. As stated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 534-44 (1978), "Absent constitutional constraints of extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Furthermore, our requested changes would promote the

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Commission's objectives in Section I of the Draft Policy Statement, which states that "the Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing process, and to enable the development of an informed adjudicatory record that supports agency decision making."

Comment No. 1 - - If Requested by the Applicant, the NRC Should Issue a Notice of Hearing for Each Part of a Two-Part Application (1)

Although the NRC regulations at 10 CFR § 2.101(a)(5) allow submission of a Combined License ("COL") application in two parts (*i.e.*, the safety information and the environmental information), Section II.A.2 of the Draft Policy Statement directs issuance of a Notice of Hearing only after the entire application is docketed. The Commission should modify the Draft Policy Statement such that, at the request of the applicant, Notices of Hearing would be provided after docketing each part of the application.

The length of the NRC's review of an application is directly affected by the timing of the staff review of an application and the length of the hearing. Under the Draft Policy Statement, the hearing process cannot begin until the staff has completed docketing of both parts of the application related to environmental issues and safety issues. Therefore, the hearing process will be delayed until both the environmental and safety acceptance reviews are completed. In that case, the completion date of the hearing will be determined by the most time-consuming part of the application. If an applicant could submit that part of the application that will take longer to review and litigate earlier than the other part, then the entire proceeding could be completed sooner. Furthermore, if the hearing process is started earlier, it will lead to earlier resolution of contentions and greater certainty in the licensing process.

Additionally, our requested change is consistent with the NRC regulations at 10 CFR § 2.104(a), which state that a Notice of Hearing "must be issued as soon as practicable after the NRC has docketed the application." Under 10 CFR § 2.101(a)(5), the NRC "accept[s] for docketing" each part of the two-part application. Docketing one part of the application and then waiting up to 18 months, as permitted by Section 2.101(a)(5), to issue the Notice of Hearing cannot be considered "as soon as practicable." Furthermore, the issuance of multiple Notices of Hearing as requested above is consistent with the final rulemaking on Limited Work Authorizations (SECY 07-0030), which provides for multiple Notices of Hearing.

Finally, our proposed change is fully compatible with a fair hearing process, because all public participants would continue to have the opportunity to challenge every section of an application. As the Draft Policy Statement acknowledges in Section II.B.1 in a different context, "Such a procedure [involving two Notices of Hearing] would not affect any prospective intervenor's substantive rights; i.e., members of the public will still have a right to petition for intervention on every issue material to the Commission's decision on each individual application." Thus, the Commission itself has already recognized that issuing multiple Notices of Hearing will not detrimentally affect the public's right to participate in the hearing process.

Comment No. 2 - - The Draft Policy Statement Should Provide Guidance for Proceedings in Which a COL Application References an Early Site Permit ("ESP") Application or an Application for an ESP Amendment, Comparable to Guidance Set Forth for COL Applications Which Reference a Design Certification Application (2)

Section B.2 of the Draft Policy Statement, "COL Applications Referencing Design Certification Applications," provides a substantial amount of guidance regarding COL applications referencing a Design Certification application. Similar guidance should be provided for COL applications that either (1) reference an ESP application or (2) reference an application for an ESP amendment. In particular, just as Section B.2 of the Draft Policy Statement instructs Licensing Boards not to accept contentions that are the subject of a Design Certification application, the Draft Policy Statement should instruct Licensing Boards not to accept contentions that are subject to an ESP application or an application for an ESP amendment.

Such changes are necessary to prevent the possibility of redundant reviews and hearings, with the possibility of inconsistent results. An issue that is being addressed and resolved in an ESP proceeding should not be addressed in a contemporaneous COL proceeding. Since members of the public have a right to petition to intervene in the ESP proceeding, their hearing rights will be fully preserved. Interested parties should not have a right to litigate the same issue twice - - once in the ESP hearing and once in the COL hearing. Such an outcome would be the very antithesis of an effective and efficient licensing process. Therefore, the Draft Policy Statement should be augmented to prohibit such a possibility.

Comment No. 3 - - The Draft Policy Statement Should Treat COL Applications that Reference Applications for Design Certification Amendments in a Manner Comparable to COL Applications that Reference Design Certifications (3)

Currently, two of the reactor vendors that sponsored existing Design Certifications (AP1000 and ABWR) have applied or are planning to apply for amendments to the Design Certifications. It is anticipated that some COL applications may reference an application for amendment of a Design Certification. Therefore, the statements in the Draft Policy Statement regarding a COL application that references a Design Certification application should be expanded to encompass applications for Design Certification amendments.

In this respect, a COL application that references an application for a Design Certification amendment should be treated the same as a COL application that references a Design Certification application. This would be consistent with the well understood proposition that generic issues, such as Design Certification amendments, should be addressed through rulemaking rather than in individual licensing proceedings. *See e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 101 (1983). Additionally, the reasoning behind the statements in the Draft Policy Statement with respect to Design Certification applications applies equally to applications for Design Certification amendments.

Comment No. 4 - - NRC Should Clarify Its Positions on Consolidation

We request that the Commission clarify two provisions in Section II.B.1 of the Draft Policy Statement related to consolidation of issues common to multiple applications.

First, the Draft Policy Statement states that licensing boards should consider consolidation of such issues on their own initiative. We recommend that the Commission clarify this statement to indicate that consolidation should not occur if opposed by an applicant. Since the applicant has the burden of proof in licensing proceedings and has substantial financial investment in the application, it would be inappropriate for a licensing board to consolidate issues over the objection of an applicant.

Second, the Draft Policy Statement states "we presume that Subpart D procedures . . . will be applied to applications employing a design-centered review approach" (DCRA). To our knowledge, none of the applicants engaged in the DCRA will be seeking to use the Subpart D procedures. While use of Subpart D is permissible, it is not required and should not be presumed. Even absent a request to use Subpart D, there will still be value in utilizing the DCRA for the reviews performed by the NRC staff, as discussed in NRC Regulatory Issue Summary 2006-06. For example, the staff review of the reference COL (R-COL) application and the licensing documents generated from the review, including the Safety Evaluation Report and ACRS review, could be utilized in the proceeding of a subsequent COL (S-COL) application, notwithstanding that the hearing was not consolidated with that of other COLA applications referencing the same standard design. Moreover, the Licensing Boards would continue to have the authority to order consolidation of the hearing on specific issues such as where intervenors in separate proceedings raise identical contentions relative to a common portion of the COL applications. Therefore, we recommend the Draft Policy Statement be reworded to indicate that applications who take advantage of the DCRA may, but are not required to, utilize the provisions in Subpart D.

In addition, the Draft Policy Statement should clarify the meaning of "close in time" relative to the submission of applications in the event the provisions of Subpart D are employed in connection with the Design Centered Approach. For example, a S-COL application that is submitted between the docketing of a R-COL application and the deadline for requesting a hearing or filing a petition to intervene on the R-COL application should be considered to be filed in sufficient time to employ the procedures of Subpart D as described in the Draft Policy Statement.

Comment No. 5 - - The Provisions in the Draft Policy Statement Regarding the Finality of COL Proceedings Should Be Revised to Be Consistent with a Recent Decision by the U.S. Court of Appeals

The Draft Policy Statement contains a statement regarding the finality of COL proceedings that should be corrected to conform to the Seventh Circuit's decision in *Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006). In that case, the Seventh Circuit accepted

jurisdiction to review a decision by an NRC Licensing Board, which granted summary disposition of the only remaining contention and dismissed the Intervenors from the proceeding. The Seventh Circuit affirmed the NRC's decision, and in doing so, held that if all of an Intervenor's contentions are resolved by the Licensing Board, that decision is the final agency action with respect to that Intervenor.

Section II.B of the Draft Policy Statement is inconsistent with that ruling. That section states the following: "a decision on common issues would become final agency action only in the context of final Commission action with respect to an individual application." This statement should be modified in conformance with *Environmental Law and Policy Center* to clarify that if all of a specific Intervenor's contentions are resolved by the Licensing Board, then that decision is final agency action with respect to that Intervenor.

Comment No. 6 - - The NRC Should Ensure Consistency in Its Rules by Conforming 10 CFR § 51.105 to 10 CFR § 2.104 (6)

In an April 11, 2007 Staff Requirements Memorandum ("SRM"), the Commissioners approved a revision to Part 52 and related regulations, but directed the staff to change the mandatory findings required by a presiding officer in an uncontested hearing under 10 CFR § 2.104, "Notice of Hearing." In Change No. 18 of the Attachment to this SRM, the Commissioners required the following modification:

> The language of 2.104 should be altered to ensure that the Commission has maximum flexibility in the conduct of mandatory hearings. The mandatory content of the notice of hearing should be reduced to eliminate all references to findings made by the presiding officer. The only findings a presiding officer should make should be those regarding contested issues.

The NRC staff has modified the draft final rule such that Section 2.104 does not include any references to mandatory findings by the presiding officer of uncontested proceedings. Nonetheless, the draft final rule did not include corresponding changes to 10 CFR § 51.105, which requires similar mandatory findings in uncontested proceedings. For example, Section 51.105(a)(4) states that the presiding officer must "[d]etermine, in an uncontested proceeding, whether the NEPA review conducted by NRC staff has been adequate." This provision is essentially identical to Section 2.104(e)(3) of the draft final rule that was deleted in response to the Commissioners' direction.

Retaining requirements in Section 51.105 for the presiding officer to make certain mandatory findings in uncontested proceedings is inconsistent with the changes to Section 2.104 directed by the Commissioners. Therefore, we respectfully request that the Commission revise Section 51.105 to eliminate any mandatory findings by the presiding officer in an uncontested proceeding. To repeat the statement made by the Commissioners in the SRM, "[t]he only findings a presiding officer should make should be those regarding contested issues."

Comment No. 7 - - The NRC Should Allow for Early Submission of an Environmental Report Without All Information Specified in Sections 50.33(f)–(g) and 52.79(a)(1)

(7)

10 CFR § 2.101(a)(5) allows for a COL applicant to submit its application in two separate parts at different times: (1) an environmental report, and (2) a safety analysis report. Whichever part is submitted first must be accompanied by siting information needed for the safety analysis and the information specified in 10 CFR § 50.33 (including financial information as specified in Section 50.33(f) and offsite emergency planning information specified in Section 50.33(g)).

The current experience with preparation of COL applications indicates that development of seismic and other siting information is likely to be the most time consuming part of preparation of a COL application. However, Section 2.101(a)(5) apparently requires seismic and other siting information to be provided with the first part of a COL application, pursuant to Section 52.79(a)(1). Therefore, as a practical matter, Section 2.101(a)(5) has limited value.

To address this situation, we recommend that the Commission revise Section 2.101(a)(5) to permit the first part of the application to consist solely of the environmental report plus the general administrative information specified in 10 CFR § 50.33(a)–(e). It is not necessary for the NRC to have complete siting information, plus financial and emergency planning information, to review an environmental report. If an environmental report is prepared in accordance with NRC guidance found in the Environmental Standard Review Plan (NUREG-1555), then the NRC will not need any additional information to perform an adequate environmental review. Furthermore, by allowing a COL applicant to submit its environmental report first, the NRC can begin its environmental review early. Since environmental reviews are likely to be critical path for a COL application that references a Design Certification or a Design Certification application, the NRC should be able to complete its full review of the COL application sooner than it would otherwise be able to do so (thereby promoting administrative efficiency).

* * *

In conclusion, we respectfully request that the NRC modify the Draft Policy Statement and initiate rulemaking to address our comments.

Sincerely,

Steven P. Frantz
Stephen J. Burdick

HARMON, CURRAN, SPIELBERG EISENBERG, LLP

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Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (72FR32139)

(3)

August 10, 2007

Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
By e-mail to:

SUBJECT: *Comments on Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings*

Dear Ms. Vietti-Cook:

As a lawyer who practices regularly before the U.S. Nuclear Regulatory Commission ("NRC"), I am submitting comments on the NRC's Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings, 72 Fed. Reg. 32,139 (June 11, 2007). I am very concerned that the policy statement, as current drafted, threatens to undermine the effectiveness of public participation in NRC licensing proceedings for new reactors by requiring interested members of the public to waste precious resources on piecemeal litigation with uncertain results.

As you are undoubtedly aware, throughout the NRC's history the public has performed an important role in the oversight of NRC-licensed operations. As members of the NRC's former Appeal Board observed in 1974:

> Public participation in licensing proceedings not only can provide valuable assistance to the adjudicatory process, but on frequent occasions demonstrably has done so. It does no disservice to the diligence of either applicants generally or the regulatory staff to note that many of the substantial safety and environmental issues which have received the scrutiny of licensing boards and appeal boards were raised in the first instance by an intervenor.

Gulf States Utility Corp. (River Bend Units 1 and 2), ALAB-183, 7 AEC 222, 227-28 (1974) (citation omitted). In 1981, the then-chief of the NRC's Atomic Safety and Licensing Board (ASLB) Panel, B. Paul Cotter, Jr., described the benefits of public participation in NRC licensing decisions:

> (1) Staff and applicant reports subject to public examination are performed with greater care; (2) preparation for public examination of issues frequently creates a new perspective and causes the parties to reexamine or rethink some or all of the questions presented; (3) the quality of staff judgments is improved by a hearing process which requires experts to state their views in writing and then permits oral examination in detail . . . and (4) staff work benefits from two decades of hearings

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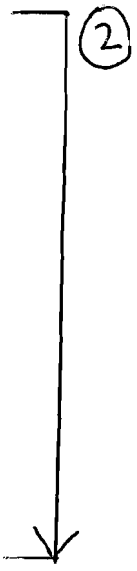
> and [ASLB] decisions on the almost limitless number of technical judgments that must be made in any given licensing application.

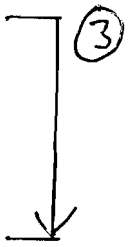
B. Paul Cotter, Memorandum to NRC Commissioner Ahearne at 8 (May 1, 1981).

Citizen intervenor groups, however, do not have limitless time and resources with which to carry out their work. Because of the limitations on their resources, in order to participate effectively in NRC licensing proceedings they must carefully prioritize the most serious safety and environmental issues that should be raised. As currently written, the NRC's proposed policy would seriously undermine their effectiveness in using their limited time and resources, by forcing them to participate in licensing hearings in the abstract, before a license applicant has committed to building a plant in a given location or according to any particular design. In effect, the policy would allow nuclear power plant license applicants to bleed the resources of citizen intervenors before submitting a completed application for a plant.

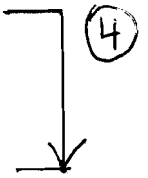
There are a number of ways in which the policy statement would undermine intervenors' ability to participate effectively in COL proceedings, and even invite serious abuse. First, although the policy statement asserts that the Commission is not in favor of holding hearings on piecemeal applications, it would allow exemptions if even one completed application is filed. Any other applicant who sends in a partial application referencing the single completed application can force intervenors to waste resources by submitting an incomplete license application that references some aspect of another applicant's completed application. For example, even if a prospective applicant for Site X was not committed to using a particular design for Site X, it could submit a partial application to use Design A for Site X, if Design A had been submitted by another applicant in an application for Site Y. Any neighbor of Site X who was concerned about the adequacy of Design A would be forced to participate in the hearing for site Y or otherwise lose the opportunity to challenge that design in the eventual COL proceeding for Site X. But the neighbor of site X would have no opportunity to prioritize the most important safety and environmental issues that should be raised with respect to a new nuclear plant on Site X, because the entire application for Site X would not yet exist. And if the applicant for Site X later decided to drop Design A from the actual completed application for Site X, the neighbor would have expended its scarce resources for no purpose.



The proposed policy also appears to relax or abandon the requirement for reliance on design certifications, allowing license applicants to depart from certified designs in their license applications, and then forcing the consolidation of hearings where the applications appear to have something in common. In this respect, the policy seems intended to maximize the rigidity of design certification where intervenors' interests are at stake, and maximize flexibility where license applicants' interests are at stake. The policy should be consistent for both intervenors and applicants.



The Commission has previously recognized the unfairness of piecemeal litigation governed by a license applicant's indecision about whether to pursue a project. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 29 (2001). The Commission should redraft its policy statement to ensure that COL hearings will be conducted in a manner that is fair to all parties.



Finally, the draft policy statement instructs licensing boards to tailor hearing schedules to accommodate limited work authorizations, by holding hearings on environmental matters and portions of the Safety Evaluation Report that are "relevant" to environmental matters. 72 Fed. Reg. at 32,141. Given that compliance with safety regulations is the principal means by which the NRC protects the environment, it is difficult to conceive of any safety-related issues whose resolution could lawfully be considered unrelated to compliance with the National Environmental Policy Act. Therefore, the Commission should eliminate this instruction from the policy statement.

Sincerely,

Diane Curran

Union of Concerned Scientists
Citizens and Scientists for Environmental Solutions

August 10, 2007

Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
By e-mail to: SECY@nrc.gov

SUBJECT: Comments on Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings, 72 FR 32141 (June 11, 2007)

Dear Ms. Vietti-Cook:

Kindly convey the following comments concerning the above referenced proposed "Policy" to the appropriate persons within your agency. We hereby incorporate by reference the Comments of Ms. Diane Curran, Esq., filed with you on this day, and further set forth as follows.

The alleged goals of the NRC's new policies include "fairness" to the parties as well as expediency of the proceedings (often deemed "efficiency" in the proposed Policy at issue). The reality of the Commission's proposed "policy" is to effectively eliminate any meaningful opportunity for public participation in the process of licensing new reactors. This will be achieved by allowing, nay encouraging, the licensees, even under the stern admonition that "the Commission strongly discourages piecemeal submission of portions of an application," to seek exemptions from the existing rules[1] that make holes through which they may drive the proverbial Mack truck. The ink on the new Part 52 rules is not dry, yet, while strongly discouraging piecemeal litigation (wink, wink, nudge, nudge) the Commission tells the nuclear industry that it "would be favorably disposed to the NRC staff's entertaining a request for an exemption from the requirements of § 2.101." Thus, apparently, the new rules really would be best applied by the NRC staff "entertaining" who knows how many discretionary exemptions in the name of a more efficient (i.e., full-speed ahead, public be damned) "design-centered review approach." If that is not adequate "service" to the nuclear industry, why not also bifurcate the notice procedures?

(1)

Again, with lip-service to it "being most efficient" to issue a Notice of Hearing "only when the entire application has been docketed" (wink wink, nudge, nudge) the Commission provides the nuclear industry with two more exceptions under which it

[1] At this writing it is not clear whether the final new Part 52 rules have actually been released to the public.

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"may give notice of the hearing on the complete application" (one supposes that it also may not do so?) and "give notice of the hearing on the other application with respect to the matters common to the complete application." If this were not confusing enough, again, with the (wink, wink, nudge, nudge) intention of avoiding "piecemeal litigation," the Commission states it will upon "submission of information completing the other application ... give notice [of] hearing with respect to that information." At this point, incredibly, the Commission adds that "in all other cases" (how many will be left??) it will issue the notice of hearing "only when a compete application has been docketed in order to avoid piecemeal litigation."[2] Who are you kidding?

The same considerations apply to the "Consolidation of Issues Common to Multiple Applications," the "Referencing Design Certification Application" and "ITAAC". Beginning with the last, it is not an insubstantial change in the rules to now state that the Commission, presiding officer of any request for hearing filed under §52.103, will, by fiat, "designate the procedures under which the proceeding shall be conducted." This means that potential parties must await word from the Red Queen as to whether procedures mandate entertaining or beheading. One would hope that a bit of rule-making might be in order (under whatever semblance of Due Process Clause remains under current interpretations of the United States Constitution) well before commencement of extraordinary hearings before the Commission. After all, even the sections of the Administrative Procedure Act that apply to the NRC, appear, at a minimum, to require procedures for hearing be fully articulated through notice and comment rulemaking before they are applied--not justified by Commission fiat as *post hoc, ergo propter hoc.*

The "exception" provided in COL Applications that will permit use of the "custom design" is yet another hole in the regulatory dike. The referencing process creates a Chinese menu application with many potential hearings on each and every selection. Moreover, as "the underlying element of the design may change after the exemption request is submitted, such an exemption may ultimately become unnecessary or may need to be reconsidered or conformed to the final design certification rule."

Why not, in the name of efficiency and fairness, wait until the application process is complete before holding a hearing--one hearing--on a completed design and completed application for a specific reactor site?

[2] Given the fact that it is already receiving requests for such exemptions--e.g., UniStar for the new Calvert Cliffs application--*before* this proposed policy has been vetted in the public comment process, and the fact that the NRC staff has chosen to hold a public meeting explaining the way this new policy will work only four days after the close of the public comment period on it, it is a safe bet that only the "Public" is in the dark about how the Commission will rule on the proposed policy changes.

Instead, by instituting yet another series of proceedings in which interested members of the public must participate in order to have standing to be involved in the final process at a particular site, the Commission sanctions extremely costly and time-consuming multiple proceedings in the name of what it deems "efficiency". Who but the owners of nuclear utilities (and, perhaps, some of the larger state governments) could afford to participate in multiple, scattered hearings? Surely, again, this choice by the Commission is designed solely to convenience the nuclear industry and will have the NRC staff "entertaining" a steady stream of exemptions under the guise of "custom designs."

The Treatment of Generic Issues, may, however, provide the most effective obstacle to meaningful public participation in the hearing process on new reactor licenses. Under this approach, the application is broken down into subatomic pieces. Interested members of the public will need to chase after every potentially applicable piece in proceedings held at whatever plant in whatever location they might take place. All that, just to be permitted to take a stab at participating in proceedings over issues that may (or may not) affect a license application in their locale. Again, when Subpart D--which the Commission touts for its applicability in this context--was promulgated in 1975, potential participants had a full panoply of hearing rights under 10 CFR Part 2. Now, without the formal procedure once available to them, members of the public--including state and local governments--will need to guess what reactor license may be coming in their state or locality and, on that basis (and perhaps some form of divination?), take a shot in the dark choosing in which generic proceedings to become involved. Uttering the word "fairness" in the context of discussing this approach to licensing defies common sense (or any sense at all, for that matter).

The only ones entertained and served by this special "fairness" will be the nuclear industry. How can the Commission possibly respect the requirements of the Atomic Energy Act concerning security and, at the same time, encourage a process that will make it nearly impossible to adequately consider new reactor designs in the context of site-specific characteristics of each application? Encouraging generic "variances and exemptions" from certified designs and endorsing the notion that "security" considerations in reactor siting are ever "identical" from one site to another flies in the face of the commonly accepted view that each piece of land is unique. Plainly, a rector on the sea has very different security considerations from one on an inland lake or river; different, again, from a reactor on a cliff or in a valley. To encourage licensees to seek variances, exemptions, and generic licenses based on the premise that only components are at issue without reference to where they are located is, in a Post-9/11 world, burying one's head in the sand.

If the Commission needs to encourage, under the guise of a policy statement, myriad exemptions to the new Part 52 rules, the new Part 52 rules patently need revision.

(2)

(3)

A final observation is in order. Given that the Commission has stripped away nearly all opportunities for meaningful public participation in the licensing hearing process by eliminating party access to full and fair discovery procedure and cross-examination of adverse witnesses, there is grave danger to implementing the policies at issue. As Attorney Curran mentioned in her comments, back in the day when the public actually had a hearing right or two, Atomic Safety and Licensing Board judges recognized the contributions of ordinary persons intervening in the hearing process. Such persons, in fact, made substantial contributions to the licensing process by unearthing serious public health and safety problems. The proposed policies, however, will make the notion of the availability of any opportunity for meaningful public participation in the NRC reactor licensing process a complete travesty. With public examination and criticism hermetically sealed from the process, the Commission will achieve only one goal: efficiency. If the sole rationale is to license as many reactors as possible in the shortest period of time without permitting opposition, criticism, or, even, dissenting opinions, then it will have achieved that goal. If the purpose is to carry out the intentions of Congress under §2239 of the Atomic Energy Act, that end will be completely and finally thwarted.

For the above reasons, and those contained in the incorporated letter of Ms. Diane Curran, Esq., we ask that the Commission withdraw the proposed policy and commence an appropriate notice and comment rule-making on the matters at issue, including restoration of party access to both full and fair discovery and cross-examination of adverse witnesses in the hearing process.

Respectfully submitted:

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NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
Vice President, General Counsel
and Secretary

August 10, 2007

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Mail Stop 0-16C1
Washington, DC 20555-0001

ATTN: Rulemaking and Adjudications Staff

SUBJECT: NRC Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings; CLI-07
72 Fed. Reg. 32,139 (June 11, 2007)

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute (NEI),[1] on behalf of the commercial nuclear energy industry, is pleased to submit the enclosed comments on the NRC Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings, published at 72 Fed. Reg. 32,139 (June 11, 2007). When finalized, this guidance will supplement existing Commission Policy Statements on licensing and adjudicatory matters and complement the NRC's newly amended regulatory framework governing licensing proceedings for combined licenses (COLs), design certifications (DCs) and Early Site Permits (ESPs). We commend the Commission's timely re-examination of its licensing review and adjudication processes.

The Draft Policy affirms the Commission's position that the procedures in 10 CFR Part 2, as applied to the 10 CFR Part 52 licensing process, will "provide a fair and efficient framework" for litigation of disputed safety and environmental matters. NEI concurs with the Commission's objective to improve its licensing process, and we appreciate the opportunity to comment on possible enhancements to that process.

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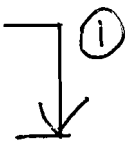
[1] The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

NEI strongly supports the Draft Policy's stated goals: "avoiding duplicative litigation through consolidation to the extent possible," eliminating unnecessary delays in the licensing review and hearing processes, facilitating a fair hearing process and developing an informed adjudicatory record. While we support many of the Draft Policy's proposed initiatives, not every aspect of the Draft Policy reflects the most effective way of accomplishing the Commission's objectives. In those areas where we do not agree with the Draft Policy, we have endeavored to propose workable alternatives. Further, we note that the Draft Policy focuses largely on the potential benefits of using a "design-centered" approach to safety reviews ("multiple applicants would apply for COLs for plants of identical design at different sites") and consolidation of hearing issues common to such applications. Given the relatively limited scope of the Draft Policy, NEI's comments also propose additional initiatives to improve the efficiency and the timeliness of new reactor licensing proceedings.

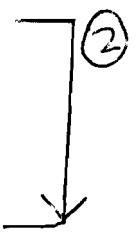
Overview of NEI Comments

A. NEI Comments on Draft Policy Statement Provisions (Section II)

The Draft Policy contains a number of "initial matters" including a proposal regarding the docketing of COL applications (COLAs). NEI supports the pending amendments to 10 CFR 2.101(a)(5) and also those Draft Policy provisions that would permit ESP or COL applicants to present an application for docketing "in a manner not currently authorized," such as by submitting requests for exemption from 10 CFR 2.101. Our comments discuss how the NRC might facilitate such exemption requests. Further, NEI concurs that a partial COLA should be "complete" before the Staff accepts it for docketing. The final Policy Statement should clarify the definition of completeness in this context, particularly given Commission approval of the Combined License Review Task Force recommendation[2] to extend the duration and broaden the scope of NRC licensing acceptance reviews.

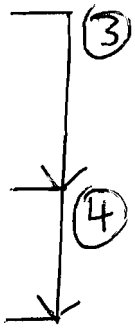


NEI's comments express opposition to the Draft Policy's proposal concerning the timing of NRC Notices of Hearing. 10 CFR 2.101(a)(5), which allows submittal of COL applications in two parts, does not specify when such notices will be issued. The Draft Policy concludes that (with two exceptions) it will be "most efficient to issue a Notice of Hearing only when the entire application has been docketed." *See* 72 Fed. Reg. 32,141. To the extent that early submittal of a partial COLA is intended to accelerate both the commencement of the licensing review and also earlier completion of the overall licensing process, the licensing hearing should begin (and end) earlier. Delaying issuance of the Notice of Hearing directly undermines that objective and the NRC's rationale for doing so ("avoiding piecemeal litigation") is not compelling. The Commission should modify the final Policy Statement to provide that the NRC will issue a Notice of Hearing for a complete partial COLA "as soon as practicable" after the NRC dockets that portion of the COLA, unless the applicant affirmatively requests that the Notice of Hearing be issued after the entire COLA is docketed.

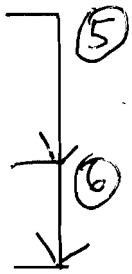


[2] *See Report of the Combined License Review Task Force* (April 2007), pp. 2-3.

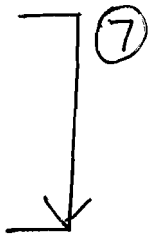
The Draft Policy includes provisions designed to achieve efficient treatment of generic matters through consolidation of issues common to multiple applications. While generic consideration of common issues could potentially improve the efficiency and effectiveness of NRC licensing reviews and hearings, the Draft Policy does not provide sufficient information to assess whether the NRC's proposed approach will in fact achieve the stated objective. The final Policy Statement should more clearly explain the parameters or necessary conditions for consolidation. (For example, consolidation would not appear appropriate unless there is a congruence of objectives and perspectives among the applicants and the proceedings being consolidated.) Whether consolidating hearings and issues will streamline and shorten the overall licensing schedule must also be considered. Finally, the Commission should clarify that consolidation of hearings on identical portions of the COL application is *not* required to obtain the NRC staff's design-centered review. Many efficiencies and benefits of the design-centered approach could still be achieved through a single design-centered review of the portions of the COLAs identical to the "reference application."



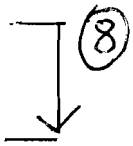
With respect to COLAs that reference design certification applications, NEI supports the Draft Policy's position on avoiding unnecessary, duplicative consideration in COL hearings of design issues addressed in a DC application. A similar policy should apply to a COLA that references a DC amendment application or a COLA that references an ESP application, to avoid redundant reviews and hearings with inconsistent results. We recommend that the Draft Policy direct the licensing board to deny a contention in a COL proceeding if the contention addresses a matter subject to a DC rulemaking, rather than holding the contention in abeyance and denying it later upon adoption of the final DC rule.



On a related point, NEI disagrees with the Draft Policy's position that in COL proceedings referencing DC applications, the NRC will not issue the COL until the design certification rule is final (unless the applicant requests that the COLA be treated as a custom design). Rather, the NRC should issue the license even though the DC rule is not yet final, if the COL proceeding is otherwise complete. A COL license condition premised on promulgation of the DC rule could be imposed, allowing any judicial challenges to be raised in a timely manner without adversely impacting the COL.

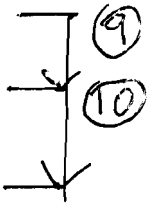


With respect to the Draft Policy's guidance on ITAAC compliance hearings, NEI recommends that the NRC identify the hearing procedures to be used in 10 CFR 52.103(a) ITAAC compliance hearings in the near term and certainly well before the first such hearing is imminent. Further, because the Commission has ample authority to use informal adjudicatory hearing procedures in ITAAC compliance hearings, NEI reiterates support for the use of some type of expedited hearing procedures for such hearings. Whatever procedures the NRC adopts for ITAAC compliance hearings should be tailored to meet the agency's obligation to provide an opportunity for a hearing on whether the ITAAC for the new nuclear facility have been satisfied, and do so quickly, efficiently and without causing delay immediately prior to plant operation. NEI also supports the Combined License Review Task Force recommendation that the Commission itself serve as the presiding officer for any hearing request under Section 52.103.

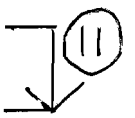


B. Additional Policy Recommendations in NEI's Comments (Section III)

NEI recommends additional initiatives that the NRC should undertake to ensure that its licensing process continues to be thorough and rigorous but is also more efficient, timely and predictable. For example, NEI urges implementation of the Combined License Review Task Force recommendation that the Commission itself conduct all mandatory uncontested hearings for COL applications. NEI also believes it is appropriate to eliminate the Atomic Energy Act requirement for mandatory uncontested hearings. We also suggest that the Commission implement another Task Force recommendation to use rulemakings to resolve common issues generically and thereby minimize duplicative consideration of such issues. With respect to matters not amenable to rulemaking, NEI proposes that the Commission use hearing orders in individual licensing proceedings to provide additional guidance.



NEI requests that the Commission commence COL licensing hearings based on the availability of draft licensing documents where circumstances warrant. The comments provide the various considerations that would support such a flexible policy. We also include specific suggestions regarding the establishment of clear schedule directives, to facilitate more timely completion of COL licensing reviews and to accelerate and streamline NRC licensing hearings.



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In sum, NEI requests that in developing the final Policy Statement, the Commission consider the comments and additional suggestions discussed in the Enclosure to this letter and incorporate these proposals to the extent feasible.

Please contact me ((202) 739-8140, ecg@nei.org) or Anne Cottingham ((202) 739-8139, awc@nei.org) with any questions regarding these comments.

Sincerely,

Ellen C. Ginsberg

Enclosure

c: The Honorable Dale E. Klein, Chairman, NRC
The Honorable Gregory B. Jaczko, Commissioner, NRC
The Honorable Peter B. Lyons, Commissioner, NRC
The Honorable Edward McGaffigan, Commissioner, NRC
Karen D. Cyr, Esquire, General Counsel, NRC

NUCLEAR ENERGY INSTITUTE

ENCLOSURE

NUCLEAR ENERGY INSTITUTE COMMENTS ON THE NRC DRAFT STATEMENT OF POLICY ON CONDUCT OF NEW REACTOR LICENSING PROCEEDINGS

I. Overview and Summary

The Nuclear Energy Institute (NEI)[1] is pleased to submit the following comments in response to the NRC Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (Draft Policy), published at 72 Fed. Reg. 32,139 (June 11, 2007). We commend the NRC on its timely effort to re-examine and revise certain policies relating to new reactor licensing proceedings. Given the anticipated wave of applications for combined licenses (COL), design certifications (DC) and early site permits (ESP) beginning later this year, the Draft Policy, when finalized, should provide a useful complement to the amended regulatory framework for license applicants.

The Draft Policy is intended to supplement, rather than replace, the Commission's 1981 and 1998 Policy Statements on the conduct of adjudicatory proceedings. The NRC continues to endorse those Policy Statements.[2] Recognizing that the next generation of U.S. commercial nuclear plants will be much more standardized than the existing fleet, the Draft Policy focuses closely on the potential benefits of the NRC Staff's conducting its safety reviews using a "design-centered approach." This approach envisions multiple applicants applying for COLs for plants of identical design at different sites, resulting in opportunities for consolidation of issues common to such applications before a single NRC Atomic Safety and Licensing Board (licensing board). *See* 72 Fed. Reg. 32,140.

NEI concurs with NRC's observation that the existing framework for litigation of disputed issues under the Atomic Energy Act of 1954, as amended (AEA), and the National Environmental Policy Act of 1969, as amended (NEPA), while well developed, can be improved. *Id.* Following the order of issues presented in the Draft Policy, Section II.A. of NEI's comments addresses "initial

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[1] The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

[2] See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452 (1981).

matters," including the docketing of license applications, the timing of notices of hearing and hearing schedules for Limited Work Authorizations (LWAs). *See* Draft Policy at 72 Fed. Reg. 32,141-42 and NEI comments pp. 3-6. Section II.B. discusses treatment of generic issues. *See* Draft Policy at 72 Fed. Reg. 32,142-44 and NEI comments pp. 7-10. Section II.C. addresses NRC proposed policies concerning inspections, tests, analyses and acceptance criteria (ITAAC) compliance hearings. *See* Draft Policy at 72 Fed. Reg. 32,144; NEI comments at pp. 10-11.

The industry also has considered whether the Commission's proposals in the Draft Policy will advance the NRC's goal to eliminate "duplicative litigation through consolidation to the extent possible" (emphasis added), and "to provide a fair hearing process, to avoid unnecessary delays in [the NRC's] review and hearing processes, and to enable the development of an informed adjudicatory record that supports agency decision making . . . ." 72 Fed. Reg. 32,140. Although the Draft Policy contains several sound policy proposals, more can be done to enhance the NRC's licensing review and adjudicatory process.

Accordingly, Section III discusses additional initiatives that we believe the NRC should undertake to make its new reactor licensing process more efficient, timely and predictable, while continuing to assure that the agency develops an informed, fully-supported record and that the public is afforded an adequate opportunity to participate in the licensing process. Specifically, these comments address NEI's support for the conduct of mandatory uncontested hearings by the Commission and the pursuit of legislative changes to eliminate the statutory requirement for mandatory uncontested hearings (see Section III.A., pp. 12-13). We also advise using rulemakings and hearing orders to minimize duplicative consideration of generic issues (Section III.B., pp. 13-14), accelerating licensing hearings based on the availability of draft licensing documents (Section III.C., pp. 14-16), and tightening milestone schedules to facilitate more efficient licensing reviews and licensing hearings (Sections III.D. and E., pp. 16-19).

Considering new policies and approaches as a means of achieving "significant efficiencies" in the NRC's licensing process is a proactive and positive step. Yet the existing tools that the Commission has at its disposal must not be overlooked. Instilling discipline in the hearing process and ensuring a prompt, yet fair, resolution of contested issues in adjudicatory proceedings (*see* 72 Fed. Reg. 32,140) are essential. Both the licensing boards and the Commission have obligations in this area. NRC licensing boards must rigorously "enforce adherence" to hearing procedures in 10 CFR Part 2. The Commission must continue to "exercise its inherent supervisory authority" whenever needed as part of the reactor licensing process. *Id.* at 32,141. That has been true in previous NRC licensing proceedings and will be equally if not more important under the revamped 10 CFR Part 52 licensing regime.

In sum, NEI supports many of the policy initiatives set forth in the Draft Policy. Where we disagree with certain proposals, we have provided the bases for our disagreement and, where feasible, an alternative policy. NEI requests that the Commission consider the comments and additional suggestions discussed below. Further improvements to the Draft Policy Statement can be made, consistent with the Commission's goals of providing a fair hearing process, avoiding unnecessary delays and promoting the development of an informed adjudicatory record that supports the agency's decisions. We believe that clear guidance by the Commission in advance of the upcoming new-plant related hearings will well serve all stakeholders.

II. Comments on Draft Policy Statement Provisions

A. Draft Policy Guidance on Initial Matters

1. Docketing of Applications (72 Fed. Reg. 32,141)

NEI supports the pending amendments to 10 CFR Parts 2, 50, 51 and 52 that will provide greater flexibility and better accommodate COL applicants' specific circumstances. For example, we envision that those provisions allowing separate submittal of safety and environmental information for combined license applications (COLAs) under 10 CFR 2.101(a)(5) will facilitate more timely and efficient licensing reviews by the NRC Staff.[3] Section 2.101(a)(5) amendments that would lengthen the time allowed between submittal of COLA portions from 6 to 18 months are also a positive step.

Similarly, NEI supports those Draft Policy provisions that would permit ESP or COL applicants to present an application for docketing "in a manner not currently authorized." The Draft Policy specifically suggests that the NRC would entertain requests for exemption from the requirements of 10 CFR 2.101. On that point, the NRC has the inherent authority to change its Rules of Practice in 10 CFR Part 2 without the need for an applicant to apply for a specific exemption under Part 50 or any other part. So long as it gives notice to interested parties of any changes to its procedures, the Commission is free to adopt alternate docketing requirements.[4] NEI believes that the primary criterion for NRC approval of alternative docketing procedures should relate to improvements in efficiency or effectiveness.[5]

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[3] However, note the discussion in the next section on the timing of NRC notices of hearing.

[4] *See, e.g., National Whistleblower Center v. NRC*, 208 F.3d 256, 262-63 (D.C. Cir. 2000) (NRC had authority to change adjudicatory rules to accommodate a large number of cases through a Policy Statement and a subsequent referral order at the start of a proceeding).

[5] In situations where an exemption from NRC regulations other than those in 10 CFR Part 2 is needed, the exemption provisions specific to that part of the regulations should continue to apply.

With respect to the completeness of parts of an application filed separately, we concur that, consistent with NRC licensing practice and precedent, whatever part of the application is submitted to the NRC should be complete before the Staff accepts that part of the application for docketing. We assume that in determining "completeness" of the application in this context, the NRC would look to the acceptability for docketing of only that separately-tendered portion of the application. Further, given the Commission's recent approval of the Combined License Review Task Force[6] recommendation to expand the "scope and duration of the COL application acceptance review to include completeness and technical sufficiency reviews," NEI believes that additional NRC guidance on this subject will be needed in the near term to ensure that the criteria used for the Staff's review are "clear and transparent."[7]

2. *Notices of Hearing (72 Fed. Reg. 32,141)*

10 CFR 2.101(a)(5), which allows submittal of COL applications in two parts, does not specify when the Notice of Hearing will be issued. 10 CFR 2.104(a) provides that the Notice of Hearing for a COLA will be issued "as soon as practicable" after the NRC dockets the application; the Draft Policy estimates that this will require around 30 days if the COLA is "complete." Similarly, NRC regulations do not specify when the Notice of Hearing should be issued for an application filed in two parts under a request for exemption from Section 2.101. On this important point, the Draft Policy concludes that (with two exceptions) it will be "most efficient to issue a Notice of Hearing only when the entire application has been docketed." Therefore, in most situations, the Commission proposes to delay the initiation of the licensing hearing process until the entire application has been submitted. *See* 72 Fed. Reg. 32,141.

As NEI has previously emphasized in connection with the ongoing Part 52 rulemaking, a primary purpose of early submittal of part of a COLA is to facilitate the commencement of the NRC Staff's licensing review of that portion of the application at an earlier date than it would otherwise. The NRC now appears receptive to this approach, given the 10 CFR Part 2 amendments that will soon be implemented. However, in addition to accelerating the Staff's licensing review, another objective of early COLA submittal is to facilitate earlier completion of the licensing process and, in turn, contribute to maintaining or advancing the project's overall

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[6] *See Report of the Combined License Review Task Force,* pp. 2-3. The Combined License Review Task Force, led by former Commissioner Jeffrey Merrifield, was directed to "explore further efficiencies" in the NRC's environmental, technical and adjudicatory review processes for new reactor license applications. On April 18, 2007, NRC Chairman Klein and Commissioner Merrifield provided the resulting Task Force Report to Commissioners Jaczko, Lyons, and McGaffigan, urging that the Commission support "expeditious" implementation of all of the task force recommendations for process improvements.

[7] *See* June 22, 2007 *Staff Requirements Memorandum COMDEK-07-0001/COMJSM-07-0001 re Report of the Combined License Task Force,* p. 1.

completion schedule. To accomplish this goal, the licensing hearing should both commence earlier and end earlier. Delaying issuance of the Notice of Hearing—and, therefore, delaying initiation of the hearing itself—directly undercuts that objective.

We do not think that the Commission's general policy should be to issue a Notice of Hearing only after the entire COL application has been docketed. As a supporting rationale, the Draft Policy states, without more, that such a policy will "avoid piecemeal litigation." Significantly, the Draft Policy does not demonstrate that separate hearings on complete, segregable portions of a COLA (e.g., the Environmental Report (ER) or a partial ER for an LWA application) will foster duplicative litigation, or would be less efficient overall than a single licensing hearing. Moreover, the proposed policy appears to ignore ample NRC precedent for adjudication of safety and environmental issues on separate NRC hearing tracks.[8]

Publication of two Notices of Hearing under Section 2.101(a)(5) would not eliminate or reduce any opportunities to request a hearing; it would provide an opportunity for earlier public participation. Nor would this proposed alternative approach create any new or different NRC Staff or licensing board reviews. NRC Staff support of a hearing request on a Section 2.101(a)(5) submittal would not necessarily be different than that required for a complete COL application. NEI's approach also is consistent with the NRC's intent to publish separate notices of hearing for Limited Work Authorization (LWA) requests and requests for early review of site suitability issues.

By delaying the Notice of Hearing despite the availability of a segregable portion of an application (such as all environmental information under Section 2.101(a)(5)), the NRC is effectively eliminating much of the process-related benefit of an early COLA submittal. By contrast, issuing the Notice of Hearing and moving forward with proceedings as soon as practicable after the docketing of a complete portion of the COLA allows appropriate "phasing" of the hearing. It would lessen the resource, schedule and litigation burden on NRC Staff, the licensing board, applicants and potential intervenors, by reducing (or "smoothing") the peak resource demands. It also would promote the Commission's stated goals of increasing effectiveness and efficiency in the licensing review and hearing processes. Further, it would minimize the likelihood of potential new issues arising late in the review process when the drafting of Staff documents is much farther along and the flexibility to address these issues is more limited.

[8] The NRC has previously followed this approach under Section 2.101(a)(5). *See Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 48-49 (1983) (involving early antitrust submittal under Section 2.101(a)(5) that was separately noticed for hearing).

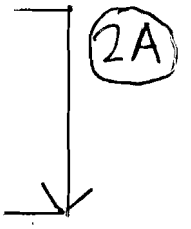
In short, the Draft Policy, as written, discourages early submittals and causes unnecessary delay in the licensing process contrary to its stated objectives. Therefore, the final Policy Statement should provide that the NRC will issue a Notice of Hearing for a completed portion of an applicant's COL application "as soon as practicable" after the NRC dockets that portion of the COLA, unless the applicant notifies the NRC that it prefers to have the Notice of Hearing issued as soon as practicable after the entire application has been docketed. (Conforming changes to the discussion at 72 Fed. Reg. 32,142 also would be needed.)

3. Limited Work Authorizations (72 Fed. Reg. 32,141-42)

NEI agrees with the guidance provided on Limited Work Authorizations. In particular, the Draft Policy states (72 Fed. Reg. 32,141):

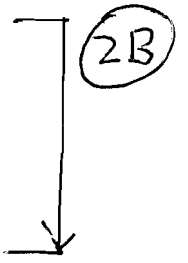
> In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request. Specifically, if an applicant requests a limited work authorization as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing a limited work authorization.

We suggest that the final Policy Statement incorporate a very minor revision to the first sentence above, to read (italicized text added):



> In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request, *unless the applicant specifically requests otherwise.*

This minor change would provide flexibility in a situation in which an LWA applicant might not be prepared to resolve LWA issues first. Also, we propose that the second sentence in the quoted section above be modified to read:



> Specifically, if an applicant requests a limited work authorization as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing a limited work authorization, *up to and including an early partial decision on the LWA.*

On a related point, the Draft Policy states that NRC resolution of LWA-related issues first "may lead to hearings on environmental matters and the portions of the Safety Evaluation Report relevant to such findings before commencement of hearings on other issues." 72 Fed. Reg. 32,141. Consistent with its overall objective of avoiding unnecessary delay in the licensing review and hearing processes, the Commission's policy should seek to minimize any delays in

COL licensing proceedings attributable to the applicant's LWA application, consistent with the NRC's statutory obligations.

B. Draft Policy Guidance on Treatment of Generic Issues

1. Consolidation of Common Issues (72 Fed. Reg. 32,142-43)

This section of the Draft Policy sets forth the Commission's vision for implementing a design-centered approach under the procedures of 10 CFR Part 2, Subpart D,[9] which explicitly addresses treatment of COL applications for identical plants at multiple sites. NEI generally agrees that "generic consideration of issues common to several applications may well yield benefits, both in terms of effective consideration of issues and efficiency." Such efficiencies would be most apparent for situations involving common applicants using a fleet-wide approach. Like the Commission, NEI believes that "[s]uch benefits would accrue not only to the staff review process, but also to litigation of such matters before the licensing board." 72 Fed. Reg. 32,142. (3)

The Draft Policy, however, does not provide sufficient information to assess whether the Commission's proposed approach to consolidation of hearing issues will in fact achieve overall increased efficiency and effective consideration of issues. That is, the benefits and potential adverse consequences of this proposed approach are uncertain, particularly given the range of permutations in issues and applications that may occur in practice. Accordingly, we urge the Commission to revise this section of the Draft Policy to include a fuller discussion of the parameters or necessary conditions for consolidation. For example, it would appear that consolidation is appropriate only where there are identical contentions in multiple proceedings on the same schedule. Consolidation would not be appropriate where it will expand the number of admitted contentions for any particular application.

Further, the Draft Policy states that either the licensing board or an applicant, pursuant to its own motion, may seek consolidation. The final Policy Statement should expand this point to state affirmatively that the licensing board should not seek consolidation where an applicant chooses to "opt-out" of consolidation. (This question is not squarely answered by 10 CFR 2.317(b), which allows licensing boards to consider consolidation pursuant to the applicant's motion or on their own initiative.) For example, there may be circumstances where consolidation could cause a substantial delay in the review of one application or where different applicants have different views on how to resolve a particular issue. Since the applicant bears (3A)

[9] 10 CFR Part 2, Subpart D (Additional Procedures Applicable to Proceedings for the Issuance of Licenses to Construct and/or Operate Nuclear Power Plants of Identical Design at Multiple Sites), will be revised as part of the ongoing NRC rulemaking to amend 10 CFR Part 52.

the burden of proving that the license should be issued, consolidation is appropriate only where there is a congruence of objectives and perspectives among the applicants and the proceedings being consolidated.[10] Finally, the usefulness of consolidating hearings and issues must be considered in the broader context of whether such an approach will have the effect of streamlining the overall licensing process in any given proceeding.

On a related point, the Draft Policy Statement's discussion of consolidation focuses on the NRC's concept of a "design-centered approach" rooted in 10 CFR Part 2, Subpart D, which in turn describes the procedures applicable to license applications referencing identical designs at multiple sites under Appendix N of Part 52.[11] Appendix N (as revised in the forthcoming final rule amending Part 52), provides for a common hearing on identical portions of such applications. Accordingly, the Draft Policy focuses on the process for initiating and conducting such common proceedings.

The Draft Policy implies that in order to take advantage of the design-centered approach, consolidation of hearings on identical portions of the COL application, whether pursuant to 10 CFR 2.317(b) or 10 CFR Part 2, Subpart D, is required. As noted above, however, consolidation of hearings may not be necessary in all cases to achieve the benefits of a design-centered review. For example, where applications referencing identical designs are submitted on a schedule not conducive to consolidation, or where the applicant prefers not to have its proceeding consolidated with other proceedings, many of the efficiencies and benefits of the design-centered approach could still be achieved through a single design-centered review of the portions of the applications identical to the "reference application." The NRC licensing documents (including the Safety Evaluation Report and ACRS review) in the reference

[10] The Commission should consider the very real possibility that "applicants who intend to apply for licenses for plants of identical design and request the Staff to apply the design-centered review approach" will not submit their applications simultaneously, as the Draft Policy suggests. *See* 72 Fed. Reg. 32,142. There may be a variety of reasons why such precise coordination may not be feasible. Thus, the alternative suggestion that licensees in this situation could file COLAs for plants of identical design "close in time" to take advantage of the design-centered approach is useful.

Some delay between the submission of the reference COL application and a second application referencing the same standard design should not prejudice the second COLA relative to utilization of the design-centered approach. In fact, NRC Staff has suggested that submittal after the sufficiency review of the reference COLA could indeed be preferable to simultaneous filing. The final Policy Statement should clarify that applications filed within a certain period of time after docketing of the reference application, or that are filed prior to a particular event (such as the expiration of the time for filing contentions on the reference COLA) are timely for consideration under the design-centered approach.

[11] CFR Part 52, Appendix N (Standardization of Nuclear Power Plant Designs: Combined Licenses to Construct and Operate Nuclear Power Reactors of Identical Design at Multiple Sites) sets forth requirements and procedures applicable when one or more COLAs are filed by one or more applicants for reactors of identical design to be located at multiple sites.

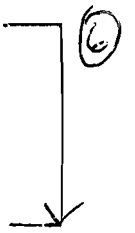
proceeding could then be utilized in the applicant's COLA proceeding notwithstanding that hearings were not consolidated. Licensing boards would continue to have the authority to order consolidation of the hearing on specific issues, such as where intervenors in separate proceedings raise identical contentions relative to a common portion of the COLAs. Recognition of this option in the final Policy Statement will provide important flexibility regarding this first-of-a-kind process.

2. *COLAs Referencing Design Certification Applications (72 Fed. Reg. 32,143)*

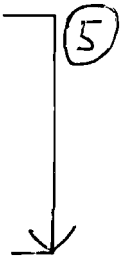
The Draft Policy attempts to avoid unnecessary and duplicative consideration in COL licensing hearings of design issues addressed in a design certification (DC) application. As we have previously asserted, contentions that raise an issue on a design matter addressed in the DC application should be resolved in the DC rulemaking proceeding, not in the COL proceeding. On this matter, the Draft Policy proposes the following approach (72 Fed. Reg. 32,143):

> Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rule making, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.

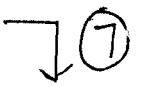
We propose a minor modification to this proposed policy. Where an otherwise acceptable contention raised in a COL proceeding addresses or challenges a matter that is subject to a DC rulemaking, the licensing board should simply deny the contention, rather than holding it in abeyance for denial later upon adoption of the final design certification rule. Denial of the contention in this situation is consistent with the case law cited in the Draft Policy on this point. *See* 72 Fed. Reg. 32,143.



A similar policy should apply to a COL application that references an application for a design certification amendment, or a COL application that references an Early Site Permit (ESP) application. The final Policy Statement should instruct licensing boards not to accept in a COL proceeding contentions that were or could have been raised in a DC rulemaking or in a proceeding on an ESP application referenced in the COL application. These changes are necessary to avoid redundant reviews and hearings with the possibility of inconsistent results.



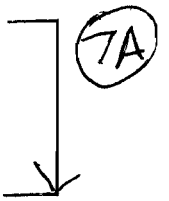
The Commission further states in this section of the Draft Policy that in COL proceedings referencing DC applications, the NRC will not issue the COL until the design certification rule is



final (unless the applicant requests that the COLA be treated as a custom design).[12] In our view, it is not necessary for the Commission to adopt such a policy. Provided that the COL proceeding is otherwise complete, the NRC should issue the license even though the DC rule is not yet final. Issuance of a COL license could be conditioned on the promulgation of the DC rule, which would allow COL activities to proceed and judicial challenges to be brought in a timely manner. By contrast, withholding issuance of the COL pending finalization of the DC rule could delay the opportunity for parties to address any legal challenges to the COL, therefore increasing the risk of an unnecessary delay for the project.

3. Later COLs Referencing a Design Certification Rule (72 Fed. Reg. 32,144)

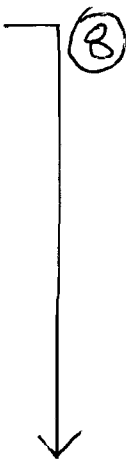
The final Policy Statement should clarify the opening statement in this section, which provides: "If initial COL applicants referencing a particular design certification rule succeed in obtaining COLs, the Commission fully expects subsequent COL applicants to reference that design certification rule." The meaning of this sentence is unclear, and the significance of the Commission's "expectation" vague.



C. Draft Policy Guidance on ITAAC Compliance Hearings (72 Fed. Reg. 32,144)

1. Specification of ITAAC Compliance Hearing Procedures

NEI recognizes that 10 CFR 52.103 hearings will not be held until the final phase of the licensing process. However, we urge the NRC to make the decision regarding the procedures to be used in ITAAC-related hearings well before the time that the first Section 52.103 ITAAC compliance hearing is imminent. It is important to provide advance information regarding the hearing procedures so that potential participants can plan and prepare for such hearings. Further, the number of ITAAC compliance hearing requests that NRC might receive should not necessarily be determinative of the type of hearing procedures to use.



The Commission's authority to determine, at its discretion, whether to use formal or informal adjudicatory hearing procedures for ITAAC compliance hearings held under 10 CFR 52.103(a) is clear.[13] As the NRC considers this question, NEI would like to take this opportunity to reiterate

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[12] The Draft Policy states: "A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final. In such circumstances, the license may not issue until the design certification rule is final, unless the applicant requests that the entire application be treated as a "custom" design." 72 Fed. Reg. 32,143.

[13] *See* AEA Section 189a.(1)(B)(iv), which provides: "The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor." *See also* 10 CFR 52.103(d). Additionally, the May 2006

our support for the use of some type of expedited informal hearing procedures for ITAAC compliance hearings.[14] The procedures that the Commission ultimately adopts for its ITAAC hearings should be tailored to meet the NRC's obligation to provide an opportunity for a hearing on whether the inspections, tests, analyses, and acceptance criteria for the new nuclear facility have been satisfied, and do so quickly, efficiently and without causing delay at a point immediately prior to plant operation. The informal hearing approach selected also should be appropriate for resolving focused and objective disputes on whether the ITAAC have been satisfied. Rigorous adherence to the schedule also is critical to ensuring that ITAAC compliance hearings do not cause unnecessary start-up delay. Whatever procedures it selects, the Commission should set clear, unambiguous schedules for conducting all ITAAC compliance hearings (rather than permit development of ITAAC hearing schedules on a case-by-case basis).

2. Commission Serving as Presiding Officer for 52.103 Hearing Requests

The Draft Policy states that, to "lend predictability" to the ITAAC compliance process, "the Commission itself will serve as the presiding officer with respect to any request for a hearing filed under § 52.103." Thus, the Commission itself will determine whether the person requesting a hearing under Section 52.103(a) has made the required *prima facie* showing that one or more COL acceptance criteria have not been or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of public health and safety (if any). It will determine whether or not to grant the request for a hearing, in accordance with 10 CFR 2.309. If the Commission grants the hearing request, it will then determine whether there will be reasonable assurance of adequate protection of public health and safety during a period of initial operation of the facility in question under the combined license. Additionally, the Commission will designate the procedures under which the Section 52.103 hearing will be conducted. *See* 72 Fed. Reg. 32,144; *see also* 10 CFR Part 52 draft final rule, pp. 365-66, 684-86, and conforming changes to 10 CFR Part 2 (May 2007). NEI supports all of these policy choices and related regulatory amendments.

Supplementary Information for the 10 CFR Part 52 rulemaking states (pp. 365-66) that the Commission may, consistent with the AEA, direct the use of informal hearing procedures "to the maximum extent practical and permissible under law."

[14] *See* "Nuclear Energy Institute Partial Comments on March 13, 2006, 10 CFR Part 52 Notice of Proposed Rulemaking: Proposed Enhancements to Streamline and Increase the Efficiency of the NRC Licensing and Hearing Process for Nuclear Plants"(May 25, 2006), which include recommendations concerning the use of informal hearing procedures for ITAAC compliance hearings (pp. 11-13).

III. Additional Industry Recommendations

NEI believes that a number of other measures can and should be taken to achieve the agency goals set forth in the Draft Policy. As a practical matter, it may not be feasible to address all possible enhancements to the NRC's licensing and hearing process in a policy statement. However, we offer herein several additional proposals the implementation of which would provide greater efficiencies in the licensing and hearing process while continuing to ensure the agency's compliance with its legal obligations and preserving the public's opportunity to participate.

Several of these proposals were addressed in the recent recommendations of the Combined License Review Task Force, which identified specific policies and regulatory measures aimed at reducing NRC licensing review time both for the anticipated "first wave" of COL applications and for subsequent COL applications.[15] Other proposals have been discussed with the NRC during the last several years, primarily in the context of the Part 52 rulemaking.

A. The Commission Should Conduct All Mandatory Uncontested Hearings and Seek Legislation to Eliminate those Hearings

The Commission recently approved 4 of the 6 recommendations of the Combined License Review Task Force aimed at reducing licensing review time for the anticipated "first wave" of COL applications, and two additional task force proposals to reduce licensing review time for subsequent COL applications.[16] In our view, one of the most significant outcomes of the task force report is the Commission's approval of the proposal that it conduct mandatory uncontested hearings for COL applications.[17] The task force estimated that implementing this change could achieve an 8 to 10 month schedule reduction beginning with the first COL applications. Of course, the Commission retains the authority to request that the Atomic Safety and Licensing Board conduct a hearing in a particular case.

The Commission directed the Office of General Counsel to prepare a plan for the conduct of mandatory uncontested hearings by the Commission modeled after the Browns Ferry 1 restart meeting and the Calvert Cliffs and Oconee license renewal meetings. NEI fully supports this policy recommendation and urges the NRC to implement this Commission directive to maximize

(9)

[15] *See* June 22, 2007 Staff Requirements Memorandum (SRM) COMDEK-07-0001/COMJSM-07-0001.

[16] *See* June 22, 2007 SRM for COMDEK-07-0001/COMJSM-07-0001.

[17] *See* Task Force Recommendation (1), pp. 6-7 of the report; see also executive summary at 3. Additional Recommendation (1) is set forth at pp. 11 of the report; see also executive summary at 4.

the benefit to new-plant applicants. In this regard, we also commend Commissioner McGaffigan's recent suggestion that, in cases where there will be both a mandatory uncontested hearing and a contested hearing, the agency should endeavor to "complete the mandatory and contested hearings as simultaneously as possible."[18]

Further, the Commission approved the task force's additional recommendation that in the longer term, the agency pursue a legislative change to Section 189a of the Atomic Energy Act to eliminate the statutory requirement to conduct a mandatory uncontested hearing. The legal and practical arguments that support this legislative change have been adequately set forth elsewhere (including the discussion in the Combined License Review Task Force Report and in the related Commission vote sheets), and we do not repeat them here. In brief, NEI supports such a statutory amendment. Eliminating the mandatory uncontested hearing requirement would contribute significantly to avoiding unnecessary litigation and reducing unproductive resource demands in the NRC's licensing process.[19]

B. The Commission Should Use Rulemaking and Specific Hearing Orders to Minimize Duplicative Consideration of Generic Issues

(10)

NEI urges the NRC to expedite implementation of the recent recommendation of the Combined License Review Task Force for rulemakings on various issues generic to COL applications, in an effort to provide guidance on such issues before they become subject to adjudication in individual licensing hearings. Candidate rulemaking topics identified by the Task Force include non-proliferation risks of nuclear power, need for power, long-term storage of spent fuel, and reprocessing. The Commission has approved this recommendation and has directed the NRC Staff to propose those rulemakings "that will provide the greatest efficiencies" and to assess whether such rulemaking initiatives would hinder the Staff's ability to complete COLA reviews efficiently.[20] While NRC rulemakings to resolve generic policy issues clearly have the potential

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[18] *See* Comments of Commissioner McGaffigan's on COMDEK-07-0001/COMJSM-07-0001, at 1.

[19] In this regard, see the July 20, 2007, letter from NRC Chairman Dale E. Klein to the Honorable Pete V. Domenici, Subcommittee on Energy and Water Development, U.S. Senate Committee on Appropriations, at p. 2 ("In the radically different legal landscape that has arisen since 1957, the requirement for a hearing even if uncontested lengthens the licensing process and consumes significant resources at a time when a large number of reactor licensing applications are expected to be submitted to the Commission.").

[20] The Combined License Review Task Force, led by former Commissioner Jeffrey Merrifield, was directed to "explore further efficiencies" in the NRC's environmental, technical and adjudicatory review process for new reactor license applications. On April 18, 2007, Chairman Klein and Commissioner Merrifield provided the resulting *Report of the Combined License Review Task Force* to Commissioners Jaczko, Lyons, and McGaffigan, urging that the Commission support "expeditious" implementation of all of the task force recommendations for process improvements. The Commission's action on the Task

to reduce duplicative litigation in individual licensing hearings, the Commission would need to initiate and conclude such rulemakings promptly to maximize the benefit to COL applicants.[21]

The Commission also should take other steps to preclude the need to resolve policy issues on a case-by-case basis. Particularly in near-term COL proceedings, the Commission should address such policy issues in COL hearing orders,[22] which can provide guidance to the NRC Staff, licensing boards, applicants and potential intervenors on policy issues that are likely to arise during consideration of the first few COLAs.[23]

For example, the Commission might issue a hearing order to provide guidance to the NRC Staff and licensing boards on conducting alternate site reviews for proposed new reactors co-located at the sites of existing reactors or assessing the need for power at merchant plants. In addition, it might be helpful for the Commission to reiterate its views on the handling of contentions based on historical cost overruns.[24] By providing early policy guidance to participants on issues of first impression for COL proceedings, this approach offers the additional benefit of allowing the licensing boards to focus on factual matters rather than policy issues, which ultimately require Commission resolution in any case.

Force recommendations is detailed in the June 22, 2007 Staff Requirements Memorandum (SRM) COMDEK-07-0001/COMJSM-07-0001. The Commission specifically approved "rulemaking to resolve issues that are generic to COL applications." *See* SRM at 2.

[21] It is well-established Commission precedent that "licensing boards should not accept in individual licensing proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 345 (1999), *quoting Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

[22] *See e.g.*, "In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order,"69 Fed. Reg. 5873 (Feb. 3, 2004) (providing guidance on, among other topics, treatment of depleted uranium tails, environmental justice, financial qualifications, foreign ownership and antitrust reviews for uranium enrichment facilities).

[23] *See Dominion Nuclear North Anna LLC* (Early Site Permit for North Anna ESP Site), LBP-07-09, 65 NRC __ (slip op. at 91-107) (June 29, 2007) (identifying several novel and important issues where Commission guidance would be helpful).

[24] *See, e.g., Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 46 n. 38 (2006).

C. Commission Policy Should Allow the Option of Accelerating Hearings Based on the Availability of the Draft Licensing Documents

(11)

NRC regulations currently give the presiding officer discretion to accelerate the merits hearing on safety issues but not on environmental issues. *See* 10 CFR 2.332(d); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 393 (2007). Nevertheless, using an individual hearing order, the Commission has previously directed the presiding officers in two uranium enrichment proceedings to expedite those proceedings by conducting hearings on contentions prior to issuance of the final Safety Evaluation Report (SER) and Environmental Impact Statement (EIS), unless those hearings would adversely impact the Staff's ability to complete its evaluations in a timely manner.[25] The Commission's authorization in those proceedings took the following form:

> Threshold environmental legal and policy issues need not await issuance of the final [environmental impact statement] . . . . The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents ([safety evaluation report or environmental impact statement]) *unless the Licensing Board in its discretion* finds that starting the hearing with respect to one or more safety issues prior to the issuance of the final [safety evaluation report] (*or one or more environmental contentions* directed at the Applicant's Environmental Report) will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.[26]

This approach was key to completing the LES license application review within 30 months. By allowing the licensing board, NRC Staff, the applicant and intervenors the flexibility to address certain issues earlier, participants were able to avoid a "back loading" of the hearing process without any adverse impact on the NRC Staff's ability to conduct and complete its technical evaluations. The early consideration of environmental issues based on the draft EIS arguably produced a more informed record overall, as the results of the review could be factored into the final environmental documents.

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[25] *See e.g., Louisiana Energy Services* (National Enrichment Facility), "Notice of Hearing and Commission Order," 69 Fed. Reg. 5873, 5876 (Feb. 6, 2004); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-03, 59 NRC 10, 17 (2004); *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 60 NRC 426, 432 (2004).

[26] *LES,* CLI-04-03, 59 NRC at 17 (*emphasis added), cited in Southern Nuclear Operating Co.*, CLI-07-17, 65 NRC at 396, n. 12.

The Commission's recent decision in CLI-07-17 directly addresses this issue. In that Early Site Permit proceeding, the Commission declined, on the record before it, to authorize or require a merits hearing prior to issuance of the final EIS. Nevertheless, we urge the Commission not to foreclose this approach in future COL licensing proceedings. Indeed, NRC policy should affirmatively recognize the possibility that a Part 52 hearing may, at a minimum, address "threshold legal and policy issues" based on the information in the draft SER and draft EIS. On this question, the final Policy Statement should provide that if the licensing board determines that commencing the hearing on safety or environmental matters prior to the issuance of the final SER and/or final EIS will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner, the merits hearing may proceed.

Such an approach would be consistent with CLI-07-17, where the Commission observed: "The *LES* example shows that we are willing to be flexible in the timing of NEPA hearings where special circumstances are present." To the extent that CLI-07-17 was shaped by the Commission's view that there was no urgency motivating the agency to accelerate the proceeding, such will certainly not be the case for many if not all new-plant licensing proceedings. Whereas an ESP allows an applicant to "bank" a site for future use and requires a subsequent licensing review for a COL at a particular site, the objective of a COL application is construction and operation of a nuclear power plant; no additional approval is necessary. Moreover, Congress has clearly indicated that COL licensing reviews should be expedited to the extent practicable.[27] More broadly, adoption of such a policy would clearly facilitate the prompt, efficient and complete resolution of contested issues, and is consistent with the Draft Policy objectives to improve the management and the timely completion of the proceeding and avoid unnecessary delays. 63 Fed. Reg. 41,872 (Aug. 5, 1998).

Alternatively, the Commission could direct that hearings commence more promptly – 45 days after issuance of the final SER and final EIS, if no additional contentions on the final SER or EIS are admitted. Based on this rationale, NRC could require that proposed late-filed contentions be submitted within 30 days of initial issuance of the SER with open items and any draft EIS. The deadline for motions for summary disposition on previously admitted contentions could also be moved up. Within 85 days of issuance of draft SER and draft NEPA document, the presiding

[27] For example, the Energy Policy Act of 2005 (EPAct) authorizes Production Tax Credits for new nuclear facilities that obtain a COL and commence construction before January 1, 2014. Similarly, EPAct creates a Standby Support program that provides up to $2 billion to alleviate the impacts of certain regulatory delays. Nuclear Power 2010 is another Federal program whose objectives are the near-term deployment of new nuclear power plants. The expansion of nuclear energy is also a national policy goal. *See, e.g.*, "Report of the National Energy Policy Development Group"(May 2001) ("Provide for the safe expansion of nuclear energy by establishing a national repository for nuclear waste, and by streamlining the licensing of nuclear power plants."). The timing and objectives of each of these programs and policies demonstrate the strong and broad Congressional support for timely licensing reviews of COLAs.

officer would rule on admission of proposed late-filed contentions and motions for summary disposition, and set a schedule for the remainder of proceeding.

D. Commission Policy Should Seek to Ensure the NRC Staff's Timely Completion of Licensing Reviews for New-Plant Applications

NEI continues to believe that the Commission should establish schedules for the Staff to complete licensing reviews and issue safety and environmental licensing documents. Currently, NRC regulations do not mandate that the Staff meet specific deadlines for major licensing review activities. Specific schedules could be established as a matter of agency policy, promulgated as regulatory requirements, or set forth in regulatory guidance.[28]

Clear scheduling directives would make the licensing process more efficient, while allowing adequate time for completion of the Staff's review. NEI readily acknowledges that rigid schedule deadlines are disfavored because some NRC licensing reviews will inherently require more time than others. We agree that the NRC Staff and agency contractors must devote sufficient time and effort to each review to ensure that NRC standards for completeness, accuracy and protection of public health and safety are satisfied. Nevertheless, the Commission can and should set schedules as a general rule, subject to exception, rather than utilize a case-by-case approach.

Staff review schedules will be particularly useful for standardized license applications or standardized portions of applications where tighter schedules can be established to expedite the process. For example, because the commencement of NRC licensing hearings is currently linked to the issuance of NRC final licensing documents, earlier completion of the Staff's licensing review will facilitate earlier initiation (and, therefore, completion) of licensing hearings for new-plant applications. Adoption of scheduling deadlines should accelerate the overall NRC licensing and project completion timetable while remaining consistent with the Commission's goals of avoiding unnecessary delay and ensuring an adequate record for its decisions. Moreover, by identifying the Commission's expectations at the ouset, the agency can achieve greater accountability.

We offer the following specific suggestions for achieving more efficient and expedient COLA reviews:

[28] We do not believe that this goal is unreasonable or unreachable. For example, during the first two years of its existence (1975-1976), the NRC routinely completed its licensing reviews and mandatory hearings for a construction permit in about 24 months. Note that those reviews were conducted on applications that were not based , as will these be, on standardized and certified designs.

- Direct the NRC Staff to complete and issue the draft SER or SER with open items and the draft EIS within 12 months after docketing an ESP or reference COL application.[29] This period could be shorter for a COL application that references a certified design or a reference COL application.

- Direct the NRC Staff to complete and issue the final SER and the final EIS within 4 months after issuance of the draft SER and EIS. This period could be shorter for a COL application that references a DC and/or ESP.

E. The Commission Should Tighten the Milestone Schedules iin 10 CFR Part 2 to Streamline Hearing Schedules

We also urge the Commission to revise the "Model Milestones for NRC Adjudicatory Proceedings" schedules in 10 CFR Part 2 Appendix B, to streamline the hearing process and promote more timely hearings on ESP and COL applications held under Part 2, Subpart L.[30] We believe that such modifications would do much to further the Commission's stated goals concerning regulatory effectiveness and efficiency.

1. Changes Designed to Initiate NRC Hearings Earlier

The NRC model schedule for hearings on COL applications conducted under Part 2, Subpart L, states that licensing hearings should begin 175 days after issuance of the SER and NEPA document. This time interval should be shortened appreciably, even considering that additional contentions may be admitted based upon the final SER and final EIS. NRC precedent suggests that the final SER and EIS are unlikely to contain new information not in the draft SER and draft EIS that is sufficient to support admission of a contention.

In the event that the final SER or final EIS contains significant new information, there would be an opportunity to submit late-filed contentions. Thus, any hearing on late-filed contentions should commence as promptly as possible, perhaps 90 days after issuance of the final SER and

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[29] For subsequent standardized COL applications, the turnaround time for the draft licensing documents should be shorter.

[30] In 2005, the NRC published a final rule amending its regulations to adopt "Model Milestones for NRC Adjudicatory Proceedings." *See* 70 Fed. Reg. 20,457 (April 20, 2005). NRC presiding officers must "refer to the model milestones as a starting point" in establishing a hearing schedule and in managing NRC hearings in accordance with that schedule. *Id.* The model milestones are not mandatory, however, and allow detailed hearing schedules to be established based upon all relevant information. *Id.* at 20,458-59. Some of the milestones (discussed herein) are specifically intended for use in Part 2, Subpart L hearings on COL applications. *Id.* at 20,460.

final EIS. That should give the parties sufficient time to finalize their testimony and prepare for hearing. The model milestone schedule should reflect these different scenarios.

2. Changes Designed to Facilitate Earlier Issuance of Licensing Decisions

NEI has previously provided comments on changes designed to streamline the NRC's adjudicatory process.[31] It is NEI's position that additional improvements can be made without sacrificing the NRC's goals of creating an informed record or otherwise adversely impacting the hearing process. To help achieve these objectives, we propose that the Commission monitor on a continuing basis whether NRC licensing boards are meeting the existing model milestones, and take proactive measures when necessary to maintain appropriate hearing schedules for COLA proceedings. This has been done with excellent results in the context of license renewal application proceedings.

One oversight mechanism would be for the Commission to direct licensing boards to issue a scheduling order at the outset of a proceeding that is consistent with the model milestones, but more detailed. The Commission could also direct the licensing board to inform the Commission promptly, in writing, if the board determines that any single milestone could be missed by more than 30 days. Such notifications should include an explanation of why the milestone cannot be met and the measures the licensing board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

In addition, some specific changes to the existing model milestones may be warranted. NRC's model schedule for COLA hearings under 10 CFR Part 2, Subpart L, states that the presiding officer should issue an initial decision on a COL application within 90 days after the end of the hearing and the close of the record. NEI believes that the target date should be 60 days or less after the close of the record. Further, NRC licensing boards should be directed to issue a decision in the 10 CFR 52.103 hearing within 30 days of the close of that proceeding. Licensing boards would be allowed to deviate from those time limits only with the prior approval of the Commission.

[31] *See* "Nuclear Energy Institute Partial Comments on March 13, 2006, 10 CFR Part 52 Notice of Proposed Rulemaking: Proposed Enhancements to Streamline and Increase the Efficiency of the NRC Licensing and Hearing Process for Nuclear Plants"(May 25, 2006).

NEI recommends that the NRC revise the 10 CFR Part 2, Appendix B milestones as follows:[32]

MODEL MILESTONES
[10 CFR Part 2, Subpart L]
Specific to Early Site Permit and Combined License Application Proceedings

• Within 30 days of issuance of <u>draft</u> SER and any necessary <u>draft</u> NEPA document:	<u>Proposed late-filed contentions on draft SER and necessary draft NEPA documents filed; last date for motions for summary disposition on previously admitted contentions</u>.
• <u>Within 85 days of issuance of draft SER and draft NEPA document:</u>	Presiding officer decision on admission of proposed late-filed contentions and motions for summary disposition; presiding officer sets schedule for remainder of proceeding.
• Within 14 days after presiding officer decision on amended/late-filed contentions:	All parties complete updates of mandatory disclosures.
• Within 115 days of issuance of <u>draft</u> SER and <u>draft</u> NEPA document:	~~Motions for summary disposition due~~. Written direct testimony filed.
• Within ~~155~~ <u>135</u> days of issuance of <u>draft</u> SER and <u>draft</u> NEPA document:	Evidentiary hearing begins <u>on initial contentions</u>.
• Within ~~175~~ <u>90</u> days of issuance of <u>final</u> SER and <u>final</u> NEPA document:	Evidentiary hearing begins on late-filed contentions, if any.
• Within 60 ~~90~~ days of end of evidentiary hearing and closing of record:	Presiding officer issues initial decision.

[32] Because we have proposed more than one alternative for modifying various deadlines in the license review and hearing process, not all alternatives may be reflected in the marked-up model milestones.

GE-Hitachi Nuclear Energy

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MFN 07-442

10 CFR Part 2

August 10, 2007

Annette L. Vietti-Cook
Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Branch

Subject: Comments on Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings, 72 Fed. Reg. 32,139 (June 11, 2007)

GE-Hitachi Nuclear Energy Americas LLC ("GEH") endorses comments submitted by the Nuclear Energy Institute (NEI) on the subject draft policy statement submitted August 10, 2007. The draft policy statement is a move toward greater standardization in the conduct of license proceedings in anticipation of the near-term filing of a number of combined license applications for nuclear power plants. The 10 CFR Part 52 licensing process relying on standard designs and early site permits offers opportunities to avoid unnecessary delays in the combined license proceedings. Certain of these opportunities are discussed in the draft policy statement. In addition to the issues specifically discussed in the draft policy statement, GEH suggests that the final policy statement address related actions directed by the Commission in the Staff Requirements regarding the combined license review task force recommendations.[1]

GEH supplements the NEI comments as follows:

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[1] *See* Staff Requirements – COMDEK-07-0001/COMJSM-07-0001 – Report of the Combined License Review Task Force (June 22, 2007).

- *Treatment of Generic Issues:* Both the draft policy statement and the combined license task force report recommend treatment of generic or design-specific issues in a manner that minimizes review or litigation of an issue more than once. As NEI comments, in the context of a generic issue, the task force recommends (and the Commission directs) that the NRC staff should resolve such issues through rulemaking. As a design certification applicant for the ABWR (10 CFR Part 52, Appendix A) and the ESBWR (currently under NRC staff review), GEH is interested in achieving finality for standard design issues, as appropriate, including those that may arise in combined license application proceedings.

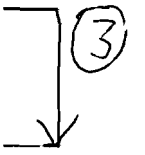
  While the draft policy statement notes that there may be remaining common matters that are not resolved through the design certification rulemaking, GEH believes that there may be opportunities for further standardization through rulemaking, either in the design certification rule(s) or in other NRC regulations. GEH notes, however, that the draft policy statement recognizes that there may be issues – such as those initially certified as design acceptance criteria inspections, tests, analyses and acceptance criteria – that future combined license applicants may seek to resolve through another approach or in a manner that employs more advanced technology and, thus, would not seek to employ an earlier resolution of the issue.

  Recommendation: For those issues that are litigated as design-specific issues and which have been resolved in one or more proceedings, the final policy statement should direct that the NRC staff consider – on a case-by-case basis – whether any such issues could be addressed through rulemaking as generic or standard design issues. This approach could afford finality in future proceedings (*e.g.*, for those applications that follow the initial consolidation of a issue), *if and when appropriate*.[2] In some such cases, it *may* be appropriate to address one or more issues in a revision to a design certification rule. In those cases, the NRC staff should coordinate with the design certification applicant and determine an acceptable approach to amend the design certification rule, as appropriate, particularly for those issues that could enhance standardization.

- *Issuance of a Combined License Prior to Design Certification Final Rulemaking:* NEI advocates that the Commission need not delay issuance of a combined license referencing a design certification application until the certification rule is final, absent a legal prohibition. We concur with this approach. We request, however, that the Commission's policy continue to support expeditious completion of the final certification rule.

[2] As NEI points out in the comments, applicants may hold different views as to whether an issue can and should be resolved on a generic or design-specific basis versus on a plant-specific basis. In addition, we recognize that some generic and/or design-specific issues may not lend themselves to rulemaking, but may be better addressed in a revision to NRC guidance; however, this would not provide the same degree of finality as a rule.

- *Future Changes to the Policy Statement:* The Commission should monitor the license proceedings and adjust the policy statement as experience is gained. In addition, any elements of the policy statement or lessons learned that may apply in other licensing proceedings (*e.g.*, fuel cycle facility licensing) should be incorporated into the hearing process, as appropriate.



Please contact me should you have any questions regarding the information provided herein.

Sincerely,

R. E. Brown

Robert E. Brown
Sr. Vice President
Regulatory Affairs

CC:
E. Ginsberg (NEI)
Document Control Desk (NRC)

(7)

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August 10, 2007

Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (72FR32139)

Ms. Annette Viette-Cook
Office of the Secretary
United States Nuclear Regulatory Commission
Washington, DC 2055

By email: secy@nrc.gov

Ms. Viette-Cook:

Beyond Nuclear at the Nuclear Policy Research Institute submits its endorsement of the attached comments as provided by the legal office of Harmon, Curran, Spielberg &Eisenberg, LLP with regard to the Draft Policy Statement on New Reactor Licensing as published in the Federal Register, June 11, 2007. We are likewise very concerned that the proposed draft policy statement would unduly and unreasonably undermine the public's effective participation in NRC licensing hearings on applications for new reactor construction.

(1)

Sincerely,

Paul Gunter
Director of Reactor Oversight

Attached: 08/10/2007 Comments of Diane Curran, Esq.

Template = SECY-067

SECY-02

R.M. Krich
Senior Vice President, Regulatory Affairs

Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings (72FR32139)

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UniStar NUCLEAR

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USNRC

August 13, 2007 (3:22pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

August 10, 2007

UN#07-011

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudications Staff

Subject: UniStar Nuclear Additional Comments on "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," 72 Federal Register 32139 (June 11, 2007)

References:
1) Letter UN#07-006, from R. M. Krich (UniStar Nuclear) to the Secretary, U.S. Nuclear Regulatory Commission, "UniStar Nuclear Comments on 'Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings,' 72 Federal Register 32139 (June 11, 2007)," dated June 20, 2007

2) Letter from Ellen C. Ginsberg (Nuclear Energy Institute) to Annette L. Vietti-Cook (NRC), "NRC Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings; CLI-07, 72 Fed. Reg. 32,139 (June 11, 2007)," dated August 10, 2007

UniStar Nuclear appreciates the opportunity to provide additional comments on the "Draft Statement of Policy on Conduct of New Reactor Licensing Proceedings," published in volume 72 of the Federal Register (FR), page 32139, on June 11, 2007. UniStar Nuclear submitted initial comments on the Draft Statement of Policy by letter dated June 20, 2007 (Reference 1), at which time we stated that UniStar Nuclear would submit an additional comment letter on or before August 10, 2007 if UniStar Nuclear had additional comments. Accordingly, this letter provides UniStar Nuclear's additional comments.

UniStar Nuclear supports the Draft Statement of Policy goals of avoiding duplicative litigation through consolidation, eliminating unnecessary delays in the licensing review and hearing processes, facilitating a fair hearing process, and developing an informed adjudicatory record. UniStar Nuclear does, however, have additional concerns. Accordingly, UniStar Nuclear participated in the development of, and endorses, the comments on this Draft Statement of

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SECY-02

Policy that are provided by the Nuclear Energy Institute (NEI) in its letter dated August 10, 2007 (Reference 2).

If you have any questions, please contact me at (410) 864-6441.

Respectfully,

R. M. Krich
UniStar Nuclear Development, LLC