

Nuclear Regulatory Commission
Conduct of New Reactor Licensing Proceedings; Final Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Final policy statement.

SUMMARY: The Nuclear Regulatory Commission (NRC or the Commission) is adopting a statement of policy concerning the conduct of new reactor licensing proceedings.

DATES: This policy statement becomes effective **(INSERT DATE OF PUBLICATION)**.

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SUPPLEMENTARY INFORMATION: On June 11, 2007 (72 FR 32139), the Commission published in the *Federal Register* a request for public comment on the draft statement of policy on Conduct of New Reactor Licensing Proceedings (draft Policy Statement). The Commission received eight letters transmitting comments on the draft Policy Statement by the deadline set in the June 11, 2007, notice for receipt of comments. Commenters included a law firm (Morgan Lewis on behalf of five energy companies), a lawyer (Diane Curran), two advocacy groups, (Beyond Nuclear/Nuclear Policy Research Institute (BN/NPRI) and the Union of Concerned Scientists (UCS)), an

industry organization (the Nuclear Energy Institute (NEI)), a vendor (GE-Hitachi Nuclear Energy), and one individual energy company (UniStar Nuclear)(two letters). BN/NPRI endorsed Ms. Curran's comments, and UCS incorporated them by reference in the UCS comments. Similarly, GE-Hitachi and UniStar endorsed the NEI comments.

The comments fell primarily in the following three categories. First, many comments related to 10 CFR 2.101(a)(5), which permits an applicant to submit its application in two parts filed no more than eighteen months apart. The comments were primarily concerned with whether the NRC should issue a Notice of Hearing (required by 10 CFR 2.104) for each part of the application or just one Notice of Hearing when the application is complete. Second, many comments related to the NRC's consideration of applications that propose to build and operate reactors of identical design (except for site-specific elements). The comments addressed the implementation of the "design-centered review approach" in the NRC Staff's (Staff) review of the applications and the adjudicatory proceedings on the applications before the Atomic Safety and Licensing Board (Licensing Board). Third, many comments requested rulemaking to implement a variety of measures that the commenters believe desirable or necessary for the effectiveness or efficiency of the review or adjudicatory processes. Below, the Commission summarizes and responds to the comments beginning with these three categories of comments. Discussion of additional comments follows. In response to the comments, the Commission has revised the policy statement in several respects, as noted below. The Commission has also corrected the Policy Statement or added explanatory text in a few instances.

Comments On Notice of Hearing:

Comment: The Commission should modify the final Policy Statement to provide that the NRC will issue a Notice of Hearing for the complete partial

Combined License Application (hereinafter COLA) “as soon as practicable” after the NRC docketed that portion of the COLA, unless the applicant affirmatively requests that the Notice of Hearing be issued after the entire COLA is docketed. (NEI 2, Morgan Lewis 1, UniStar 1)

The commenters state that the approach they suggest will lessen the burdens on all parties. Specifically, these commenters submit that a Notice of Hearing should be issued upon the docketing of the first part of an application submitted under 10 CFR 2.101(a)(5) so that the hearing on that portion of the application may be completed sooner, thus providing an applicant the opportunity to shorten the critical path for the licensing proceeding. These commenters also state that the proposed approach “smoothes” peak resource demands for all parties, provides for earlier public participation, would not call for different NRC staff support or different Staff or Licensing Board reviews, minimizes the likelihood of potential new issues arising late in the review process, would not affect any person’s substantive rights, and is consistent with the NRC intent to publish a separate Notice of Hearing on a request for a limited work authorization (LWA). Further, these commenters indicated that docketing one part of an application and then waiting up to 18 months to issue the Notice of Hearing cannot be considered to result in issuing the notice “as soon as practicable” after docketing, as required by 10 CFR 2.104(a). These commenters also state that the draft Policy Statement approach of normally issuing only one Notice of Hearing appears to ignore NRC precedent for adjudication of safety and environmental issues on separate hearing tracks. One commenter states that issuing separate notices focuses all parties on results, not process, while another asserts that the draft Policy Statement, as written, discourages early application submission and causes delay in the licensing process.

UniStar bases its comments on its plans to submit the environmental portion of its COL application first, in accordance with § 2.101(a)(5), and provides the following

additional comments. UniStar believes issuing a Notice of Hearing in connection with the first part of the application docketed provides an earlier opportunity for public participation on environmental matters, offers the Staff an early opportunity to consider and address environmental issues unique to COLs, and lessens the potential for the NRC environmental review to be “critical path” for the UniStar application.

NRC Response: The NRC does not believe that an overall benefit can reasonably be predicted to derive from issuing separate Notices of Hearing for separate portions of applications filed pursuant to 10 CFR 2.101(a)(5). The assertion that issuing two Notices of Hearing will provide an applicant the opportunity to shorten the critical path for a licensing proceeding is speculative. The nature and complexity of contentions that may be raised with respect to the safety and environmental aspects of any application may vary considerably. Moreover, while an earlier, separate Notice might be advantageous to an applicant by allowing potential intervenors to raise their concerns early and thus allow the applicant more time to consider the gravity of those concerns and provide information to the staff to address them, if appropriate, we do not believe those possible advantages overcome the inefficiencies that could be introduced into the NRC’s internal review and hearing processes as well as the potential burden on the resources of the advocacy community to monitor and respond to multiple Notices of Hearing.

Industry commenters assert that issuing separate notices would not impair the substantive rights of any party, and is consistent with the practice established in the LWA rule and previous licensing proceedings. The Commission agrees that no person’s substantive rights would be impaired if either a single Notice of Hearing is issued on a complete application, or if two such notices are issued on parts of an application submitted under 10 CFR 2.101(a)(5). In this respect, the two procedures are equivalent. However, in the case of a request for an LWA, there is a clear potential benefit—

issuance of an LWA to permit an applicant to begin certain safety-related construction activities before a COL is issued—not just a more nebulous “smoothing” out of resource demands, to balance against the potential negative impacts noted above.

The industry commenters point to a proceeding in which a Notice of Hearing was issued for a single part of an application relating solely to antitrust matters. See *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 47 (1983). The requirements of 10 CFR 50.33a that applied in that proceeding, however, explicitly required submission of antitrust information in advance of the rest of the application, presumably because litigation of antitrust matters before the Licensing Boards were virtually always the lengthiest portion of a licensing proceeding. See 10 CFR 50.33a (1983). As described above, that rationale does not apply here. Similarly, the fact that in some proceedings safety and environmental matters were considered on separate tracks, based on the admitted contentions, does not present a rationale for issuing separate Notices of Hearing for such matters. Specifically, hearings on admitted safety and environmental contentions may proceed on separate tracks, if the presiding officer finds that this is warranted. The advantages derived from establishing such separate hearing tracks can be obtained without issuing separate notices for each part of an application submitted under § 2.101(a)(5).

Accordingly, the Commission does not support issuing a separate Notice of Hearing on each part of an application filed under 10 CFR 2.101(a)(5). With respect to the additional issues UniStar raises that are unique to its application, and which are summarized above, the Commission does not believe it appropriate to address such application-specific concerns in responses to comments on a generally applicable policy statement such as this one. The comments do not warrant changes in the Policy Statement.

Comment: 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? (UCS 1, Curran 2). The Commission has previously recognized the unfairness of piecemeal litigation governed by a license applicant’s indecision about whether to pursue a project. The Commission should redraft its policy statement to ensure that COL hearings will be conducted in a manner that is fair to all parties. (Curran 4)

In essence, the commenter is objecting to the Commission’s proposal to consider exemptions to the requirements of § 2.101 if the granting of such exemptions will further the design centered review approach. The commenter indicates that such exemptions will result in issuing two rather than one Notice of Hearing on each complete application, and will overtake the Commission’s stated intention to issue just one Notice of Hearing on each complete application in the absence of the advantages of the design centered review approach. The commenters indicate that under the design-centered approach, intervenors will be forced to participate in “abstract” proceedings in order to protect their rights, and that this will waste the intervenors’ resources. Further, the commenters assert that such proceedings may subject them to abusive litigation tactics, since an applicant could request consideration of one design pursuant to an exemption from § 2.101(a)(5), and then drop that design in favor of another upon filing the remaining portion of the application. They conclude that potential intervenors will not be able to prioritize the most important issues that should be raised with respect to a proposed new plant on a particular site.

NRC Response: The commenters misapprehend the effect of an exemption from § 2.101 that would further the design-centered review approach. Such an exemption would not result in an “abstract” application. Rather, the applicant would, in

its application, request approval to construct and operate a particular facility at a particular site. Prospective intervenors will not need to guess what plant might be described in an application for a COL that could affect them, nor will they need to participate in proceedings on proposed reactors that do not affect their interests.

Further, exemptions from § 2.101 in furtherance of the design-centered review approach would not result in litigation of design matters that an individual applicant might readily change. The point of allowing such a procedure is to permit the Staff and the Licensing Board to consider the standard portions of an incomplete application submitted pursuant to an exemption from § 2.101 together with other applications involving the same design or operational information. An individual applicant obtains the benefits of participating in such a proceeding by relinquishing some of its ability to change that information.

Although the Commission notes that established doctrines of repose (*res judicata*, collateral estoppel) apply once an adjudication is finally decided, prospective intervenors need not seek to participate in proceedings unrelated to their locale by virtue of the Policy Statement provisions discussing possible exemptions from § 2.101.

With respect to the concern that an applicant might decide to substitute one design for another in an application, modify its proposal, or decline to complete or pursue an application, and thus render any hearings related to those aspects of an application moot, that possibility exists whether or not an applicant has sought an exemption from § 2.101. For example, it may become apparent during the course of the NRC staff review that the proposed plant is not acceptable for the proposed site. Accordingly, the Commission concludes that these comments do not warrant changes to the Policy Statement.

The Commission notes that UCS, in connection with its comment, identified a confusing sentence in the draft Policy Statement to the effect that the NRC “may give

notice” with respect to a complete application. This sentence has been revised to read that the NRC “will give notice” with respect to a complete application.

Comments on Design-Centered Review Approach:

Comment: The proposed policy appears to relax or abandon the requirement for reliance on design certifications, allowing license applicants to depart from certified designs in 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. (Curran 3, UCS 1, BY/NPRI)

NRC Response: Part 52 has never *required* an applicant for a COL to reference a certified design. Rather, a COL applicant has always had the option of requesting a COL for a design that is not certified under Part 52, Subpart B (a “custom” plant). See 10 CFR 52.79. Similarly, Part 52 has always provided for exemptions or departures from a certified design. See 10 CFR Part 52, Appendices A, B, C, and D, Section VIII. The draft Policy Statement offered guidance on the effect these provisions might have in the context of an adjudication consolidated to take advantage of the design-centered review approach. The design-centered review approach is an effort to encourage applicants to adopt identical approaches to issues, which should increase reliance on standard design certifications. Moreover, multiple applicants could choose the same uncertified design (e.g., a gas-cooled reactor), which the NRC could review using the design-centered approach. This circumstance would be consistent with the Commission’s policy encouraging greater standardization, albeit not via design certification.

With respect to whether proceedings should be consolidated, the draft Policy Statement does not *require* consolidation. Rather, it provides, among other things, that the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should do so only if consolidation will not impose an undue burden upon the parties. Further, the draft Policy Statement recommends that applicants and intervenors alike agree on a lead representative. The Policy Statement does not treat intervenors and applicants inconsistently in this regard.

Finally, the draft Policy Statement does not state that consolidation is appropriate when “applications appear to have something in common.” Rather, the Commission is suggesting that intervenors, applicants, and the NRC alike may save and appropriately focus resources by litigating matters relating to applications for identical designs in consolidated proceedings. Our rules of practice have long provided for the possibility of consolidation of issues and parties.

Comment: 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. 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. (UCS 2)

NRC Response: The Commission of course recognizes that certain aspects of security are site-specific. The Commission has not “endorsed the notion that ‘security’ considerations in reactor siting are . . . ‘identical’ from one site to another[,]” as suggested by the commenter. Nonetheless, certified designs include certain features or

design elements directed to security and safeguards, and these design matters will be common at sites referencing the design certification. The Policy Statement is focused on “components” in this regard because it is focused on the design-centered approach. The Policy Statement’s focus should not be read to exclude site-specific issues from the scope of NRC review. The Commission does not believe it is encouraging a “myriad” of exemptions by this Policy Statement. The Statement identifies limited circumstances under which an exemption to Part 2 may be entertained or granted. The regulations in Part 52 have long accommodated the need for exemptions to design certification rules in defined circumstances. See 10 CFR Part 52, Appendices A, B, C, and D, Section VIII.

Comment: The final Policy Statement should more clearly explain the parameters or necessary conditions for consolidation. (NEI 3, Morgan Lewis 4)

NRC Response: Whether separate proceedings should be consolidated depends on their particular circumstances, and is within the discretion of the presiding officers in the proceedings, as currently set forth in Part 2. See 10 CFR 2.317. The draft Policy Statement adequately explains how the design-centered review approach may be appropriately factored into the presiding officers’ decision on consolidation. Whether two applications are sufficiently close in time to warrant consolidation depends on the particular facts involved. No modification to the Policy Statement is warranted.

Comment: 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. While the use of Subpart D is permissible, it is not required and should not be presumed. (NEI 4, Morgan Lewis 4)

NRC Response: The Commission believes that the Policy Statement already makes clear that consolidation of hearings is not required to obtain the NRC staff’s design-centered review. Without consolidation of hearings, however, some of the benefits of the design-centered review approach may not be realized. Therefore, the

Policy Statement presumes the use of Subpart D because the Commission believes that such use will offer benefits not otherwise available. A particular applicant's choice not to seek the use of Subpart D will mean that such benefits will not be available to that applicant.

Comment: 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. (Morgan Lewis 3, NEI 5)

NRC Response: The draft Policy Statement explicitly discusses applications for design certification. The Commission believes that discussion also encompasses an application for an amendment to a design certification, and the Policy Statement need not be changed.

Comment: The Policy Statement should direct the Licensing Board to deny a contention in a COL proceeding if the contention addresses a matter subject to a design certification rulemaking, rather than holding the contention in abeyance and denying it later upon adoption of the final design certification rule. (NEI 6)

NRC Response: While the approach NEI suggests is consistent with the Commission decisions cited in the draft Policy Statement, the Commission believes that an application for design certification calls for a different approach. An applicant for a COL may choose to pursue its application as a custom design if, for example, the review of an application for design certification originally referenced is delayed. In such a case, the Commission believes it inefficient to require previously admitted intervenors to justify, for a second time, admission of contentions which address aspects within the scope of the design certification rulemaking. Holding these contentions in abeyance instead of denying them resolves this problem. Accordingly, the Commission has determined to leave the Policy Statement unchanged in this regard.

Comment: The Commission should clarify the statement in section B.3 of the Policy Statement that “[i]f 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.”

NRC Response: The Commission has clarified the sentence by stating that if the NRC grants an initial application referencing a design certification rule, the Commission believes it is likely that subsequent applications referencing that rule will be filed.

Comments Relating to Rulemaking:

Comment: The NRC should ensure consistency in its rules by conforming 10 CFR 51.105, which contains mandatory findings on NEPA matters in uncontested proceedings, to 10 CFR 2.104, which does not specify the findings to be made. (Morgan Lewis 6)

NRC response: This proposal would involve rulemaking, which is beyond the scope of the development of this Policy Statement. Because this matter has been raised as a comment on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under § 2.802. If the commenter wishes the agency to undertake such a consideration, the commenter should file such a petition. The Commission would note that the commenter’s proposed change was considered in the development of the final Part 52 rulemaking, but was rejected for several reasons. Such a change would have represented a fundamental change to the NRC’s overall approach for complying with NEPA, in which the agency’s record of decision consists of the presiding officer’s findings with respect to NEPA, as required by Section 51.105. The Commission did not believe it made sense to modify the NRC’s approach in one specific situation- the issuance of combined licenses – without considering the implications or desirability of adopting a global change to Part 51 with respect to the agency’s NEPA’s procedures.

Moreover, the Commission believed that such a change in the NRC's NEPA compliance procedures should be subject to a notice and comment process and did not want to further delay agency adoption of a final part 52 rule.

Comment: The NRC should revise 10 CFR 2.101(a)(5) to permit the first part of a phased application to consist solely of the environmental report plus the general administrative information specified in § 50.33(a) through (e). It is not necessary for the NRC to have complete seismic and other siting information, plus financial and emergency planning information, to review an environmental report. (Morgan Lewis 7)

NRC response: First, this proposal would require a change to Commission rules, which is beyond the scope of the development of this Policy Statement. Second, with respect to the commenter's proposal that siting (which includes seismic) information is not necessary for the first part of a phased COL application (even if the rest of the first part is the environmental report), the Commission does not find persuasive this argument for omitting siting information.

The Commission requirements governing site safety are based upon the Atomic Energy Act (AEA). The NRC's National Environmental Policy Act (NEPA) review responsibilities do not expand its AEA authority, but are complementary thereto. Consequently, there is no need for a NEPA siting review absent consideration of site safety under the AEA. Regarding site safety, the information an applicant must submit to satisfy the requirements of 10 CFR 2.101(a)(5) addresses the suitability of the site with respect to man-made and natural hazards (including seismic information) and potential radiological consequences of postulated accidents and the release of fission products. Furthermore, the site characteristics must comply with 10 CFR Part 100, "Reactor Site Criteria." Additional safety elements required in a siting determination include information on emergency preparedness and security plans. Administrative

information, including the protection of sensitive information is necessary to fulfill requirements under the AEA. The Commission considers that much of the above site safety information may be of use in informing the Commission NEPA review.

Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The final Policy Statement should direct the NRC staff to consider, on a case-by-case basis, whether generic or design-specific issues could be addressed through rulemaking. (GE-Hitachi Nuclear Energy 1, NEI 10)

NRC Response: The Commission does not believe that a direction to the NRC staff to undertake rulemaking, which is an internal agency matter, is an appropriate subject for a policy statement. The Commission has, however, directed the NRC staff, in consultation with the Office of the General Counsel, to consider initiating rulemakings in appropriate circumstances to address issues that are generic to COL applications. See SRM COMDEK-07-0001/COMJSM-07-0001 – Report of the Combined License Review Task Force (June 22, 2007) (ADAMS Accession No. ML0717601090). Accordingly, the Commission does not see any further benefit in duplicating this Commission direction in a policy statement.

Comment: The NRC should institute notice-and-comment rulemaking to provide for meaningful public participation in the licensing hearing process under Subpart L of Part 2, including full and fair discovery procedure and cross-examination of adverse witnesses. (UCS 3)

NRC Response: The Commission does not agree that its current requirements in 10 CFR Part 2, Subpart L, governing discovery and cross-examination, are unfair to

any potential party in an NRC adjudication, nor does the Commission believe that Part 2 fails to provide for meaningful public participation in the licensing hearing process. The Commission addressed the fairness and expected benefits of the reconstituted discovery process in Subpart L in the statement of considerations for the final 2004 revisions to Part 2. See 69 FR 2182 (January 14, 2004) upheld by *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3rd 338 (1st Cir. 2004). The discovery process provides for mandatory disclosures by all parties of information relating to admitted contentions, and Staff preparation of a hearing file. Furthermore, cross-examination is allowed or may be allowed by the presiding officer under those circumstances in which the Commission has determined that cross-examination would be best-suited to result in the timely development of a record sufficient to inform a fair decision by the presiding officer. The commenter provided nothing other than the generalized assertion that the new procedures are unfair or would preclude meaningful public participation in the licensing hearing process. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The NRC should decrease the time periods in the 10 CFR Part 2 Milestone Schedules to further streamline the hearing process and promote more timely hearings on ESP and COL applications, by (1) decreasing the 175 day period between issuance of the SER and final EIS and the start of the evidentiary hearing; and (2) reducing from 90 to 60 days the period for the presiding officer to issue its initial decision following the end of the evidentiary hearing. (NEI 13)

NRC Response: The Commission does not agree that the Model Milestones in Appendix B to 10 CFR Part 2 should be modified to adopt the two changes suggested by

the commenter. The 175 day time period provides for, among other things, scheduling and holding a pre-hearing conference, issuance of the presiding officer's order following the prehearing conference, mandatory disclosures, preparation of summary disposition motions, issuance of presiding officer orders on such motions, preparation of pre-filed written testimony, suggested presiding officer questions based upon the pre-filed testimony, and any motions for cross-examination together with cross-examination plans. It may well be that, with the particular parties involved or matters at issue in any individual case, the schedule can be shortened by the presiding officer. But, given the activities outlined above, the Commission does not believe that the 175 day period is unreasonable or should be significantly shortened at this time.

The Commission believes that the 90 day period provided for issuance of a presiding officer decision is reasonable, given the likelihood – as described above - that the first set of combined license application hearings may be complex and raise issues of first impression for the NRC. If, however, the issues to be addressed in an initial decision are small in number, simple in nature and lack complexity, enabling the presiding officer to issue the initial decision in a shorter period of time, the Commission expects the presiding officer to do so rather than taking the full 90 day period.

The Commission also notes that the Model Milestones were adopted on April 20, 2005 (70 FR 20457), and have yet to be applied in full in any early site permit or combined license proceeding. Hence, the NRC has yet to develop any extensive experience on their application in such proceedings. Absent some fundamental problem or error with the Model Milestones – which the commenter has not described – the Commission is unwilling to modify the Model Milestones at this time. Once the Commission has had greater experience with the conduct of combined license application hearings, the Commission will revisit the Model Milestones to see if adjustments are desirable or if a specific schedule of milestones should be established

for early site permit and combined license proceedings. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Other Comments:

Comment: The provisions in the draft Policy Statement (in Section B.1) regarding the finality of COL proceedings should be revised to be consistent with a recent decision by the U.S. Court of Appeals in which the Seventh Circuit held that if all of an intervenor's contentions are resolved by the Licensing Board, then the Board's decision is final agency action with respect to that intervenor.

(Morgan Lewis 5)

NRC Response: The Commission agrees that the draft Policy Statement could be misinterpreted on this score. Accordingly, the Commission has modified the pertinent provision of the Policy Statement to state that "a decision on common issues would become final agency action if it resolves a specific intervenor's contentions in a proceeding on an individual application."

Comment: It is not an insubstantial change in the rules to now state the Commission, presiding officer on any request for hearing filed under § 52.103, will, by fiat, "designate the procedures under which the proceeding shall be conducted." A bit of rulemaking might be in order well before commencement of extraordinary hearings before the Commission. (UCS 1A) NEI recommends that the NRC identify the hearing procedures to be used in the 10 CFR 52.103(a) ITAAC

compliance hearings in the near term and certainly well before the first such hearing is imminent. (NEI 8)

NRC Response: Section 189a.(1)(B)(iv) of the Atomic Energy Act explicitly authorizes the Commission to establish procedures for ITAAC compliance hearings. This AEA provision has been reflected in Commission rules since 1992. ITAAC compliance hearing procedures warrant in-depth consideration, which would unduly delay the issuance of the Policy Statement. The Commission believes it appropriate to first issue guidance on proceedings on COL applications, which are indeed imminent, before turning to ITAAC compliance hearings. While the Commission is not addressing ITAAC compliance hearing procedures in this Policy Statement, the Commission intends to do so “well before” the first such hearing, as both intervenor and industry commenters request. The Commission, however, does not believe it necessary to establish such procedures by rule, and retains the discretion to specify such procedures in a future policy statement or on a case-by-case basis by order.

Comment: 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. 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. (Curran 5)

NRC Response: The Commission agrees that the portion of the draft Policy Statement to which the comment is addressed could be misunderstood, but disagrees with the comment’s underlying premise. Specifically, the Commission need not resolve

all safety issues in order to perform the environmental evaluation required in connection with a request for an LWA. Rather, the Commission need only resolve those safety issues identified in 10 CFR 50.10 as needing resolution before the Commission may issue an LWA. The Commission has revised the Policy Statement to eliminate the ambiguity identified in the comment.

Comment: The final Policy Statement should incorporate the following revision: “In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request, *unless the applicant specifically requests otherwise.*” (NEI 2A) (additional suggested text in italics)

NRC Response: The presiding officer already has the authority to modify the schedule of a proceeding consistent with fairness to all parties and the expeditious disposition of the proceeding. See 10 CFR 2.319, 2.332, and 2.334. In this regard, the presiding officer must consider the interests of all parties, as well as the overall schedule, and not just the interests of the applicant. Accordingly, the Commission declines to add the suggested language to this portion of the Policy Statement.

Comment: The final Policy Statement should incorporate the following revision: “Specifically, if an applicant requests [an LWA] as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing [an LWA], *up to and including an early partial decision on the LWA.*” (NEI 2B) (additional suggested text in italics)

NRC Response: “Resolution” of issues prerequisite to issuing an LWA necessarily includes a Licensing Board decision on those issues. To add the suggested language would be redundant and possibly confusing. Accordingly, the Commission declines to add the suggested language.

Comment: The draft Policy Statement should provide guidance for a proceeding in which a COL application references an early site permit (ESP) application or an application for ESP amendment, comparable to guidance set forth for COL applications which reference a design certification application. (Morgan Lewis 2, NEI 5)

NRC Response: The Commission agrees with this comment, and has modified the Policy Statement accordingly.

Comment: 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. A COL license condition premised on promulgation of the DC rule could be imposed, allowing any judicial challenge to be raised in a timely manner without adversely impacting the COL. (GE-Hitachi 2, NEI 7)

NRC Response: As the comment recognizes, the AEA requires the NRC to make certain findings before issuing a license. While a license condition may, in some instances, impose specific design or operational requirements to allow the NRC to make the required findings, a license condition may not be used to defer the required findings beyond the issuance of the license, *e.g.*, in order to complete a rulemaking. The Commission believes that the approach proposed in the comment may be inconsistent with the AEA in this respect, and so declines to adopt it.

Comment: The final Policy Statement should clarify the definition of completeness in the context of whether an application is acceptable for docketing, particularly given Commission approval of the Combined License Review Task Force recommendation to extend the duration and broaden the scope of the NRC licensing acceptance reviews. (NEI 1)

NRC Response: The NRC staff is developing detailed guidance on this subject. Such guidance is beyond the scope of this Policy Statement and will not be addressed in it.

Comment: The Commission should seek legislation to eliminate mandatory uncontested hearings. (NEI 9)

NRC Response: The question of whether legislation on a particular matter should be sought is beyond the scope of the Policy Statement. The Commission is not modifying the Policy Statement in response to this comment.

Comment: The Commission should commence COL licensing hearings based on the availability of draft licensing documents where circumstances warrant. (NEI 11)

NRC Response: We have recently addressed this question in our decision in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392 (2007). In that decision, we held that the Licensing Board, pursuant to 10 CFR 2.332(d), may not commence a hearing on environmental issues before the final environmental impact statement has been issued. *Id.* at 394. Hearings may be held on safety issues, however, prior to the staff's publication of its safety evaluation. The commenter has not identified any reason for us to revisit that decision, which provides the basis for our position on the matter, and we decline to do so.

Comment: Commission policy should seek to ensure the NRC staff's timely completion of licensing reviews for new plant applications. (NEI 12)

NRC Response: The NRC has, for the last several years, been diligently preparing to review applications to build and operate new reactors. Part of that preparation has involved significant NRC staff effort in planning for timely reviews that assure that the agency discharges its duties under the Atomic Energy Act and NEPA. These efforts have been and continue to be reflected in the agency's Strategic Plans

and budget requests, among other statements. The commenters can be assured that the NRC is committed to timely reviews provided it receives complete, high quality information from applicants.

In closing, the Commission notes that several commenters offered general statements of support or criticism of the Commission's licensing process or parts of that process. While the Commission acknowledges those comments, they do not raise any specific issue related to the Policy Statement, and no response to them is necessary.

STATEMENT OF POLICY ON CONDUCT OF
NEW REACTOR LICENSING PROCEEDINGS

CLI-08-07

I. INTRODUCTION

Because the Commission has received the first several applications for combined licenses (COLs) for nuclear power reactors and expects that several more applications for COLs will be filed within the next two years, the Commission has reexamined its procedures for conducting adjudicatory proceedings involving power reactor licensing. Such examination is particularly appropriate since the Commission will be considering these COL applications at the same time it expects to be reviewing various design certification and early site permit (ESP) applications, and the COL applications will likely reference design certification rules and ESPs, or design certification and ESP applications. Hearings related to the COL and ESP applications will be conducted within the framework of our Rules of Practice in 10 CFR Part 2, as revised in 2004 and further updated in 2007 to reflect the revisions to 10 CFR Part 52, and the existing policies applicable to adjudications. The Commission has, therefore, considered the differences between the licensing and construction of the first generation of nuclear plants, which

involved developing technology, and the currently anticipated plants, which may be much more standardized than previous plants.

We believe that the 10 CFR Part 2 procedures, as applied to the 10 CFR Part 52 licensing process, will provide a fair and efficient framework for litigation of disputed issues arising under the Atomic Energy Act of 1954, as amended (Act) and the National Environmental Policy Act of 1969, as amended (NEPA), that are material to applications. Nonetheless, we also believe that additional improvements can be made to our process. In particular, the guidance stated in this policy statement is intended to implement our goal of avoiding duplicative litigation through consolidation to the extent possible.

The differences between the new generation of designs and the old, including the degree of standardization, as well as the differences between the 10 CFR Part 50 and 10 CFR Part 52 licensing processes, have led the Commission to review its procedures for treatment of a number of matters. Given the anticipated degree of plant standardization, the Commission has most closely considered the potential benefits of the staff's conducting its safety reviews using a "design-centered" approach, in which multiple applicants would apply for COLs for plants of identical design at different sites, and of consolidation of issues common to such applications before a single Atomic Safety and Licensing Board (licensing board or ASLB). The Commission has also considered its treatment of Limited Work Authorization requests; the timing of litigation of safety and environmental issues; and the order of procedure for hearings on inspections, tests, analyses, and acceptance criteria (ITAAC), which are completed before fuel loading. In considering these matters, the Commission sought to identify procedural measures within the existing Rules of Practice to ensure that particular issues are considered in the agency proceeding that is the most appropriate forum for resolving them, and to reduce unnecessary burdens for all participants.

The new Commission policy builds on the guidance in its current policies, issued in 1981 and 1998, on the conduct of adjudicatory proceedings, which the Commission endorses. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (July 28, 1998), 63 FR 41872 (August 5, 1998); *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (May 20, 1981), 46 FR 28533 (May 27, 1981). The 1981 and 1998 policy statements provided guidance to licensing boards on the use of tools, such as the establishment of and adherence to reasonable schedules, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Since the Commission issued its previous statements, the Rules of Practice in 10 CFR Part 2 have been revised, and licensing proceedings are now usually conducted under the procedures of Subpart L, rather than Subpart G. See “Changes to Adjudicatory Process,” Final Rule, 69 FR 2182 (January 14, 2004). In addition, we have recently amended our licensing regulations in 10 CFR Parts 2, 50, 51 and 52 to clarify and improve the 10 CFR Part 52 licensing process. This statement of policy thus supplements the 1981 and 1998 statements.

With both the recent revisions to 10 CFR Part 2 and this guidance, the Commission’s objectives remain unchanged. As always, the Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing processes, and to enable the development of an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In the context of new reactor licensing under 10 CFR Part 52, members of the public should be afforded an opportunity for hearing on each genuine issue in dispute that is material to the particular agency action subject to adjudication. By the

same token, however, applicants for a license should not have to litigate each such issue more than once.

The Commission emphasizes its expectation that the licensing boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its licensing boards to consider implementing in individual proceedings, if appropriate, to minimize burdens on all parties involved. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. SPECIFIC GUIDANCE

Current adjudicatory procedures and policies provide the latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 and 1998 policy statements, the Commission encouraged licensing boards to use a number of techniques for effective case management in contested proceedings. Licensing boards and presiding officers should continue to use these techniques, but should do so with regard for the new licensing processes in 10 CFR Part 52 and the anticipated high degree of new plant standardization, which may afford significant efficiencies.

The Commission's approach to standardization through design certification has the potential for resolving design-specific issues in a rule, which subsequently cannot be challenged through application-specific litigation. See 10 CFR 52.63 (2007). Matters common to a particular design, however, may not have been resolved even for a

certified design. For example, matters not treated as part of the design, such as operational programs, may remain unresolved for any particular application referencing a particular certified design. Further, site-specific design matters and satisfaction of ITAAC will not be resolved during design certification. The timing and manner in which associated design certification and COL applications are docketed may affect the resolution of these matters in proceedings on those applications, *e.g.*, with respect to what forum is appropriate for resolving an issue. As discussed further below, a design-centered review approach for treating such matters in adjudication may yield significant efficiencies in Commission proceedings.

As set forth below, the Commission has identified other approaches, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. See, *e.g.*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners. We begin with the docketing of applications.

A. INITIAL MATTERS

1. Docketing of Applications

The rules in Part 52 are designed to accommodate a COL applicant's particular circumstances, such that an applicant may reference a design certification rule, an ESP, both, or neither. See 10 CFR 52.79. The rules also allow a COL applicant to reference a design certification or ESP application that has been docketed but not yet granted.

See 10 CFR 52.27(c) and 52.55(c). Further, we have changed the procedures in § 2.101 to address ESP, design certification, and COL applications, in addition to construction permit and operating license applications. Accordingly, a COL applicant may submit the safety information required of an applicant by §§ 52.79 and 52.80(a) and (b) apart from the environmental information required by § 52.80(c), as is now permitted by § 2.101(a)(5). In addition, we have lengthened the time allowed between submission of parts of an application under § 2.101(a)(5) from six to eighteen months.

Notwithstanding these procedures, the Commission can envision a situation in which an applicant might want to present a particular ESP or COL application for docketing in a manner not currently authorized. For example, an applicant might wish to apply for a COL for a plant identical to those of other applicants under the design-centered approach, and request application of the provisions of 10 CFR Part 52, Appendix N and Part 2, Subpart D, before it has prepared the site- or plant-specific portion of the application. Such an applicant might not be prepared to submit its application as required by the rules, even considering the flexibility afforded by § 2.101(a)(5).

Under such circumstances, the Commission would be favorably disposed to the NRC staff's entertaining a request for an exemption from the requirements of § 2.101. Such an exemption request could be granted if it is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Moreover, because this is a procedural rule established for the effective and efficient processing of applications, the Commission can exercise its inherent authority to approve such exemptions based on similar considerations of effectiveness and efficiency. The Commission strongly discourages piecemeal submission of portions of an application pursuant to an exemption unless such a procedure is likely to afford significant advantages to the design-centered review approach described in more detail

below. The Commission intends to monitor requests for exemptions from the requirements of § 2.101, and to issue a case-specific order governing such matters if warranted. Whether a COL application is submitted pursuant to § 2.101 or an exemption, the first part of an application submitted should be complete before the staff accepts that part of the application for docketing. Similarly, the staff should not docket any subsequently submitted portion of the application unless it is complete.

2. Notice of Hearing

As required by § 2.104(a), a Notice of Hearing on an application is to be issued as soon as practicable after the application is docketed. A Notice of Hearing for a complete COL application should normally be issued within about thirty (30) days of the staff's docketing of the application. Section 2.101(a)(5), which provides for submitting applications in two parts, does not specify when the Notice of Hearing should be issued, nor is it clear when a Notice of Hearing would be issued for an application filed in parts under an exemption from § 2.101. With two exceptions, the Commission believes it most efficient to issue a Notice of Hearing only when the entire application has been docketed. The first exception is a construction permit application submitted in accordance with § 2.101(a-1), which results in a decision on early site review. The second exception involves circumstances in which: (1) a complete application is submitted; (2) one or more other applications that identify a design identical to that described in the complete application are submitted; and (3) another application is incomplete with respect to matters other than those common to the complete application. Under such circumstances, the Commission will give notice of the hearing on the complete application, and give notice of the hearing on the other application with respect to the matters common to the complete application. The Commission determination in this regard will consider the extent to which any notice is consistent with the timely completion of staff reviews using the design-centered approach and with the efficient

conduct of any required hearing, with due regard for the rights of all parties. Upon submission of information completing the other application, the Commission would give notice of a hearing with respect to that information. Under all other circumstances, the Commission will issue a Notice of Hearing only when a complete application has been docketed in order to avoid piecemeal litigation.

3. Limited Work Authorizations

Section 50.10 contains provisions for limited work authorizations, which allows certain construction activities on production and utilization facilities to commence before a construction permit or combined license is issued. The Commission has redefined the term “construction” in 10 CFR 50.10, as well as the provisions governing limited work authorizations. Accordingly, we are providing additional guidance regarding limited work authorizations.

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. This may lead to hearings on the safety and environmental matters specified in 10 CFR 50.10 before commencement of hearings on other issues. Such considerations should be incorporated into the milestones set for each proceeding in accordance with 10 CFR Part 2, Appendix B.

B. TREATMENT OF GENERIC ISSUES

1. Consolidation of Issues Common to Multiple Applications

The Commission believes that generic consideration of issues common to several applications may well yield benefits, both in terms of effective consideration of issues and efficiency. Such benefits would accrue not only to the staff review process,

but also to litigation of such matters before the licensing board. We acknowledge that consideration of generic matters common to several applications may be possible in several contexts. For example, an applicant might seek staff review of a corporate program such as quality assurance or security that is common to several of its applications. If contentions on such a program are admitted with respect to more than one application, consolidation of such contentions before a single licensing board may result in more efficient decision making, as well as conserving the parties' resources. Licensing boards should consider consolidating proceedings involving such matters, pursuant to an applicant's motion or pursuant to their own initiative under § 2.317(b). In addition, different applicants may seek COLs for plants of identical design at multiple sites, as in the design-centered review approach, and may therefore seek to implement the provisions of 10 CFR Part 2, Subpart D. In this regard, we have amended Subpart D to Part 2 and Appendix N to 10 CFR Part 52 to provide explicit treatment of COL applications for identical plants at multiple sites.

Because we believe that the design-centered approach is the chief example of circumstances in which generic consideration of issues common to several applications may yield benefits, we discuss that approach in detail below. While much has changed since we first promulgated Subpart D in 1975, we believe many of the concepts originally underpinning Subpart D still apply today, and we presume that Subpart D procedures, as well as other applicable Rules of Practice in 10 CFR Part 2, will be applied to applications employing a design-centered review approach. Our vision for the implementation of a "design-centered" approach under the procedures of Subpart D is set forth below.

As indicated above, issues, such as those involving operational programs or design acceptance criteria,¹ common to several applications referencing a design certification rule or design certification application may be most effectively and efficiently treated with a single review in a “design-centered” approach and, subsequently, in a single hearing. In order to achieve such benefits, however, applicants who intend to apply for licenses for plants of identical design and request the staff to employ the design-centered review approach should submit their applications simultaneously. Subpart D nonetheless affords the licensing board discretion to consolidate applications filed close in time, if this will be more efficient and otherwise provide for a fair hearing. While not required, we believe applicants for COLs for plants of identical design should consolidate the portions of their applications containing common information into a joint submission. In doing so, each applicant would also submit the information required by §§ 50.33(a) through (e) and 50.37 and would identify the location of its proposed facility, if this information has not already been submitted to the Commission.

Appendix N requires that the design of those structures, systems, and components important to radiological health and safety and the common defense and security described in separate applications be identical in order for the Commission to treat the applications under Appendix N and Subpart D. The Commission believes that any variances or exemptions requested from a design certification in this context should be common to all applications. In addition, while not required, the Commission encourages applicants to standardize the balance of their plants insofar as is practicable.

Subpart D provides flexibility in the hearing process. Each application will necessarily involve a separate proceeding to consider site-specific matters, and the

¹ Design acceptance criteria are a special type of ITAAC that are used to verify the resolution of design issues for which completed design information was not provided in the design certification application.

required hearings may, as appropriate, be comprised of two (or more) phases, the sequence of which depends on the circumstances. For any of the phases, the hearings may be consolidated to consider common issues relating to all or some of the applications involved.

An applicant requesting treatment of its application under the design-centered approach may seek to submit separate portions of the application at different times, pursuant to § 2.101(a)(5) or an exemption from § 2.101, as discussed above. Under such circumstances, the Commission intends to issue a Notice of Hearing for the portion of the application to be reviewed under the design-centered approach, and a second notice limited to the portion of the application not treated under the design-centered review approach upon submission of the complete application. Such a procedure 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.

The staff would review the common information in the applications, or in the joint submission, for sufficiency for docketing and, if acceptable, would docket this information as a portion of each application. Each application would be assigned a docket number in connection with the first portion of the application docketed, which could be the common submission. The applicants should designate one applicant to be the single point of contact for the staff review of this common information, and to represent the applicants before the licensing board.

Consistent with our guidance set forth above, we would expect to issue a Notice of Hearing only upon the docketing of at least one complete application that includes the common information. The Notice of Hearing will not only provide an opportunity to petition to intervene in the proceeding on the complete individual application, but will also provide such an opportunity with respect to the information common to all the

applications, which would be docketed separately. Accordingly, upon issuance of such a notice, the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP or Panel) should, as is the normal practice, designate a licensing board to preside over the application-specific proceeding, and should also designate a licensing board to preside over the consolidated portions of the applications. Initially, these two licensing boards could be the same.

A person having standing with respect to one of the facilities proposed in the applications partially consolidated would be entitled to petition for intervention in the proceeding on the common information. Such a petitioner would be required to satisfy the other applicable provisions of § 2.309 with respect to the application being contested to be admitted as a party to the proceeding on the common information. Petitioners admitted as parties to such a proceeding with respect to a proposed facility for which the application remains incomplete at the time of the initial Notice of Hearing would have an opportunity to propose contentions with respect to the rest of the application upon the docketing of a complete application, but would not need to demonstrate standing a second time. Those persons granted intervention are required to designate a lead for common contentions, as required by § 2.309(f)(3); as stated above, applicants submitting common information under the design-centered approach would likewise designate a representative to appear before the licensing board. In addition, the presiding officer may require consolidation of parties in accordance with § 2.316.

The Commission is willing to consider other methods of managing proceedings involving consideration of information common to several applications. For example, the Commission does not intend to foreclose the Chief Judge of the Panel from designating a licensing board to preside over common portions of applications on the motion of the applicants, even if separate proceedings have already been convened on one or more of the applications involved. In such a case, however, the applicants should jointly identify

the common portions of their respective applications when requesting the Chief Judge to take such action. Petitioners admitted as parties to any affected proceeding would of course have the right to answer such a motion.

As stated above, upon issuance of a Notice of Hearing for a complete plant-specific application that includes information on “common issues,” the Chief Judge of the Panel should designate a licensing board to preside over the plant-specific portion of each application that is then complete. Each licensing board, whether designated to consider the common issues or a specific application, should manage its respective portion of the proceedings with due regard for our 1981 and 1998 policy statements. We emphasize that the Chief Judge of the Panel should not designate another licensing board to consider specific aspects of a proceeding unless the standards we enunciated in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310-11 (1998) for doing so are met. These standards are that the proceeding involve discrete and separable issues; that multiple licensing boards can handle these issues more expeditiously than a single licensing board; and that the proceeding can be conducted without undue burden on the parties. *Id.*

An initial decision by the licensing board presiding over a proceeding on a joint submission containing information common to more than one plant-specific application will be a partial initial decision for which a party may request review under § 2.341 (as is also provided in Subpart D) and which we may review on our own motion. Such a decision would become part of each initial decision in the individual application proceedings, which will become final in accordance with the regulation that applies depending on which subpart of our Rules of Practice has been applied in a proceeding on a particular application (e.g., § 2.713 under Subpart G; § 2.1210 under Subpart L). Accordingly, a decision on common issues would become final agency action if it resolves a specific intervenor’s contentions in a proceeding on an individual application.

Revisions of specific applications during the review process could result in formerly common issues being referred to the licensing board presiding over a specific portion of one or more applications. These issues would be resolved in the normal course of adjudication, but may well result in delay in final determination of the individual application.

2. COL Applications Referencing Design Certification and ESP Applications

With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that “licensing boards should not accept in individual license 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). In accordance with these decisions, a licensing board should treat the NRC’s docketing of a design certification application as the Commission’s determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. 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 rulemaking, 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.

Similar considerations apply if a COL applicant references an ESP application that has not been granted. In such a case, the Licensing Board presiding over the proceeding on the COL application should refer contentions within the scope of the ESP proceeding to the Licensing Board presiding over the ESP proceeding.

An individual applicant, nonetheless, may choose to request that the application be treated as a “custom” design, and thereby resolve any specific technical matter in the context of its individual application. An applicant might choose such a course if, for example, the referenced design certification application were denied, or the rulemaking delayed. The application-specific licensing board would then consider contentions on design issues, which otherwise would have been treated in the design certification proceeding. Similarly, a COL applicant referencing a design certification application may request an exemption from one or more elements of the requested design certification, as provided in § 52.63(b) and Section VIII of each appendix to 10 CFR Part 52 that certifies a design. As set forth in those provisions, such a request is subject to litigation in the same manner as other issues in a COL proceeding. Since 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. Such matters would be considered by an application-specific licensing board. 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.

COL applicants should coordinate with vendors applying for certified designs to ensure that decisions on design certification applications do not impede decisions on COL applications. If design certification is delayed, a licensing board considering common technical issues may likewise be delayed.

3. Subsequent Applications Referencing a Design Certification Rule

If the Commission grants initial COL applications referencing a particular design certification rule, the Commission believes it likely that subsequent COL applicants will also reference that design certification rule. In this event, the Commission would expect to develop additional processes to facilitate coordination of proceedings on such applications. We observe, however, that an issue associated with such matters as operational programs or design acceptance criteria may be resolved through the design-centered review approach for initial applications containing common information, but we do not intend to impose any resolution so obtained on subsequent COL applicants. While there is no requirement to adopt a previously-approved resolution of an issue, and subsequent applicants are free to use the most recent state-of-the-art methods to resolve such issues, we nevertheless urge such applicants to consider adopting previous resolutions in order to maximize plant standardization. If a COL applicant adopts an approach to a technical issue previously found acceptable, no further staff review of the adequacy of the approach is necessary. Rather, the staff review should be limited to verification that the applicant has indeed adopted the previously approved approach and will properly implement it, and, for technical issues that depend on site-specific factors, that the previously-approved approach applies to the applicant's proposed facility.

C. ITAAC

In first promulgating 10 CFR Part 52 in 1989, we determined that hearings on whether the acceptance criteria in a COL have been met (ITAAC-compliance hearings) would be held in accordance with the Administrative Procedure Act (APA) provisions applicable to determining applications for initial licenses, but that we would specify the procedures to be followed in the Notice of Hearing. See 10 CFR 52.103(b)(2)(i) (1990); 54 FR 15395 (April 18, 1989). In enacting the Energy Policy Act of 1992, Congress

subsequently confirmed our authority to adopt 10 CFR Part 52, and by statute accorded us additional discretion to determine procedures, whether formal or informal, for ITAAC-compliance hearings. See Atomic Energy Act section 189a.(1)(B)(iv), 42 U.S.C. § 2239(a)(1)(B)(iv). We therefore amended § 52.103(d) to provide that we would determine, in our discretion, “appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under [§ 52.103(a)].”

While we recognize that specification of procedures for the treatment of requests for hearings on ITAAC would lend some predictability to the ITAAC compliance process, we are not yet in a position to specify such procedures, since we have not approved even one complete set of ITAAC necessary for issuing a COL. Further, ITAAC-compliance hearings are likely several years distant, and we have no experience with the type and number of hearing requests that we might receive with respect to ITAAC compliance. While it may not be necessary to consider the first requests for ITAAC-compliance hearings in order for us to determine the procedures appropriate to govern such hearings, we believe it premature to specify such procedures now. In addition, the staff is now formulating guidance on the times necessary for the staff to consider different categories of completed ITAAC, and this guidance should assist licensees in scheduling and performing ITAAC so as to minimize the critical path for staff consideration of completed ITAAC.

In view of the above considerations, we have identified one measure 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. In acting as the presiding officer under these circumstances, we will make three initial determinations. First, we will decide whether the person requesting the hearing has shown, *prima facie*, that one or more of the acceptance criteria in the COL have not been, or will not be met, and the attendant public health and safety consequences of

