Enclosure 2

Alternatives Approaches on Interlocutory Appeals

The NRC is seeking public comments as to whether to amend 10 CFR Part 2 regarding interlocutory review of rulings by a presiding officer granting or denying a request for hearing or intervention petition, including late-filed requests or petitions. Currently, § 2.311(c) effectively allows the requestor or petitioner to appeal an order wholly denying an intervention petition or request for hearing. Therefore, if the presiding officer grants the intervention petition and denies the admissibility of one or more proposed contentions, the petitioner may not appeal the denial of any proposed contentions until the presiding officer issues a final decision at the end of the proceeding. Conversely, any party other than the petitioner may immediately appeal the order on the grounds that the requestor or petitioner lacks standing or that all of their proposed contentions were inadmissible. Although this basic scheme for interlocutory review of intervention petitions and requests for hearing has been in place since 1972 (*see* 37 Fed. Reg. 28,710 (Dec. 29, 1972)), there have been some suggestions that a change to the current practice might be warranted to either provide earlier appellate review of contention admissibility or, alternatively, to discourage frivolous appeals. The NRC is considering two options for a potential amendment. The NRC requests comment on the options, and possible rule language that would implement each option.

Option 1

The first option would amend § 2.311(c) and (d) to allow any party to appeal an order granting a request for hearing or petition to intervene in whole or in part within 25 days of the presiding officer's issuance of the order. This amendment would effectively allow all parties to immediately appeal rulings on the admissibility of any particular contention (including late-filed contentions). The NRC is considering adopting the following rule language if it were to adopt this option:

> § 2.311(c) An order granting or denying a request for hearing or a petition to intervene in whole or in part, including late-filed requests or petitions, is appealable within 25 days of the issuance of the order on the question as to whether the petition should have been granted in whole or in part.
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> (d) An order denying a request for access to the information described in paragraph (a) of this section is appealable by the requestor on the question as to whether the request should have been granted. An order granting a request for access to the information described in paragraph (a) of this section is appealable by a party other than the requestor on the question as to whether the request for access to the information described in paragraph (a)(3) of this section should have been denied in whole or in part. However, such a question with respect to SGI may only be appealed by the NRC staff, and such a question with respect to SUNSI may be appealed only by the NRC staff or by a party whose interest independent of the proceeding would be harmed by the release of the information.

The potential advantage of amending § 2.311 is that it allows early resolution of contention admissibility issues. Specifically, it eliminates the possibility that, after a Board has issued its final order in the proceeding, the Commission on appeal will remand the proceeding to the Board for consideration of a contention that the Commission has determined should have been admitted and thereby prolong the proceeding. Consistent with the general principles applied by courts and agencies that favor limited interlocutory review, the disadvantages of departing from the current practice under § 2.311 include the potential increase in the Commission's appellate workload at the early stage of a proceeding and the attention given to matters that may be unnecessary to address at all because a party decides not to pursue the matter at the conclusion of the proceeding or further developments, such as settlement, obviate the need to address the admissibility question. This amendment would not alter a party's ability to appeal orders on the question of standing.

Option 2

The second option would delete § 2.311(d)(1) in order to remove the right of parties other than the petitioner to appeal orders granting an intervention petition. This would effectively leave all parties with similar appellate rights, including the right to seek interlocutory review under § 2.341(f)(2). The potential advantage of this option is that it would reduce the Commission's appellate workload by removing any incentive for parties other than the petitioner to oppose all proffered contentions solely to preserve their right to appeal. The main disadvantage would be removing the means by which an early determination can be made as to the proper admission of some contentions.