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NUCLEAR ENERGY INSTITUTE

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May 16, 2011

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

SUBJ: NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2
Docket ID NRC-2008-0415

Dear Madam Secretary:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to submit comments on the Nuclear Regulatory Commission's proposed amendments to its rules of practice in 10 CFR Part 2 governing agency adjudications. See 76 Fed. Reg. 10,781 *et seq.* (Feb. 28, 2011). These proposed revisions are intended to correct errors and omissions from the 2004 rulemaking amending 10 CFR Part 2, clarify the intended meaning of certain provisions in Part 2, and "promote fairness, efficiency, and openness" in adjudicatory proceedings. NEI's comments on specific proposed changes are set forth in Section I of the attachment to this letter.

In our view, the more noteworthy proposed changes include proposed revisions to 10 CFR Section 2.305 (methods of service), Section 2.309(c) and (f) (the "good cause" factors for evaluating non-timely filings), Section 2.309(c)(5) (environmental contentions), Section 2.311 (deadlines for interlocutory appeals), Section 2.335 (waiver requirements for considering Commission rules in individual adjudications), Section 2.336 (schedule for mandatory disclosure updates), Section 2.340 (issuance of licensing decisions before hearing completion), Section 2.341 (deadlines for filing/briefing petitions for review, Commission review) and Section 2.704 (mandatory disclosures). Our comments address these and other specific proposed modifications to Part 2 requirements.

Additionally, NRC seeks stakeholder comment on specific questions relating to the scope of the NRC Staff's mandatory disclosure obligation and interlocutory review of ASLB rulings (see

[1] 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 entities involved in the nuclear energy industry.

76 Fed. Reg. 10,798-91). NEI's comments on these topics are set forth in Section II of the attachment to this letter.

Please do not hesitate to contact me if there are any questions concerning these comments.

Sincerely,

Ellen C. Ginsberg

Ellen C. Ginsberg

Attachment

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05/16/2011

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE
NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2
Docket ID NRC-2008-0415

The Nuclear Energy Institute (NEI)[1] is pleased to submit the following comments regarding the Nuclear Regulatory Commission's proposed amendments to its rules of practice in 10 CFR Part 2 governing agency adjudications. See 76 Fed. Reg. 10,781 *et seq.* (Feb. 28, 2011). The last substantive changes to Part 2 were promulgated in 2004. The current proposed amendments are intended to correct errors and omissions from that rulemaking, clarify certain provisions in 10 CFR Part 2, and "promote fairness, efficiency, and openness" in adjudicatory proceedings. NEI's comments on specific proposed changes are set forth in Section I below. Our additional comments on other issues, as solicited by the NRC, are set forth in Section II.

As background, NRC states that while the proposed amendments are procedural rules exempt from the notice and comment provisions of the Administrative Procedure Act (APA) and NRC regulations, the agency is seeking public comment to benefit from stakeholder input. NRC also addresses the "grandfathering" question, noting that new and amended requirements in the final rule will not be retroactively applied to adjudicatory decisions and/or determinations issued before the effective date of the final rule. "[N]or would these requirements be retroactively imposed on parties, such that a party would have to compensate for past activities that were accomplished in conformance with the requirements in effect at the time, but would no longer meet the new or amended requirements in the final rule." See 76 Fed. Reg. 10,782.

I. NEI COMMENTS ON SPECIFIC PROPOSED AMENDMENTS TO PART 2

Revisions to 10 CFR Part 2 — *(Title)*

To better reflect the scope of its subparts and mirror the language of the APA, the NRC proposes to change the title of 10 CFR Part 2 from "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders" to "Agency Rules of Practice and Procedure." See 76 Fed. Reg. 10,782. NEI does not object to this revision.

Additionally, the NRC proposes to revise references to "presiding officer" throughout Part 2, to provide consistent use and capitalization of the term. See 76 Fed. Reg. 10,789. We believe these changes are appropriate.

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Revisions to 10 CFR § 2.4 — (*Definitions*)

NRC proposes to change the definition of "participant" in Section 2.4 to clarify that any individual or organization, *including States, local governments, and Federally-recognized Indian tribes,* that petitions to intervene or requests a hearing shall be considered a "participant." Additionally, NRC proposes to delete "affected" from the phrase "affected Federally-recognized Indian tribe" as used in the definition of "participant," because "affected Federally-recognized Indian tribe" applies only to Indian tribes that seek to participate in the NRC high-level waste repository proceeding. Federally-recognized Indian tribes do not have to be "affected Federally-recognized Indian tribes" in order to participate in other NRC licensing actions. See 76 Fed. Reg. 10,791, 10,796.

NRC also proposes changes to the definition of "NRC personnel" in Section 2.4 to eliminate outdated references to 10 CFR §§ 2.336 and 2.1018. See 76 Fed. Reg. 10,791, 10,796. NEI does not object to either of these proposed changes.

Part 2, Subpart A — Procedure for Issuance, Amendment, Transfer, or Renewal of a License, and Standard Design Approval

Revisions to 10 CFR § 2.101 — (*Filing of application*)

NRC proposes to revise Section 2.101 to change incorrect internal references to Section 2.101(g) to Section 2.101(f). (Currently there is no Section 2.101(g).) This correction would not change the intent or meaning of this provision. See 76 Fed. Reg. 10,791, 10,796. NEI does not object to these proposed corrections.

Revisions to 10 CFR § 2.105 — (*Notice of proposed action*)

NRC proposes to revise Section 2.105 by (i) adding to Section 2.105(a) a reference to the NRC's Web site, (ii) clarifying that the referenced "notice" in Section 2.105(b) is one that is published in the *Federal Register*; and (iii) replacing the specific deadline in Section 2.105(d) with a reference to "the time period included in Section 2.309(b)." See 76 Fed. Reg. 10,791, 10,796-97. NEI does not object to these changes.

Part 2, Subpart C — Rules of General Applicability

Revisions to 10 CFR § 2.305 — (*Service of documents; methods; proof*)

Section 2.305(c)(4) (*Method of service accompanying a filing*):

The NRC proposes to revise Section 2.305(c)(4) to provide that any "document" (rather than any "paper," as currently provided) served upon participants to the proceeding must be accompanied

by a signed certificate of service. See 76 Fed. Reg. 10,782, 10,791, 10,797. One effect of this revision would be to "clarify" (in the NRC's words) that a certificate of service that states only that the document is being served through the NRC's e-filing system (EIE) is *inadequate*:

> Section 2.305(c)(4) currently refers to "any paper," which could be interpreted to exclude electronic documents filed through the NRC's E-Filing system. The NRC is therefore proposing to clarify that a signed certificate of service must be included with "any document" served upon the parties in a proceeding under 10 CFR part 2. Under this rule, the certificate of service must include the name and address of each person upon whom service is being made (which for electronic submissions under the E-Filing system should include, at a minimum, the name and e-mail address used for service of each person in the E-Filing system service list for a proceeding upon whom service needs to be made) and the date and method of service. Because it is the responsibility of a participant submitting a document to the E-Filing system to comply with the service requirements, a certificate of service that simply states the document is being served "per the service list in the E-Filing system" without listing the names and addresses of each of those being served is insufficient to comply with § 2.305(c)(4). The NRC notes that § 2.304 requires that electronic documents be signed using a participant's digital certificate; in such circumstances it is not necessary to submit an electronic copy of the document that includes an actual signature. 76 Fed. Reg. 10,782.

NEI disagrees with this suggested change. Alternatively, we propose that any revision to Section 2.305(c)(4) be clarified to state the opposite: unless the presiding officer states otherwise, a certificate of service that simply states the document is being served 'per the service list in the E-Filing system' without providing names and addresses of those being served is sufficient to comply with Section 2.305(c)(4). Given that all parties are required to use the NRC's e-filing system absent unusual circumstances (or the need to submit documents under a protective order), NRC has failed to demonstrate any compelling reason why simply referencing the e-filing service for normal filings is not adequate.

It is the responsibility of each party to ensure that it has access to the EIE, so that it can access necessary documents filed by other parties. The parties uploading a document to the EIE have no way of knowing whether the other parties have received the EIE notice or have changed their e-mail address. For this reason, it is difficult for a party to state, with confidence, anything more than that he/she has uploaded the document to the EIE. Thus, the Commission should not require a party to attest to having performed a duty (*i.e.*, served the other parties) when that party has no control over the EIE system or the contact information provided by another party to the NRC. We recommend that the NRC permit parties to certify only that they filed a pleading with EIE unless special arrangements were made prior to the filing. This would conform to practice for electronic filing in many federal courts.

Section 2.305(g)(1) (*Service on the NRC staff*):

NRC proposes to revise Section 2.305(g)(1) to specifically provide for a method of service of documents on the NRC Staff if no attorney representing the NRC Staff has yet filed a notice of appearance in the proceeding and service is not being made through the E-Filing System. See 76 Fed. 10, 782, 10,791, Reg. 10,797. NEI does not object to this proposed change.

Revisions to 10 CFR § 2.309 — (*Hearing requests, petitions to intervene, requirements for standing, and contentions*)

Section 2.309(b)(5) (*Timing*):

NRC proposes to revise Section 2.309(b)(5) to specify that recipients of an order under 10 CFR 2.205(c) (orders imposing an NRC civil penalty) have the time specified in the order to file their answers. See 76 Fed. Reg. 10,782, 10,791. Currently, this provision does not specify a time for answers to Section 2.205(c) orders. In NEI's view, the correction of this omission is appropriate.

Sections 2.309(c) and (f) (*Subsequent submissions of petition/request or new or amended contentions*)

This is one of the most significant modifications proposed in this rulemaking. Currently, non-timely hearing requests and/or petitions must address each of the eight factors in 10 CFR 2.309(c) (*Non-timely filings*) as well as the requirements of Section 2.309(f)(2) (*Contentions*). The NRC proposes to revise this regulation to incorporate different "good cause" criteria to replace the existing factors that are to be applied by an NRC Atomic Safety and Licensing Board ("Licensing Board") to determine whether to consider "non-timely" hearing requests and new/amended contentions (late-filed contentions). See 76 Fed. Reg. 10,783, 10,791-92, 10,797. This change is described as an "update" and a "clarification" of the intent of the regulations. The proposed rule would modify this framework by incorporating the factors in Section 2.309(f)(2) into amended Section 2.309(c)(2)(i)-(iii), as follows:

> (c) *Subsequent submission of petition/request or new or amended contentions.*
>
> (1) Determination by presiding officer. Hearing requests, intervention petitions, and new or amended contentions filed after the deadlines in paragraph (b) of this section, will not be entertained absent a determination by the presiding officer that there is good cause for its submission after the deadlines in paragraph (b) of this section.
>
> (2) *Good cause.* To show good cause for a request for hearing, petition to intervene, or a new or amended contention filed after the deadlines in paragraph (b) of this section, the requestor or petitioner must demonstrate that:
>
> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

Under the amended rule, the showing made regarding these three "good cause" criteria would determine whether there is sufficient justification for non-timely filings made after the deadlines in Section 2.309(b). In place of the array of factors traditionally addressed in demonstrating good cause for late filings, the new emphasis would be on whether the underlying information supporting the non-timely filing was "not previously available," whether it is "materially different from information previously available," and whether the filing was made in a timely fashion based on the availability of the new information.[2]

The NRC specifically requests stakeholder comment on the effect of relying solely on "good cause" and eliminating the remaining late-filing factors. 76 Fed. Reg. 10,783. In our view, the Commission should *not* eliminate the eight late-filed factors in Section 2.309(c)(1). These late-filed factors should continue to apply fully, even in cases where contentions are filed after the initial hearing request only because the information on which they are based was not available until after the filing deadline. It is especially important that the eight late-filed factors be applied to a request for hearing or petition to intervene submitted after the initial deadline.

Although Licensing Boards, following the 2004 changes to 10 CFR Part 2, often focus primarily on the "good cause" factor in Section 2.309(c)(1), the requirement to apply the factors in 10 CFR § 2.309(c) did not change with the promulgation of the revised Part 2 at that time. *See* "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) ("If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding."). We believe the 2004 approach should be continued. The NRC should not casually eliminate decades of Commission adjudicatory practice in pursuit of simplified "non-timely" criteria.

We are concerned that simplifying the "good cause" criteria as NRC proposes could lead to additional litigation of untimely contentions that broaden the scope of a licensing proceeding at a late date, that are unlikely to assist in developing a sound record, or that duplicate the concerns of other parties to the proceeding. By eliminating most of the Section 2.309(c) criteria that the NRC has previously found necessary to ensure efficient adjudications, the proposed approach would also increase the likelihood that new requests for hearing or petitions to intervene would be granted late in the hearing process. There is no evidence that application of the balancing factors, in addition to the three-part "good cause" test, has led or would lead to inefficient and ineffective proceedings. To the contrary, the current approach has served the NRC well over the years. This existing approach *does not preclude* the filing of timely new contentions, and will continue to allow the granting of legitimate petitions. And, given that many new reactor licensing proceedings are far along in the adjudicatory process, changing the rules governing

[2] In this context, "not previously available" means that a requestor or petitioner cannot base a contention on a document or a report that does not yet exist or is not yet complete. 76 Fed. Reg. 10,791-92.

consideration of new or amended contentions and new requests for hearing/petitions to intervene could lead to unnecessary litigation of new issues eventually admitted for hearing under the proposed new (and less stringent) standards.

Further, we observe that application of only a three-part "good cause" test could, applied literally, lead to litigation of many contentions that would otherwise be inadmissible under the balancing factor test. Similarly, the proposed approach could lead to granting of requests for hearing/petitions to intervene that would otherwise be denied. For example, NRC Licensing Boards applying the three "good cause" criteria have on occasion admitted untimely contentions based on NRC documents that contain new information relative to the applicant's Environmental Report (ER) — where that information was nevertheless available during the course of the NRC Staff's review (*e.g.*, public utility commission decision that post-dates ER but pre-dates the issuance of an NRC Staff review document). At a minimum, the Commission should clarify that the agency's use of new "information or document" for purposes of "good cause" does not mean that a contention meets the good cause test based only on a new document that includes old information.

Section 2.309(c)(3) (*New petitioner*):

NRC also proposes to add a new Section 2.309(c)(3) to clarify that any non-timely new or amended petition to intervene must include new or amended proposed contentions if the petitioner seeks admission as a party. This provision also would require the petitioner to meet requirements relating to legal standing and contention admissibility in Section 2.309(d) and (f). See 76 Fed. Reg. 10,791-92, 10,797. NEI does not object to this change.

Section 2.309(c)(4) (*Party or participant*):

NRC proposes to add a new Section 2.309(c)(4) to require that any new or amended proposed contentions (also) meet the admissibility requirements in Section 2.309(f). This new provision would also clarify that a party or participant that has previously met legal standing requirements in the proceeding where the contention is filed would not have to do so again. See 76 Fed. Reg. 10,797. NEI does not object to this change.

Section 2.309(c)(5) (*Environmental contentions*):

NRC proposes to add a new Section 2.309(c)(5) to provide that for new or amended contentions arising under the National Environmental Policy Act (NEPA) and based on conclusions in a draft or final NRC environmental impact statement (EIS), environmental assessment (EA), or any supplements thereto, the party or participant "must show that the data or conclusions in the NRC's documents differ significantly from the data or conclusions in the applicant's environmental report." See 76 Fed. Reg 10,792, 10,797.

We agree with this revision but do not believe the proposed language goes far enough. NEI recommends that, as amended, Section 2.309(c)(5) also provide that the "differ significantly" test

or showing does not allow new contentions based on information that became available to the parties during the course of the NRC Staff's review. This will insure that interested persons raise concerns in a timely fashion after the *information* becomes available, rather than waiting until the NRC Staff completes its review. Further, the Commission should make clear in Section 2.309(c)(5) that new information in the DEIS, FEIS, or EA relative to the ER is not, by itself, sufficient to meet the good cause for late-filing standards. This "differ significantly" test should be *in addition to* the three "good cause" factors. Further, the Commission should clarify that similar considerations apply to NRC Staff Safety Evaluation Reports.

Section 2.309(h) (*States, local governmental bodies, and Federally-recognized Indian tribes seeking party status*):

NRC proposes to revise and move Section 2.309(d)(2), relating to participation of States, local governmental bodies, and Federally-recognized Indian tribes, to an amended Section 2.309(h). As amended, the text of Section 2.309(h)(1) would address several issues, including the following:

- Revised Section 2.309(h)(1) would correct the distinction between Federally-recognized Indian tribes and "affected" Federally-recognized Indian tribes. (The latter applies only in the context of the NRC high-level radioactive waste disposal facility proceeding.)

- Revised Section 2.309(h)(1) also would provide that if a State, local governmental body, or Federally-recognized Indian tribe seeks to participate as a party, it must submit a request for hearing or a petition to intervene with at least one admissible contention.

- Revised Section 2.309(h)(1) also would provide that if a State, local governmental body, or Federally-recognized Indian tribe seeks to participate as a party, it must designate a single representative for the hearing. If the hearing request is granted, the NRC would admit as a party only a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian tribe.

We agree with these proposed revisions.

As amended, Section 2.309(h)(2) would address standing issues, as follows:

- In NRC proceedings relating to an NRC production or utilization facility (as defined in 10 CFR 50.2) located within the boundaries of a State, local governmental body, or Federally-recognized Indian tribe, the State, local governmental body, or Federally-recognized Indian tribe seeking to participate as a party need not demonstrate legal standing to participate.

- In NRC proceedings relating to an NRC production or utilization facility located outside its boundaries, the State, local governmental body, or Federally-recognized Indian tribe seeking to participate as a party must demonstrate legal standing to participate.

We agree with these proposed revisions.

As amended, Section 2.309(h)(3) – the current Section 2.309(d)(2)(iii) – would apply only to an NRC licensing proceeding for a high-level radioactive waste repository. This provision would retain references to "affected" Federally-recognized Indian tribes and would mirror the definition of "party" in Section 2.1001. It would allow intervention in a 10 CFR Part 60 or Part 63 proceeding by the State and local governmental body in which such repository area is located and by any affected Federally-recognized Indian tribe if the requirements of 10 CFR 2.309(f) regarding contention admissibility are met. Other petitions for intervention must meet the requirements of 10 CFR 2.309(a) through (f). We agree with these proposed revisions.

Existing Section 2.309(h) (*Answers to requests for hearing and petitions to intervene*) would be re-designated as Section 2.309(i), and would be clarified to provide that the same deadlines will apply to answers and replies with respect to proposed new or amended contentions as apply to intervention petitions and hearing requests filed after the deadlines in Section 2.309(b). This is an appropriate clarification that conforms to generally accepted practice.

Revisions to 10 CFR § 2.311 — (*Interlocutory review of rulings on requests for hearings and petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information*)

NRC proposes to *extend from 10 to 25 days* after service of the order the time allowed to file certain permissible interlocutory appeals and briefs in opposition to an appeal. 76 Fed. Reg. 10,792, 10,798. Parties opposing the appeal would be allowed to file a brief in opposition within 25 days (rather than 10 days) after service of the appeal. As amended, the provision would continue to require that a supporting brief and any answer conform to the requirements in 10 CFR 2.341(c)(2). No other appeals from rulings on requests for hearings would be allowed.

We agree with the NRC that the additional time allowed could increase the quality of briefs on appeal. As the NRC also suggests, the extension of time occurs early in the hearing process and appears unlikely to affect the overall hearing schedule. While we are cautious about any delay in the hearing schedule, NEI does not object to this proposal. The proposal appears to reflect a reasonable allocation of time in the overall hearing process to what are potentially significant legal issues affecting the basic nature of the proceeding.

Revisions to 10 CFR § 2.314 — (*Appearance and practice before the Commission in adjudicatory proceedings*)

10 CFR § 2.314(c)(3) allows anyone disciplined under the rules to appeal the discipline to the Commission. NRC proposes to revise this provision to *extend from 10 to 25 days* the time

allowed to file an appeal with the Commission from an order disciplining a party. See 76 Fed. Reg. 10,784-85, 10,792, 10,798. NEI does not object to this proposed change, which appears unlikely to affect the overall hearing schedule and which may, as the NRC observes, "result in higher-quality appeals." Nonetheless, we note that the issues on such an appeal should be well-defined and would not seem to require the extension.

Revisions to 10 CFR § 2.315 — (*Participation by a person not a party*)

NRC proposes to revise existing Section 2.315(c) to state explicitly that interested States, local government bodies, and Federally-recognized Indian tribes that are not admitted as parties to a hearing but seek to participate "must take the proceeding as they find it." 76 Fed. Reg. 10,792, 10,798-99. Their participation "shall be limited to unresolved issues and contentions, and issues and contentions that are raised after the State, local governmental body, or Federally-recognized Indian tribe becomes a participant." 76 Fed. Reg. 10,798. This result, which is consistent with NRC practice, is also intended to preclude non-party participation from interfering with the schedule established for the proceeding. We believe this clarification is appropriate.

Revisions to 10 CFR § 2.319 — (*Power of the presiding officer*)

Section 2.319(l) currently authorizes a presiding officer to "Certify questions to the Commission for its determination, either in the presiding officer's discretion, or on motion of a party or on direction of the Commission." NRC proposes to revise this provision to authorize the presiding officer to "Refer rulings to the Commission under § 2.323(f)(1), or certify questions to the Commission for its determination, either in the presiding officer's discretion, or on petition of a party under § 2.323(f)(2), or on direction of the Commission." See 76 Fed. Reg. 10,785, 10,792, 10,799. This modification, which is intended to clarify the scope of the presiding officer's authority to refer rulings and certify questions, is consistent with the proposed changes regarding motions in Section 2.323. NEI does not object to this amendment.

NRC also proposes to add a new Section 2.319(r) to authorize a presiding officer to "Establish a schedule for briefs and oral arguments to decide any admitted contentions that, as determined by the presiding officer, constitute pure issues of law." Thus, an admitted contention that the presiding officer finds to contain legal issues only, would have to be decided solely on the basis of the briefs and/or oral arguments. See 76 Fed. Reg. 10,792, 10,799. NEI does not object to this amendment.

Revisions to 10 CFR § 2.323 — (*Motions*)

The NRC proposes to revise Section 2.323(f)(1) (*Referral and certifications to the Commission*) to allow the presiding officer to promptly refer a ruling to the Commission if, in his/her judgment, the presiding officer's decision "raises significant and novel legal or policy issues," or if prompt Commission decision is "necessary to materially advance the orderly disposition of the proceeding." See 76 Fed. Reg. 10,785, 10,792, 10,799. The existing referral criteria (whether prompt referral is necessary to prevent detriment to the public interest or unusual delay and

expense) would be deleted. In addition to authorizing the presiding officer to take this action independently, Section 2.323(f)(2), as amended, would also allow the presiding officer to do so in response to a petition from a party. NEI does not object to this amendment.

Revisions to 10 CFR § 2.335 — (*Consideration of Commission rules and regulations in adjudicatory proceedings*)

Currently, Section 2.335(b) states that parties to an adjudicatory proceeding may seek waivers or exceptions from NRC regulations. The NRC proposes to revise this provision to clarify that the regulation applies not only to parties to adjudicatory proceedings, but also to petitioners. See 76 Fed. Reg. 10,785, 10,792, 10,799. This change "would adopt the NRC's practice of allowing petitions to intervene and requests for hearing to contain § 2.335 requests for waivers or exceptions from the NRC's regulations." *Id.* at 10,792. NEI does not object to the change, which reflects current NRC practice.

Separately, we recommend that the Commission expand the current requirements for a waiver in 10 CFR Part 2 to adopt the NRC case law establishing the standards to be met for a waiver of a Commission regulation in individual adjudications. In a series of cases, the Commission has applied a four-part test for deciding whether to grant a waiver:

i. The rule's strict application "would not serve the purposes for which [it] was adopted;"

ii. The person seeking the waiver has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;"

iii. Those circumstances are "unique" to the facility rather than "common to a large class of facilities;" and

iv. A waiver of the regulation is necessary to reach a significant safety or environmental problem.[3]

Revisions to 10 CFR § 2.336 — (*General discovery*)

Section 2.336(d) currently requires parties to update mandatory disclosures with any information or documents subsequently developed or obtained within 14 days. NRC proposes to revise Section 2.336(d) to require the filing of a mandatory disclosure update *every 30 days*:

[3] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (internal citations omitted). Incorporating the four criteria would be consistent with current practice and would inform stakeholders of the criteria to be applied.

> (d) The duty of disclosure under this section is continuing. A disclosure update must be made every thirty (30) days after initial disclosures. The disclosure update is limited to documents subject to disclosure under this section that have not been disclosed in a prior update and that are developed, obtained, or discovered during the period that runs from the 5 business days before [the] last disclosure update to 5 business days before the filing of the update. The duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when [the] presiding officer issues a decision on that contention, or at such other time as may be specified by the presiding officer or the Commission. 76 Fed. Reg. 10,799.

NEI supports the proposal to revise the 14-day disclosure update requirement to a 30-day update requirement. Application of the update requirements has proven challenging in practice and has led to many case-specific deviations.[4] We generally agree that 30 days is a more appropriate time frame for updating disclosures. However, we also suggest that the update requirement be expressed in terms of a "monthly" update. This would allow parties, for example, to file their updates no later than the 1st, 5th, or the 15th of each month, rather than repeatedly calculating the due date based on when the last update was filed.

We also agree with the discussion in the proposed rule that some period of time is needed prior to the disclosure due date to collect, review, and produce documents on the due date. The NRC is proposing that the disclosure period run from five business days before the last disclosure update to five business days before the filing of the update. We believe that, as a practical matter, five days is insufficient for broad contentions that are not narrowly focused on a particular issue. For example, if a contention requires an electronic search of e-mails or other documents, five days is not sufficient time for an applicant's Information Technology (IT) department to collect documents and transmit them for legal review (*e.g.*, privilege, relevance). Where a supplemental disclosure involves many individuals (*e.g.*, more than 25 employees) or many contentions, the process of collecting and identifying relevant documents can take much longer than 5 business days. In many cases, the existing time period is also insufficient to allow adequate coordination between the licensee, its outside legal counsel, and the NRC staff in producing discovery documents. Accordingly, we recommend that the proposed time period for disclosures be changed to "15 days before the last disclosure update to 15 days before the filing of the update." Alternatively, NEI requests that the NRC make clear that the period of time allowed for disclosures can be adjusted by the Licensing Board or upon agreement of the parties based on case-specific factors (*e.g.*, number of documents, scope of production, IT capabilities).

Further, we support NRC's proposal to add a new sentence to Section 2.336(d) to clarify that the duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the presiding officer issues a decision on that contention or when specified by the presiding officer or the Commission. See 76 Fed. Reg. 10, 785, 10,792, 10,799.

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[4] On this point, the Supplementary Information for the proposed rule states: "Experience with adjudications since early 2004 has demonstrated that the current disclosure provisions are much more burdensome for litigants than was initially anticipated. Part of the burden is the frequency of required updates to the mandatory disclosures." 76 Fed. Reg. at 10,785.

Revisions to 10 CFR § 2.340 — (*Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits and licenses*)

The NRC proposes to revise Section 2.340 (dividing it into new sub-sections 2.340(a)(1) and (2)) to clarify that for contested applications involving a production and utilization facility—for an initial license (construction permit, operating license, or combined license), a renewed license, or a license amendment where the NRC has not made a determination of no significant hazards consideration—the license or amendment cannot be issued by NRC Staff prior to the completion of the hearing. In contrast, contested applications involving an *amendment to a license* where the NRC has made a determination of no significant hazards consideration can be acted upon by the NRC Staff prior to the completion of a contested hearing. In addition, in contested cases involving manufacturing licenses or facilities other than a production or utilization facility, the NRC Staff can act upon the application prior to the completion of a contested hearing. These clarifications conform to existing statutory requirements and are appropriate.

This proposed revision also addresses the topic of matters in controversy before the presiding officer. As amended, Section 2.340 would retain the scope and applicability of the existing regulations specifying that the presiding officer in all contested cases is limited to deciding matters placed into controversy by the parties, and serious matters not put into controversy by the parties that concern safety, common defense and security, or the environment and that are referred to, and consideration of which is approved by, the Commission. The limitation is reflected in the revised rules for contested cases on all types of applications, with minor clarification by adding a cross-reference to the provisions for referrals of issues to the Commission. We believe the revised language is appropriate. See 76 Fed. Reg. 10,785-86, 10,792-93, 10,799-800.

Revisions to 10 CFR § 2.341 — (*Review of decisions and actions of a presiding officer*)[5]

Section 2.341(b) (*Petitions for review*):

The NRC proposes to extend *from 15 to 25 days* the time allowed for filing appeals to the Commission from a presiding officer's full or partial initial decision. Similarly, NRC proposes to extend the time for responding to appeals *from 10 to 25 days* following service of the appeal. The time allowed for the petitioning party to file a reply to the answer would be extended *from 5 to 10 days* following service of the answer. See amended Sections 2.341(b)(1) and 2.341(b)(3); 76 Fed. Reg. 10, 786, 10,793, 10,801-02. Regarding these proposed revisions, NRC observes that the existing filing deadlines are "unnecessarily short" and that these deadlines sometimes result in superficial appellate briefs. NRC also notes that most adjudicatory bodies allow substantially more time than the Commission does for litigants to research and prepare briefs, and that well-considered briefs enable the Commission to make faster and better-reasoned decisions. *Id.* at 10,786.

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[5] NRC does not propose to amend the language in 10 CFR 2.341(a)(1) providing that "no party may request a further Commission review of a Commission determination to allow a period of interim operation under 10 CFR 52.103(c)." See 76 Fed. Reg. 10,786.

While we are cautious about supporting any rule changes that might lead to any delay in hearing schedules, we do not object to this proposal. The expanded filing schedule appears to reflect a reasonable allocation of time in the overall hearing process for consideration of significant legal issues on appeal.

Section 2.341(c) (*Petitions for review not acted upon deemed denied*):

As a result of an inadvertent omission during the 2004 rulemaking amending 10 CFR Part 2, Section 2.341 does not currently contain a time period after which a petition for review is "deemed denied." The NRC is proposing to add a new Section 2.341(c)(1) that would re-incorporate the "deemed denied" provisions of the former Section 2.786(c) with an additional 90 days for Commission review before petitions for review are deemed denied. Thus, the additional 90 days would allow the Commission *120 days of review time* before a petition for review is deemed denied. See 76 Fed. Reg. 10,786, 10,793, 10,802.

We generally support the proposed addition of a "deemed denied" provision and agree with the NRC that, as a practical matter, a 30-day time period is impracticable given the briefing schedule. However, we are concerned that a 120-day Commission review period could lead to unnecessary delays in resolution of a proceeding. We believe that a 90-day review period would provide sufficient time to review the filings without the need for frequent extensions, and request that the NRC modify this portion of the proposed rule accordingly.

Section 2.341(a) (*Time to act on a petition for review*):

The NRC proposes to expand from 40 days to 120 days the time allowed for the Commission to act on a decision of a presiding officer or a petition for review. See 76 Fed. Reg. 10,786, 10,793, 10,801. This revision is designed to align this provision with the proposed amended Section 2.341(c)(1), discussed above.

NEI does not believe that NRC has provided a compelling rationale for giving the Commission an additional 90 days to act on its own motion following a presiding officer's decision. Extending the period for the Commission to act from 40 to 120 days adds unnecessary uncertainty to the effect of Atomic Safety and Licensing Board decisions where there was no appeal by any parties. If the Commission has reason to review a presiding officer decision on its own motion, it should be expected to act quickly before the parties have taken action to implement the Licensing Board decision. We therefore request that the NRC modify this portion of the proposed rule to extend the time period from *40 to 90 days* (not 120 days).

Section 2.341(f) (*Standards for Atomic Safety and Licensing Board certifications and referrals*):

NRC proposes to revise Section 2.340(f) to clarify a perceived inconsistency in the standard for Licensing Board certifications and referrals to the Commission and Commission review of these

issues. This inconsistency stems from the slightly different standards for review set forth in existing Sections 2.323(f) and 2.341(f). See 76 Fed. Reg. 10,786, 10,793, 10,802.

We support the proposed change. As amended, Section 2.341(f)(1) would provide that: "A ruling referred or question certified to the Commission under §§ 2.319(l) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding."

Revisions to 10 CFR § 2.346 — (*Authority of the Secretary*)

Section 2.346 currently sets forth the authority of the Secretary of the Commission to perform a number of specific actions and, in addition, "take action on minor procedural matters." The NRC proposes to revise this provision to more broadly authorize the Secretary to "take action on procedural or other minor matters." See 76 Fed. Reg. 10,786, 10,793, 10,802. The Commission states that its experience with Subpart C hearing procedures since the 2004 amendments to Part 2 indicates that greater efficiencies could be achieved if the Secretary is given explicit authority to "take action on more than minor procedural matters." It further points out that such a change could expedite decision-making in situations where time is of the essence and the need to prepare an order and/or schedule an affirmation session can result in undesirable delay in issuing procedural directives. 76 Fed. Reg. 10,786-87.

NEI supports the proposal to authorize the Secretary to take action on more than minor procedural matters. We agree that this revision should reduce the potential for delay in procedural matters where time is of the essence, and/or where prompt action by the Commission could eliminate unnecessary uncertainty among the parties as to the proper course of action.

Revisions to 10 CFR § 2.347 — (*Ex parte communications*)
and 10 CFR §2.348 — (*Separation of functions*)

NRC proposes to revise Sections 2.347 and 2.348 to delete obsolete references to regulations. See 76 Fed. Reg. 10,787, 10793, 10,802. NEI does not object to the proposed deletion of the *ex parte* prohibition and separation of functions requirements for demands for information under Section 2.204.

Part 2, Subpart G — Rules for Formal Adjudications

Revisions to 10 CFR § 2.704 — (*Discovery--required disclosures*)

The NRC proposes to revise Section 2.704 to reduce the time allowed for making disclosures from 45 days after issuance of a prehearing conference order to 30 days after the date of an order granting the hearing. The NRC is also proposing to require parties to supplement their disclosures every 30 days (for the period from the last disclosure update to five days before the next disclosure update). See 76 Fed. Reg. 10,787, 10793, 10,802.

The initial round of mandatory disclosures can be very burdensome for parties. NEI does not support this proposed change because it would increase the burden on the parties by shortening the time period for completing discovery-required disclosures. Further, given the small number of adjudications that are expected to be conducted under 10 CFR Part 2 Subpart G, the need for this departure from current practice is not clear. (The Supplementary Information merely states that the change to Section 2.704 is proposed to conform with the timing provisions of amended Section 2.336(d); see 76 Fed. Reg. 10,787.) Moreover, for a Subpart G proceeding, other methods of discovery (*e.g.*, interrogatories, deposition) are available. As a result, the need for automatic disclosure supplements is not as pressing as it might otherwise be for licensing proceedings that lack alternate discovery methods. Further, use of the other discovery mechanisms available under Part 2, Subpart G creates an additional burden on the parties that further militates against shortening the time for initial disclosures to 30 days.

In the event that the NRC makes this change in the final rule, the relevant time period should be consistent with that proposed in Section 2.336(d). The time period of interest should run "from five [or fifteen] business days before the last disclosure update to five [or fifteen] business days before the filing of the update." The proposed Section 2.704 does not take into account the five-day [or fifteen-day] period *before* the last disclosure update. Additionally, updates should be "monthly," as discussed above in connection with the proposed changes to Section 2.336.

Revisions to 10 CFR § 2.705 — (*Discovery--additional methods*)

While Section 2.705(b)(2) currently allows the presiding officer to "alter the limits in these rules on the number of depositions and interrogatories," NRC rules do not explicitly limit the number of depositions or interrogatories. To provide clarification and improve efficiency, the NRC proposes to revise Section 2.705 to allow the presiding officer to "set limits on the number of depositions and interrogatories." See 76 Fed. Reg. 10,787, 10,793, 10,802. NEI supports this proposed change. Allowing the presiding officer to set reasonable limits on the number of interrogatories and depositions has always been available as a matter of discretion and has been encouraged by Commission policy to facilitate timely proceedings.

Revisions to 10 CFR § 2.709 — (*Discovery against NRC staff*)

The NRC proposes to revise Section 2.709 to limit the scope of the NRC Staff's mandatory disclosure obligations in NRC enforcement proceedings conducted under 10 CFR Part 2 subpart G. See 76 Fed. Reg. 10, 787-88, 10,793-94, 10,802-03. To effect this change, NRC would amend Section 2.336(b) to remove subpart G enforcement proceedings from the general discovery requirements, and make corresponding changes to Section 2.709 to specify the Staff's discovery obligations in a subpart G enforcement proceeding. Specifically, NRC proposes to limit the scope of the NRC Staff's disclosures in enforcement proceedings to "all NRC staff documents relevant to disputed issues alleged with particularity in the pleadings." The NRC is also proposing other conforming changes related to privileged documents, the timing of disclosure supplements, and permissible form and type of NRC Staff disclosures.

NEI does not object to the proposed changes. As noted above, we believe that a disclosure period that runs from five business days before the last disclosure update to five business days before the filing of the update is, as a practical matter, insufficient for broad contentions or in proceedings involving a large number of document custodians or contentions.

Revisions to 10 CFR § 2.802 — (*Petition for Rulemaking*)

The NRC proposes to revise Section 2.802 to clarify that a petitioner for rulemaking who is a participant in an NRC licensing proceeding (but not necessarily a party to that proceeding) may request a suspension of all or part of that licensing proceeding, pending disposition of the petition for rulemaking. See 76 Fed. Reg. 10,794, 10,803. NEI does not object to this proposed change.

Part 2, Subpart L — Simplified Hearing Procedures for NRC Adjudications

Revisions to 10 CFR Part 2, Subpart L — (*Title*)

The NRC proposes to revise the title of Part 2, Subpart L from "Informal Hearing Procedures for NRC Adjudications" to "Simplified Hearing Procedures for NRC Adjudications." See 76 Fed. Reg. 10,788, 10,803. This change is designed to reflect the fact that Subpart L proceedings are less formal than the formal Part 2, Subpart G proceedings, but are nevertheless formal, "on-the-record" hearings under the APA. NEI agrees that the procedures in Subpart L satisfy the requirements for an on-the-record proceeding and we therefore support the proposed change to the title of Subpart L.

Revisions to 10 CFR § 2.1202 — (*Authority and role of NRC staff*)

The NRC proposes to revise Section 2.1202 to clarify the content of the NRC Staff's "notice to parties" in 10 CFR Part 2, subpart L proceedings regarding the Staff's action on the licensing action in question. Specifically, when the Staff takes its action, its notification to the presiding officer and parties must include an explanation of why both the public health and safety is protected and the action is in accord with the common defense and security, despite the pendency of the contested matter before the presiding officer. Conforming changes would be made to Section 2.1403. See 76 Fed. Reg. 10,788, 10,794, 10,803. NEI does not object to this proposed clarification.

Revisions to 10 CFR § 2.1205 — (*Summary disposition*)
Revisions to 10 CFR § 2.710 — (*Motions for summary disposition*)

The NRC proposes to revise Section 2.1205(a) to explicitly require that motions for summary disposition under this provision include "a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." See 76 Fed. Reg. 10, 788, 10,803. This proposed change would correct an inadvertent omission in the 2004

amendments to Part 2, when summary disposition motions requirements were included for Part 2, Subpart L hearings.

As amended, this section would not include the requirement for a "separate" statement of material facts in dispute, as the rule already requires that the statement be attached to the motion. (A conforming change would be made to Section 2.710 so that these provisions will be identical in this regard.) NEI supports these proposed changes as appropriate and consistent with past practice.

Revisions to 10 CFR § 2.1209 — (*Findings of fact and conclusions of law*)

The NRC proposes to revise Section 2.1209 by inserting format requirements for proposed findings of fact and conclusions of law in Part 2, Subpart L proceedings. These format requirements will be the same as those in Section 2.712(c), which applies to Part 2, Subpart G proceedings. See 76 Fed. Reg. 10,788, 10,803. NEI does not object to this proposed change.

Revisions to 10 CFR § 2.1213 — (*Application for a stay*)

The NRC proposes to add a new Section 2.1213(f) that would exclude from the stay provisions matters limited to whether a "no significant hazards consideration determination" for a power reactor license amendment was proper. See 76 Fed. Reg. 10,788, 10,794, 10,803. The NRC notes that challenges to no significant hazards consideration determinations are not allowed; see 10 CFR 50.58(b)(6).[6] NEI supports this clarification that a stay request involving a no significant hazards consideration determination will not be entertained.

Revisions to 10 CFR § 2.1300 and 2.1304 — (*Scope of Subpart M*)

The NRC proposes to revise Section 2.1300 and remove Section 2.1304 to clarify that the generally applicable intervention provisions in Part 2, subpart C, and the specific provisions in Part 2, Subpart M, govern hearing procedures for Subpart M proceedings. See 76 Fed. Reg. 10,788-89, 10,794, 10,803. NEI supports these proposed clarifications regarding the governing procedures for license transfer proceedings.

Revisions to 10 CFR § 2.1316 — (*Authority and role of NRC staff*)

The NRC proposes to revise Section 2.1316, which applies to NRC license transfer application hearings under Part 2, Subpart M. Section 2.1316(c) currently allows NRC Staff to submit a simple notification at any point in the proceeding if it wishes to become a party. As amended, this provision would require the NRC Staff, within 15 days after issuance of an order granting

[6] NRC notes that excluding no significant hazards consideration determinations from NRC stay provisions is consistent with case law ruling that these findings are final agency action and therefore not appealable to the Commission. *Center for Nuclear Responsibility, Inc., v. U.S. Nuclear Regulatory Comm'n.*, 586 F.Supp. 579, 580-81 (D.D.C. 1984).

requests for hearing or petitions to intervene and admitting contentions, to notify the presiding officer and parties whether it desires to participate as a party to the proceeding and, if so, to identify the contentions on which the NRC wishes to participate. Requirements relating to the content of the Staff's notice are also addressed. See 76 Fed Reg. 10,789, 10,794, 10,803-04. NEI supports these proposed changes, which will conform the procedures involving NRC Staff participation in Subpart M proceedings to the procedures in other subparts.

Revisions to 10 CFR § 2.1407 — (*Appeal and Commission Review of initial decision*)

The NRC proposes to revise Section 2.1407(a) to extend *from 15 to 25 days* the period of time allowed for filing an appeal and a brief in opposition to an appeal under 10 CFR Part 2, Subpart N (expedited proceeding with oral hearings). See 76 Fed. Reg. 10,789, 10,794, 10, 804. NRC cites the same reasons for this proposed change as those mentioned in connection with the changes to Section 2.341. We question whether this change is truly necessary in Subpart N proceedings, which typically are narrow, expedited proceedings. Providing additional time for appellate briefs (which may well be justified in a Subpart G or Subpart L matter) may not be justified here. Alternatively, we suggest that it would be more appropriate to leave such an extension to the discretion of the Commission on a case-by-case basis.

Revisions to Outdated References in 10 CFR Part 51

We believe the proposed corrections to outdated references are appropriate.

Revisions to 10 CFR § 54.27 — (*Hearings*)

NRC proposes to revise Section 54.27 to reflect the proper 60-day period (rather than 30-day period) to request a hearing on a license renewal application, and to add a reference to Section 2.309. See 76 Fed. Reg. 10,789, 10,794, 10,805. We believe these proposed changes are appropriate.

II. NEI COMMENTS ON ADDITIONAL ISSUES

Changes to Mandatory Disclosure Obligations

The NRC seeks public comment on whether it should revise 10 CFR 2.336 (*General discovery*) to limit and focus the NRC Staff's mandatory disclosure obligations. Currently, Section 2.336(b)(3) requires the NRC staff to disclose "All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action *that is the subject of the proceeding*." NRC is considering modifying this provision to require the NRC Staff to disclose "All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action *that are relevant*

to the contentions that have been admitted into the proceeding." See 76 Fed. Reg. 10,790 (emphasis added).

NEI supports this proposed narrowing of the NRC Staff's disclosure obligations under Section 2.336. We defer to the judgment of the NRC that the burden associated with the NRC Staff production of "all documents" is substantial and unnecessary. The proposed rule refers to the burden on the Staff created by disclosure of hundreds or thousands of documents unrelated to any admitted contention. In answer to Question 1(a) at 76 Fed. Reg. 10, 790 concerning this provision, we concur that disclosure of voluminous quantities of discovery material by the Staff also burdens other parties, which must search through "hundreds or thousands of unrelated documents to find the material that is relevant to the issues in dispute." Thus, implementing the amendment to Section 2.336 would aid parties other than the NRC Staff by reducing the scope of documents they must review through the mandatory disclosure process.

In response to Question 1(b), NEI agrees that the broad disclosure obligation imposed on the NRC Staff by the existing Section 2.336(b) does not appear to be warranted, in view of other parties' more limited discovery obligations and parties' ability to find the documents by means of a search on ADAMS. Thus, the proposed change would better align the scope of the NRC Staff's disclosure obligation with that of other parties. 76 Fed. Reg. 10,790.

We also suggest that the Commission take this opportunity to reduce the burden of mandatory disclosures on other parties to NRC proceedings. For example, the regulations could make clear that the parties are not required to disclose documents that are available on ADAMS or that have previously been disclosed by another party. In our view, it is unreasonably burdensome and duplicative to require a party to identify a document that the NRC Staff or another party has already disclosed. Also, if the same relevant e-mail or document exists in multiple locations (*e.g.*, with multiple recipients), each party should be allowed to produce only one copy of that e-mail or document rather than multiple copies of identical documents. (Subsequent e-mails or edits to documents, including hand-written notes, would constitute a different document.) These commonsense changes would result in more efficient and less burdensome discovery for NRC adjudications while still ensuring that all relevant documents are available to the parties.

The proposed rule also seeks stakeholder input on whether use of a "shorter, more relevant privilege log" by the NRC Staff would aid parties to the proceeding. 76 Fed. Reg. 10,790, Question 1(c). On this question, we agree with the points made by the NRC and would have no objection to the NRC Staff's use of a shorter, more relevant privilege log.

Further, the proposed rule seeks stakeholder comment as to whether limiting the NRC Staff's obligation to make mandatory disclosure of documents under the standard set forth in Section 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure would be the preferred option. 76 Fed. Reg. 10,790, Question 1(d)-(e). With regard to disclosures, this section of the FRCP provides that (except for certain types of proceedings exempted from this requirement), a party must provide to other parties "a copy -- or a description by category and location -- of all documents,

electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses."

On this question, it appears that adoption of the FRCP standard would narrow the NRC Staff's disclosure obligation somewhat by requiring that only that it produce documents under its possession, custody or control *that the Staff may use to support its claims or defenses,* rather than those documents relevant to the party's admitted contentions. Assuming that this would be the intended effect of the amended provision, we would agree that limiting the scope of the Staff's mandatory disclosure obligation consistent with the Federal Rules appears to be the preferred alternative. That approach would likely eliminate ambiguity and reduce significantly the parties' burden in conducting electronic searches.

Moreover, if the Commission pursues this change affecting the NRC Staff, we recommend that it also promulgate analogous amendments similarly reducing the scope of the mandatory disclosure obligation of the other parties to NRC proceedings.

Alternative Approaches to Interlocutory Appeals

The NRC also seeks public comment on whether it should revise 10 CFR 2.311 regarding interlocutory review of rulings by a presiding officer granting or denying a request for hearing or petition to intervene, including late-filed requests or petitions. Proposed changes would be designed to "either provide earlier appellate review of contention admissibility or, alternatively, to discourage frivolous appeals." NRC sets forth two options for amending Section 2.311(c) and (d) at 76 Fed. Reg. 10,790-91.

In our view, no changes to the NRC's interlocutory review provisions are necessary. The existing approach, with its attendant advantages and disadvantages, has worked well for the NRC over many years. However, if a change were made, we would support Option 1.

Option 1 would eliminate the thresholds in the current regulations for review of rulings on hearing requests and initial proposed contentions. Option 1 would thus allow any party to immediately appeal a Licensing Board decision on standing or contention admissibility. This option could increase the Commission's case load and could lead to delays in Commission adjudicatory decision-making. On the other hand, this option does offer the potential benefit of more timely decisions on contention admissibility issues, which could be beneficial where a contention is improperly admitted for hearing by an Atomic Safety and Licensing Board. Under Option 1, such an error could be promptly reversed (without the need for an appeal on the admissibility of all contentions admitted for hearing), and the expense of an unnecessary hearing would be avoided. Likewise, if a contention is improperly excluded, the error could be reversed and the hearing could be held promptly – rather than much later in the process and closer in time to critical path to license issuance. Overall, however, the benefits associated with interlocutory review of the entire decision on admissibility may not outweigh the potential for delays associated with the increased appellate workload for the Commission.

We do not support Option 2, which would subject appeals of rulings on hearing requests to the existing interlocutory review standards (*i.e.,* the showing required for referrals or certifications). Longstanding NRC case law establishes that interlocutory review would not be available for many appeals on these matters. NRC precedent specifically suggests that admission of a contention does not meet the standard for interlocutory review. We believe that the availability of Commission review of initial decisions on intervention petitions and contention admissibility is important in assuring timely and efficient hearings. In light of the number of Commission appeals that reverse decisions to admit contentions, changing the current approach to eliminate interlocutory review under certain circumstances will result in a significant expansion of the number and type of contentions litigated by Licensing Boards. This would be contrary to the Commission's stated goal of increasing efficiency in the NRC hearing process. Additionally, appeals on contention admissibility also have an important "harmonizing" effect on the scope of hearings, by reducing the differences in the way that one Licensing Board interprets Commission admissibility standards relative to other Licensing Boards.

Rulemaking Comments

From: BENJAMIN, Melissa [mb@nei.org]
Sent: Monday, May 16, 2011 4:26 PM
To: Rulemaking Comments
Subject: FW: NEI Comments re NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2, Docket ID NRC-2008-0415
Attachments: NEI Comments NRC Prop Rule Amending 10 CFR Part 2 May 16 2011.pdf

I am resending as I got a delivery failure error message.

From: BENJAMIN, Melissa **On Behalf Of** GINSBERG, Ellen
Sent: Monday, May 16, 2011 4:23 PM
To: Rulemaking.Comments@nrc.gov.
Cc: GINSBERG, Ellen; COTTINGHAM, Anne
Subject: NEI Comments re NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2, Docket ID NRC-2008-0415

Attached please find comments of the Nuclear Energy Institute regarding the NRC Proposed Rule Amending 10 CFR Part 2 (76 Fed. Reg. 10781; February 28, 2011).

Please feel free to contact me or Anne Cottingham, Associate General Counsel, at (202) 739-8139, if you have any questions.

Sincerely,

Ellen C. Ginsberg

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