REQUIREMENTS FOR COL AND LWA ISSUANCE, RELATIVE TO THE FINALIZATION OF STANDARD DESIGN CERTIFICATION RULEMAKING

This paper will address the legal requirements for the issuance of a Combined Operating License ("COL") under 10 C.F.R. § 52.97 and a Limited Work Authorization ("LWA") under 10 C.F.R. § 50.10 relative to the finalization of a standard design certification rulemaking referenced in the applications for the COL or LWA. In particular, this paper addresses the timing of the issuance of the LWA-B and COL for Vogtle Units 3 and 4 relative to the finalization of the rulemaking for the amendment to the AP1000 standard design certification.

NRC regulations and guidance permit the findings and determinations relative to issues within the scope of a certified design and required for issuance of the COL and LWA to be made upon the *affirmation* by the Commission of the design certification rulemaking, and the issuance of the COL and LWA to follow in accordance with 10 C.F.R. § 2.340(i). As explained below, affirmation occurs when the Commissioners affirm their votes on a rule.

The substantive and procedural requirements for the issuance of an LWA under 10 C.F.R § 50.10(e) are different than those for the issuance of a COL under 10 C.F.R § 52.97, and can be fulfilled in advance of the completion of the COL licensing process described in SRM-SECY-10-0082, which amended the Commission's internal operating procedures for COL mandatory hearings.

Requirements for COL issuance under 10 C.F.R. § 52.97

The findings necessary for issuance of a COL are provided in 10 C.F.R. § 52.97:

> (a)(1) After conducting a hearing in accordance with § 52.85 and receiving the report submitted by the ACRS, the Commission may issue a combined license if the Commission finds that:
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> > (i) The applicable standards and requirements of the Act and the Commission's regulations have been met;
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> > (ii) Any required notifications to other agencies or bodies have been duly made;
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> > (iii) There is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations.
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> > (iv) The applicant is technically and financially qualified to engage in the activities authorized; and
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> > (v) Issuance of the license will not be inimical to the common defense and security or to the health and safety of the public; and

> (vi) The findings required by subpart A of part 51 of this chapter have been made.

Where a COLA references a certified design, all safety issues within the scope of the design certification rulemaking are resolved for the purpose of the COL. 10 C.F.R. 52, Appendix D, VI and 10 C.F.R. § 52.63(a)(5). In the case of applications for certified designs that are not yet approved by NRC, 10 C.F.R § 52.55(c) provides that "[a]n applicant for … a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted."

The Commission interpreted and applied § 52.55(c) in its 2008 Final Policy Statement on the Conduct of New Reactor Licensing Proceedings. 73 Fed. Reg. 20,963, 20,973 (April 17, 2008). In response to comments on the Draft Policy Statement advocating that a COL need not be conditioned on the approval of a referenced DCR, the Commission made clear that a COLA could reference a pending design certification application, provided that the COL could be issued only when the design certification rule ("DCR") is <u>final</u>:

> 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. (emphasis supplied)

<u>The design certification rule ("DCR") is final when the Commission affirms the rule</u>

Both the Commission and the courts have consistently referred to a regulation, in this case a DCR, becoming "final" when the Commission approves it in an affirmation session. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency action is final when the agency has consummated its decision-making process).[1] Thus, a rule becomes final before it is published in the Federal Register and before the effective date of the rule. *See, e.g., Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 344 (1st Cir. 2004) ("On January 14, 2004, the NRC published a final rule, along with a response to the comments that the proposed rule had generated. *See* 69 Fed. Reg. 2,182. … The new rules took effect on February 13, 2004."); *see also NRDC v. Abraham*, 355 F.3d. 179, 201-02 (2d Cir. 2004) ("The [Congressional Review Act] uses the term 'take effect' in the sense of the rule becoming applicable, which in the case of newly promulgated efficiency standards does not occur for several years after they are prescribed as final rules.").

[1] For example, on December 30, 2005, "the Commission voted to approve the final DCR for the AP1000 standard plant design." On January 23, 2006, "the Secretary of the Commission signed the final rule." "On January 27, 2006, the NRC issued the AP1000 final DCR in the *Federal Register*." *See* http://www.nrc.gov/reactors/new-reactors/design-cert/ap1000.html. Also, the NRC regulations at 10 CFR § 52.54 refer to "issuance" of a standard design certification, and to the Commission "adopt[ing] a final design certification rule".

This use of the term "final" in reference to the affirmation of a DCR is consistent with the record regarding the AP600 standard design certification rulemaking in 1999. In discussing the approval of the rule, the Commission Voting Record states that the Commissioners approved the NRC Staff's recommendations and "[s]ubsequently, the Commission *affirmed* the final rule as noted in the Affirmation Session and reflected in the Affirmation Session SRM issued on December 15, 1999." (emphasis supplied) (ML993510024). The SRM states that "The Commission *approved a final rule* amending 10 CFR Part 52 to certify the AP600 standard plant design." (emphasis supplied) (ML003753353). The rule became *effective*, however, on January 24, 2000. *See* 10 C.F.R Part 52, Appendix C, VII.

The NRC has most recently equated the finality of a DCR with the affirmation of the final rule in its amendments to its Internal Operating Procedures (IOPs) for the conduct of mandatory hearings on COL applications. In 2011, in response to Commission's request in SRM-SECY-10-0082, the NRC Office of the General Counsel issued a SECY proposing to revise the IOPs entitled, "Conduct of Mandatory Hearings on Applications for Combined Licenses" (SECY-11-0042, March 25, 2011). The revisions to the IOPs specifically address the situation anticipated in the Commission's Final Policy Statement, *i.e.*, that a pending design certification rule must be "final" before a COL application referencing the application for the rule can be issued. Consistent with past Commission usage of the term "final" in the context of a rulemaking, the Commission-approved revision to the IOPs expressly states that where the affirmation of the DCR occurs more than 120 days after commencement of the mandatory hearing process described in the IOPs, that the Commission will issue a final decision on a COL immediately after affirming the design certification final rule:

> The Commission intends to issue adjudicatory decisions in mandatory hearings no later than 4 months after the FSER and FEIS are both complete, except that if an associated design certification rulemaking is still pending as of that date, *the Commission will issue a decision immediately after affirming the final rule for the referenced design.*
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> Enclosure to SECY-11-0042 (emphasis supplied).

The revisions to the IOPs refer to the affirmation of the DCR, not the publication or the effective date of the DCR, being the triggering event for issuance of the final decision on the COL in two places. It would have been a simple matter for the OGC and the Commission to have referred to the "publication date" or the "effective date" of the DCR if that is what they intended. The only rational interpretation of the revision to the IOPs is that the Commission considered the affirmation of the DCR to satisfy the finality requirement expressed in the 2008 Final Policy Statement.

Issuance of a COL based on the affirmation of the DCR, rather than the effective date, is not inconsistent with the section 553 of the Administrative Procedure Act ("APA") which provides that generally substantive rules become effective 30 days after their publication date. *See* 5 U.S.C. 553. Neither section 553 of the APA nor 10 C.F.R § 52.97 require a DCR to be effective[2] before the Commission makes the findings and determinations required in order to

[2] Section 553 allows for the rule to become immediately effective upon a finding of good cause.

issue a COL. By the same token, the issuance of a COL prior to the effective date of the DCR does not undermine notice provision under the APA. Rather, the Commission's admonition in the Final Policy Statement that the DCR be final before a COL can be issued and its conclusion that finality occurs at affirmation of the DCR ensures that all technical and substantive determinations necessary to the findings required by 10 C.F.R. § 52.97 and the Atomic Energy Act have been made. The notice period under the APA will have no effect on those findings and determinations. NRC's interpretation of its own licensing rules and the Atomic Energy Act, as expressed in the Final Policy Statement and as refined in the revised IOPs, is entitled to substantial deference. *See, e.g., Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008).[3]

Application of the final design certification rule requirement to the standards for LWA issuance under 10 C.F.R. § 50.10(e)

In the context of an LWA, it is equally, if not more, clear that affirmation of the DCR by the Commission is sufficient to satisfy any requirement that a DCR referenced in an application for an LWA be "final" before the LWA is issued. This paper will discuss this issue with reference to the application for LWA-B in the Vogtle 3 and 4 COL proceeding.

The four findings necessary for the issuance of an LWA are enumerated in 10 C.F.R. § 50.10(e)(1):

> (e) Issuance of limited work authorization. (1) The Director of New Reactors or the Director of Nuclear Reactor Regulation may issue a limited work authorization only after:
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> (i) The NRC staff issues the final environmental impact statement for the limited work authorization in accordance with subpart A of part 51 of this chapter;
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> (ii) The presiding officer makes the finding in § 51.105(c) or § 51.107(d) of this chapter, as applicable;
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> (iii) The Director determines that the applicable standards and requirements of the Act, and the Commission's regulations applicable to the activities to be conducted under the limited work authorization, have been met. The applicant is technically qualified to engage in the activities authorized. Issuance of the limited work authorization will provide reasonable assurance of adequate protection to public health and safety and will not be inimical to the common defense and security; and
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> (iv) The presiding officer finds that there are no unresolved safety issues relating to the activities to be conducted under the limited work authorization that would constitute good cause for withholding the authorization.

[3] Similar considerations apply to the findings necessary for an LWA. *See infra* pp 4-6.

The Vogtle 3 and 4 COL application incorporates by reference an Early Site Permit ("ESP"), which was issued in 2009, and the application for an amendment to the standard design certification rule ("DCR") for the Westinghouse Electric Company AP1000. An LWA (LWA-A) was also issued by the NRC in 2009.

A second LWA request — LWA-B — has been included as Part 6 of the COL application. The scope of LWA-B is the installation of rebar and other embedded items in the nuclear island foundation base slab, and placement of concrete for the base slab. These activities were originally included in LWA-A, and were included in the environmental impact statement published in connection with the ESP and LWA-A. The nuclear island design is included in the DCD and will be approved along with the rest of the AP1000 standard design with the DCR.

The Vogtle ESP resolved all but two issues necessary for the issuance of LWA-B. LWA-B is based on the safety analysis for the nuclear island foundation rebar and base slab design included in the AP1000 DCD, the COLA FSAR seismic analysis contained in Section 3.7 of the FSAR, the Vogtle 3 and 4 site seismic analysis that was resolved as part of the Vogtle 3 and 4 ESP, the construction programs (Quality Assurance and Fitness for Duty) that were approved as part of LWA-A in connection with the ESP, and the Environmental Impact Statement for the Vogtle 3 and 4 ESP (NUREG-1872) which resolved the NEPA issues for the design and construction of the entire facility.

Under the Commission's regulations, as reflected in its IOPs establishing the mandatory hearing process, issues resolved in an ESP or in a DCR rulemaking are not proper subjects for a COL mandatory hearing. Accordingly, only two safety issues must be resolved in order to issue LWA-B — the adequacy of the FSAR seismic analysis, which will be addressed in the COL Final Safety Evaluation Report (FSER), and the adequacy of the rebar and base slab design, which will be resolved upon the affirmation of the DCR for the AP1000 amendment.

The COL FSER will address the remaining seismic analysis contained in section 3.7 of the Vogtle 3 and 4 FSAR, and provide the basis for the Director of New Reactors' determinations under 10 C.F.R. § 50.10(e)(1)(iii). Similarly, the affirmation of the DCR will resolve any issue regarding the safety of the rebar and basemat design. Once those documents are issued, and the Commission has approved the sufficiency of the Staff's review of FSAR 3.7, the Commission will be in a position to find in accordance with 10 C.F.R. § 50.10(e)(1)(iv) that there are "no unresolved safety issues relating to the activities to be conducted under the limited work authorization that would constitute good cause for withholding the authorization."[4] Clearly, the Office of Management and Budget review and publication of the DCR prior to its effective date would not constitute good cause for withholding the LWA[5] when all technical and

[4] The Final Environmental Impact Statement for the COLA, which includes LWA-B, has been issued and the findings required under 10 C.F.R § 51.105(c) in the ESP proceeding included the LWA-B activities have been made. Thus, the remaining requirements of 10 C.F.R. § 50.10(e)(1) have already been satisfied.

[5] NRC has determined that the regulatory analysis required under Executive Order 12866 is not required for a design certification rulemaking. *See* AP1000 Design Certification, 71 Fed. Reg. 4464, 4477 (Jan 27, 2006).

substantive requirements have been satisfied and the NRC has finally determined that the LWA activities can safely proceed, albeit at SNC's risk.

Accordingly, the affirmation of the DCR would satisfy the requirements of 10 C.F.R. § 50.10(e) relative to the adequacy of the rebar and basemat design. Together with the issues already resolved in the Vogtle ESP and those that will be resolved by the Staff's COL FSER, all 10 C.F.R. § 50.10(e)(1) requirements will be satisfied and the LWA-B can be issued regardless of whether the COL is then ready for issuance.