

ENCLOSURE 2

**INTERLOCUTORY APPEALS IN U.S. NUCLEAR REGULATORY  
COMMISSION ADJUDICATORY PROCEEDINGS**

## **Interlocutory Appeals in U.S. Nuclear Regulatory Commission Adjudicatory Proceedings**

An interlocutory appeal is an appeal of a trial court's ruling that is allowed before the trial has concluded. At the U.S. Nuclear Regulatory Commission (NRC), an interlocutory appeal refers to an appeal to the Commission of a presiding officer's ruling (such as an Atomic Safety and Licensing Board decision) that is allowed prior to the end of the adjudicatory proceeding before the presiding officer. This paper describes the current rule in the NRC's regulations for interlocutory appeals as well as alternate approaches that could be used.

### Current Rule

The NRC's regulations allow a participant who has filed a petition to intervene or request for hearing at the NRC to file an interlocutory appeal of a presiding officer's decision ruling on the participant's petition/request only if the presiding officer wholly denied the participant's petition/request (that is, denied it in its entirety). See 10 C.F.R. § 2.311(c). Consequently, if a presiding officer grants a petition to intervene but denies admission of at least one of the petitioner's contentions (in other words, the presiding officer does not allow a hearing on at least one of the contentions included in the petitioner's petition to intervene), then the petitioner is not allowed to file an interlocutory appeal of the presiding officer's decision. Instead, the petitioner would be allowed to appeal the presiding officer's denial of the contentions only after the presiding officer issues a final decision at the end of the adjudicatory proceeding. In summary, under current NRC regulations, a petitioner/requestor has the right to file an interlocutory appeal at the NRC only if the presiding officer denies admission of all the contentions filed in its petition/request or finds that the petitioner/requestor does not have standing (thereby wholly denying the petition/request).

In contrast, any party except for the petitioner/requestor (such as the applicant) is allowed under the current rule to file an interlocutory appeal of a presiding officer's decision, so long as the party argues that the presiding officer should have wholly denied the petition to intervene or request for hearing, even if the presiding officer denies admission of some of the petitioner/requestor's contentions. See 10 C.F.R. § 2.311(d)(1). To argue that a petition to intervene or request for hearing should have been wholly denied, a party would need to show either that the petitioner/requestor does not have standing or that all of the petitioner/requestor's proposed contentions are not admissible. Therefore, under the current rule, every party, except for the petitioner/requestor, may file an interlocutory appeal of a decision in which a presiding officer denies only part of a petition/request (and thereby does not wholly deny the petition/request).

### Other Options: First Approach

The NRC has identified two approaches as other options for the NRC's rule for interlocutory appeals.<sup>1</sup> The first approach would allow all parties, including the petitioner/requestor, to file an interlocutory appeal of an order in which a presiding officer grants or denies, in whole or in part, a petition to intervene or request for hearing. As a result, under this approach, any party would be allowed to immediately appeal a decision ruling on the admissibility of any contention, including new or amended contentions filed after the initial filing deadline. As part of this

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<sup>1</sup> Amendments to Adjudicatory Process Rules and Related Requirement, 76 Fed. Reg. 10,781, 10,790–10,791 (Feb. 28, 2011).

approach, parties would not have the opportunity to appeal presiding officers' contention-admissibility decisions at the end of proceedings, only immediately after the decision is issued.

There are a few advantages to this approach. This approach would ensure that all parties enjoy the same interlocutory-appeal rights—unlike the current rule, this approach would permit all parties to file an interlocutory appeal of a decision in which a presiding officer denies part of a petition to intervene or request for hearing. In addition, this approach would allow earlier resolution of contention-admissibility issues. In particular, this approach would eliminate the possibility that, after a presiding officer has issued the final decision in the proceeding, the Commission on appeal could remand the proceeding to the presiding officer to consider a contention that the Commission has determined should have been admitted by the presiding officer. A remand after the presiding officer has issued a final decision would prolong the proceeding and delay the agency's final decision in the adjudication.

One disadvantage of this approach would be that attention would be given to matters that may prove unnecessary to address at all during the proceeding. For instance, a party could choose not to pursue the matter at the conclusion of the proceeding, or other developments in the proceeding, such as settlement or issuance of the NRC Staff's safety or environmental review documents, could make it unnecessary to address the matter. Another disadvantage would be that this approach could have significant resource implications for the NRC—in order to address the increased appeal opportunities at an early stage in NRC adjudicatory proceedings.

#### Other Options: Second Approach

The second approach would remove the right of parties other than the petitioner/requestor to file an interlocutory appeal of rulings granting a petition to intervene or request for hearing. Under this approach, petitioners/requestors would retain the right to immediately appeal rulings in which a presiding officer wholly denies their petition/request (as is permitted by the current rule). However, unlike the current rule, under this approach, no party would be allowed to file a non-discretionary interlocutory appeal of a ruling that denies part of a petition to intervene or request for hearing. Parties would still be permitted to immediately file an appeal under the NRC's regulation that allows the Commission, in its discretion, to grant interlocutory review of a presiding officer's ruling in limited circumstances. See 10 C.F.R. § 2.341(f).

One advantage of this approach would be that it would remove any incentive for parties other than the petitioner/requestor to oppose all proposed contentions in order to preserve their right to file an interlocutory appeal. To a certain extent, the current rule provides an incentive for parties other than the petitioner/requestor to oppose admission of all proposed contentions because to be permitted to file an interlocutory appeal of a contention-admissibility decision under the current rule, a party must argue that the petition/request should have been wholly denied (which must be done by arguing that the presiding officer should have denied admission of all the contentions proposed in the petition/request or that the presiding officer should have found the petitioner/requestor lacked standing). Some believe that removing this incentive might result in less interlocutory appeals being filed. Another advantage would be that this approach addresses what-some-have-considered-to-be an inequity in the current system, which allows every party other than the petitioner/requestor to file an interlocutory appeal of a partial denial of a petition to intervene or request for hearing but does not provide the same opportunity to the petitioner/requestor.

The main disadvantage of this approach would be that it would remove the means by which an early determination can be made by the Commission regarding contention admissibility. In

particular, no party would be able to appeal a presiding officer's decision granting a petition/request, or denying only part of a petition/request, until the end of the adjudicatory proceeding (except under the Commission's discretionary interlocutory-review rule). This approach would also leave open the possibility that at the end of an adjudicatory proceeding, the Commission on appeal could remand the proceeding to the presiding officer to consider a contention that the Commission has determined should have been admitted. As previously mentioned, such remands delay the NRC's final decision in adjudications.