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ANPR 10 CFR Part 2

(78FR20498)

NUCLEAR ENERGY INSTITUTE

July 3, 2013

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Attn: Rulemakings and Adjudications Staff

Subject: Comments on Advanced Notice of Proposed Rulemaking re Potential Changes to the Interlocutory Appeals Process under 10 C.F.R. 2.311; 78 Fed. Reg. 20,498 (April 5, 2013); Docket ID NRC-2013-0050

Dear Ms. Vietti Cook:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to provide the attached comments on the Nuclear Regulatory Commission's Advanced Notice of Proposed Rulemaking ("ANPR") concerning possible revisions to the interlocutory appeals process under 10 C.F.R. 2.311. The ANPR presents four options for regulating interlocutory appeals from NRC Atomic Safety and Licensing Board rulings on requests for hearings or petitions to intervene under 10 C.F.R. 2.311. Option 1 is to retain the current rule without any changes.

As a preliminary matter, NEI believes that the NRC should consider whether there is a compelling need for a rulemaking to amend the interlocutory review process under 10 C.F.R. 2.311. In the current agency climate, both the NRC and the industry are grappling with the need to reduce the cumulative impacts of NRC regulatory actions and regulation process changes, as well as certain industry-driven activities and practices. Industry's efforts in this area are driven by the need to ensure that attention and resources remain focused on safe, reliable plant operations, and that any changes to industry or NRC requirements and processes (including rulemakings) result in improvements in safety and efficiency. To effectively fulfill their respective responsibilities, both the NRC and the nuclear industry should endeavor to prioritize and schedule activities in an integrated manner. Against this standard, it is not clear that an NRC rulemaking to revise 10 C.F.R. 2.311 is a high priority for the agency. For that reason, we suggest that this rulemaking be deferred, suspended, or withdrawn.

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[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Alternatively, should the agency decide to proceed with rulemaking, we offer our comments on the options proposed by the ANPR in the attachment to this letter.

The nuclear industry believes that public participation in NRC adjudications is useful and generally adds value to the agency's NRC licensing process. At the same time, we believe that any revisions to the Commission's adjudicatory hearing process must be shown to make that process more effective and efficient, and better focus the limited resources of all parties to NRC adjudicatory proceedings. Before changing the interlocutory review process, the agency should also consider the possible additional burden on its own resources, including the Commission and its staff, as well as the members of the Atomic Safety and Licensing Board.

In our view, this ANPR in itself does not provide a sufficient legal or regulatory basis to support changing the existing interlocutory appeals process in 10 C.F.R. 2.311. Should the agency decide to proceed with this rulemaking, we anticipate that the proposed rule and accompanying discussion would provide a substantive rationale and regulatory basis for changing this longstanding interlocutory appeal provision. Such additional context would better inform the views of public stakeholders on this question.

Additionally, given that the NRC specifically declined to revise 10 C.F.R. 2.311, in connection with the final rule promulgating the 2012 changes to the Commission's adjudicatory process (77 Fed. Reg. 46,562 (Aug. 3, 2012)), it is not clear why this ANPR is being considered less than a year later.

Should the Commission proceed with this rulemaking, NEI recommends that only Options 1 and 2 as set forth in the ANPR be considered. We do not believe that either Option 3 or Option 4 is preferable to the existing interlocutory appeal process in Section 2.311. Option 2, in our view, presents a much closer case. The attached comments discuss these views in more detail, and provide answers to each of the questions posed in the ANPR. NEI looks forward to providing additional comments in connection with any future proposed rule.

Thank you for your consideration of these comments. If you have any questions or require additional information, please feel free to contact me at 202/739-8139 or awc@nei.org.

Sincerely,

Anne W. Cottingham

Anne W. Cottingham
Associate General Counsel

Attachment

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COMMENTS OF THE NUCLEAR ENERGY INSTITUTE
Advanced Notice of Proposed Rulemaking on the NRC Interlocutory Appeals Process for Adjudicatory Decisions
Docket ID NRC-2013-0050

The Nuclear Energy Institute, Inc. (NEI)[1] appreciates the opportunity to submit the following comments regarding the Nuclear Regulatory Commission's (NRC) advanced notice of proposed rulemaking (ANPR) to amend 10 C.F.R. Part 2 regulations governing the interlocutory appeals process for some adjudicatory decisions. See 78 Fed. Reg. 20,498 *et seq.* (April 5, 2013).

The ANPR presents four options for regulating interlocutory appeals from NRC Atomic Safety and Licensing Board (Licensing Board) rulings on requests for hearings or petitions to intervene under 10 C.F.R. 2.311. *See* 78 Fed. Reg. at 20,499-500. The options are as follows:

> **OPTION 1**: "Retaining the current rule without any change (status quo), which permits interlocutory appeals, without any threshold requirements, of rulings on requests for hearings or petitions to intervene regarding only whether the hearing or intervention should be granted or denied in its entirety;"
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> **OPTION 2**: "Increasing the scope of 10 CFR 2.311 beyond just whether the hearing or intervention should be granted or denied in its entirety to encompass the interlocutory review of each individual contention admissibility determination. All appeals would have to be made immediately following the issuance of the ruling by the presiding officer;"
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> **OPTION 3**: "Increasing the scope of 10 CFR 2.311 to encompass the interlocutory review of each individual contention admissibility determination, except for the admission or denial of contentions grounded in the National Environmental Policy Act of 1969, as amended (NEPA). For decisions on environmental contentions partially admitting or partially denying a request or petition, the appeal of which would only be entertained either (a) after the issuance of a final Environmental Impact Statement (or other NEPA document) or, alternatively, (b) after a final decision in the proceeding (non-interlocutory);" and
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> **OPTION 4**: "Reducing the scope of 10 CFR 2.311 to include only interlocutory review of whether a request for hearing or petition to intervene was properly denied in its entirety. Orders granting a hearing, but only admitting some contentions, would not be immediately appealable by any party."

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[1] The Nuclear Energy Institute (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.

Additionally, the NRC also seeks public comment on whether the interlocutory review provisions in 10 C.F.R. §§ 2.311, 2.323, and 2.341 should remain separate or "be consolidated in one section in order to provide clarity and consistency." 78 Fed. Reg. at 20,502.

GENERAL COMMENTS

As a preliminary matter, NEI believes that the NRC should consider whether there is an acute need for a rulemaking to amend the interlocutory review process under 10 C.F.R. 2.311. In the current agency climate, both the NRC and the industry are grappling with the need to reduce the cumulative impacts of NRC regulatory actions and regulation process changes, as well as certain industry-driven activities and practices. Industry's efforts in this area are driven by the need to ensure that attention and resources remain focused on safe, reliable plant operations, and that any changes to industry or NRC requirements and processes (including rulemakings) result in improvements in safety and efficiency. Against this standard, an NRC rulemaking to revise 10 C.F.R. 2.311 appears unnecessary. In this regard, NEI stated in a recent letter to the Commission:

> The nuclear industry has an exemplary safety record due both to the industry's commitment to excellence in safety and reliability and the NRC's independent oversight of the industry. However, neither the industry nor the NRC has infinite resources to dedicate to the regulatory system for nuclear energy facilities. Maintaining safe, reliable operations; implementing the Fukushima lessons-learned; and implementing new or revised regulatory requirements for reactor safety and security all require NRC and industry attention and resources. To effectively fulfill our respective responsibilities, these activities should be prioritized and scheduled in an integrated manner.[2]

Consistent with NEI's April 16, 2013 letter, we suggest that this rulemaking be deferred, suspended, or withdrawn. Alternatively, should the agency decide to proceed with rulemaking, we offer the following general and specific comments on the options proposed by the ANPR.

The ANPR defines an "interlocutory appeal" as a request for the Commission to consider an adjudicatory issue prior to the conclusion of the hearing process before an NRC Licensing Board. 78 Fed. Reg. 20,499. NRC regulations now provide three avenues for interlocutory review in NRC adjudicatory proceedings, which are described in the ANPR at 78 Fed. Reg. 20,499. This ANPR focuses only on interlocutory review of rulings on requests for hearings or petitions to intervene under 10 C.F.R. 2.311. For such rulings, the interlocutory appeal must be made within 25 days after the service of the order, and is initiated by filing a notice of appeal and accompanying supporting brief. Unlike other types of interlocutory reviews under NRC practice, appeals under Section 2.311 do not require petitioners to meet certain threshold requirements.

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[2] April 16, 2013 letter and attachment from Anthony Pietrangelo, NEI Senior Vice-President and Chief Nuclear Officer, to Messrs. Michael Johnson, NRC Deputy Executive Director, Reactor and Preparedness Programs, and Michael Weber, NRC Deputy Executive Director for Materials, Waste, Research, State, Tribal & Compliance Programs, "Initial Industry Proposals to Address the Cumulative Impact of Regulatory Action," p. 2.

However, Section 2.311 appeals are limited in scope to *whether a hearing opportunity should have been granted or wholly denied.*

The nuclear industry believes that public participation in NRC adjudications is useful and generally adds value to the agency's NRC licensing process. At the same time, we believe that any revisions to the Commission's adjudicatory hearing process must be shown to make that process more effective and efficient, and better focus the limited resources of all parties to NRC adjudicatory proceedings. Before changing the interlocutory review process, the agency should also consider the possible additional burden on its own resources, including the Commission as well as the Licensing Board.

In our view, this ANPR in itself does not provide a sufficient legal or regulatory basis to support changing the existing interlocutory appeals process in 10 C.F.R. 2.311. Without a more comprehensive understanding of the concerns that prompted the NRC to suggest revising Section 2.311, our ability to provide meaningful comments is somewhat limited. Should the agency decide to proceed with this rulemaking, we would anticipate that the proposed rule and accompanying discussion would provide a more fulsome discussion, rationale, and regulatory basis for changing this longstanding interlocutory appeal provision. Such additional context (not found in the ANPR) would better inform the views of public stakeholders on this question.

According to the NRC, the current language in 10 C.F.R. 2.311 has been in place since 1972; see 37 Fed. Reg. 28,710 (Dec. 29, 1972). The Commission did not amend its interlocutory review process in Section 2.311 in 1989, when the agency updated its rules of practice for NRC licensing proceedings. See 54 Fed. Reg. 33,168 (Aug. 11, 1989), Final Rule, "Rules of Practice for Domestic Licensing Process—Procedural Changes in the Hearing Process." Nor did the NRC revise Section 2.311 as part of the rulemaking that led to the promulgation of changes to 10 C.F.R. Part 2 in 2004; see 69 Fed. Reg. 2182 (Jan. 14, 2004).

More recently, the NRC specifically declined to revise 10 C.F.R. 2.311 less than a year ago. In the final rule promulgating the 2012 changes to the Commission's adjudicatory process (77 Fed. Reg. 46,562 (Aug. 3, 2012)), the NRC addressed two proposed changes to Section 2.311, one of which is virtually identical to Option 2 (discussed below). With regard to that proposal, the Commission stated that "there have been some suggestions that a change to the current practice [in Section 2.311] might be warranted either to provide earlier appellate review of contention admissibility or to discourage frivolous appeals." 77 Fed. Reg. at 46,565. However, after further consideration and review of public comments, NRC decided not to modify the interlocutory review process in Section 2.311. Only one public comment – from the Nuclear Energy Institute – was received on those proposed changes to Section 2.311, and NEI did not support changing the appeals process. In response, NRC stated:

> "The lack of public comments on this issue suggests that there is not a clamor for a change in the standards for interlocutory appeals. Thus, while an argument can be made in support of a change, the NRC finds no compelling justification to change the current process." 77 Fed. Reg. 46,562, 46,565 (Supplementary Information).

The ANPR does not state what has prompted the NRC to consider revising Section 2.311 nine months later. Given the Commission's past determinations not to revise Section 2.311, we anticipate that, if it proceeds to rulemaking, the NRC will develop and publish a regulatory basis supporting any proposed rule change.

If the Commission decides to proceed with the rulemaking, NEI recommends that only Options 1 and 2 as set forth in the ANPR be considered. We do not believe that either Option 3 or Option 4 is preferable to the existing interlocutory appeal process in Section 2.311. Option 2, in our view, presents a closer case.

NEI COMMENTS ON SPECIFIC OPTIONS FOR CHANGING INTERLOCUTORY REVIEW PROCESS IN 10 C.F.R. 2.311

Comments on Option 1

Option 1 as presented in the ANPR is to retain the existing approach to interlocutory appeals set forth in 10 C.F.R. 2.311. *See* 78 Fed. Reg. at 20,499-500. By design, the scope of Section 2.311 interlocutory appeals is limited. This provision makes immediately appealable, without threshold requirements, the grant or denial of a petition to intervene or request for a hearing – but not the grant or denial of individual contentions. Thus, an entity whose hearing request or intervention petition has been granted (by a finding of legal standing and the admission of at least one contention) may not immediately appeal, under Section 2.311, a Licensing Board order denying any other proposed contentions.

In contrast, a party that opposes the grant of the hearing request or intervention petition (e.g., the applicant) may immediately appeal under Section 2.311- for example, on grounds that the petitioner lacks standing and/or that the petitioner's proposed contentions are inadmissible. But the party in opposition may only argue that none of the contentions should have been admitted—and, therefore, that the hearing request or intervention petition should have been denied in its entirety. The party in opposition may not argue that some, but not all, of the admitted contentions should have been denied. *See* 78 Fed. Reg. at 20,500.

Interlocutory appeals of individual contention admissibility determinations not necessary for the grant or denial of a hearing request or intervention petition must be made under 10 C.F.R. 2.341(f). Unlike Section 2.311, interlocutory reviews under Section 2.341 contain interlocutory review threshold requirements. *Id.* Or, the party may appeal decisions on individual contention admissibility under Section 2.341(b) after the Licensing Board has issued its final decision. In sum, as noted in the ANPR, the result of the interlocutory appeals process under Section 2.311 "is that the Commission determines whether or not a hearing opportunity should have been granted at all." *Id.* at 20,499.

The ANPR evaluates the current interlocutory review process as follows:

> The arguable advantage of the current limited scope of 10 CFR 2.311 is that it provides for immediate appeal, without threshold requirements, of the most crucial determination, which is whether a party is admitted to a proceeding, but imposes the threshold requirements for other interlocutory appeals on individual contention admissibility determinations that do not affect whether the party is admitted to the proceeding. Applying threshold requirements to these individual contention admissibility determinations may save the Commission from attending to matters that, by the end of the proceeding, prove to no longer be an issue. 78 Fed. Reg. 20,500.

The ANPR also points out perceived disadvantages of the current interlocutory review process under 10 C.F.R. § 2.311. For example, it notes that "if a petitioner appeals its denied contentions under §2.341(b) after the Licensing Board concludes the hearing process, the Commission could grant the appeal and remand the proceeding to the Licensing Board to consider a contention that was originally denied." 78 Fed. Reg. at 20,500. This scenario, the ANPR notes, "re-starts the hearing process for the remanded issue and extends the length of the proceeding." *Id.* However, because the ANPR provides no statistics or anecdotal information as to how often such a scenario has arisen in NRC adjudicatory proceedings, it is impossible to know whether this is a realistic concern.

The ANPR also states that, as written, Section 2.311 "may encourage parties opposing the request or petition to appeal admission of all contentions, regardless of merit, in order to preserve their right to appeal individual contention admissibility determinations under the advantageous no-threshold standard of 10 CFR 2.311." 78 Fed. Reg. at 20,500. Finally, the ANPR states that the current interlocutory appeal provision in Section 2.311 "may prevent individual contentions, which should not have been admitted, to proceed in the hearing process, thereby using hearing resources unnecessarily." *Id.*

In our view, Option 1, with its attendant advantages and disadvantages, has worked well for the NRC over many years and throughout hundreds of NRC adjudicatory proceedings. Like the other aspects of 10 CFR Part 2, this regulation was adopted by the agency only after careful consideration of appellate review options. Moreover, as noted above, both the agency and public stakeholders have had several opportunities over the years to amend Section 2.311 and have not done so. Unless and until we become aware of a compelling need for revision, we see no reason to modify the interlocutory review provisions in Section 2.311. Should the NRC decide to proceed with this rulemaking, NEI looks forward to the chance to review the agency's rationale for modifying 10 C.F.R. 2.311 and provide additional comments at that time.

Responses to NRC Questions on Option 1

1. *Does the current language of 10 CFR 2.311 strike a fair balance between allowing, without threshold requirements, the early resolution of contention admissibility determinations and preserving resources by deferring appellate review of issues?*

In our view, Option 1 (as reflected in existing Section 2.311) does strike a fair balance between allowing early resolution of contention admissibility and preserving the resources of all parties by deferring appellate review of some issues. The fact that this interlocutory review provision has remained in effect for so many years, and through hundreds of NRC licensing hearings, perhaps suggests that some members of the NRC staff and the Licensing Board share this view.[3] Without imposing threshold requirements, Option 1 allows petitioners to appeal immediately if all of the petitioner's proposed contentions are rejected.

As the ANPR recognizes, one advantage of the current limited scope of Section 2.311 is that "it provides for immediate appeal, without threshold requirements, of the most crucial determination, which is whether a party is admitted to a proceeding." 78 Fed. Reg. at 20,500. On the other hand, if a party's petition to intervene is granted based on a finding that the petitioner has legal standing and has raised at least one admissible contention, that petitioner (intervenor) is ensured the opportunity to participate in the hearing and litigate the petitioner's most viable contention(s), as determined by the Licensing Board. In this way, Option 1 protects the petitioner's hearing participation rights.

On a related point, the fact that a petitioner must delay if it seeks to appeal the Licensing Board's rejection of its other proposed contentions (if any) does not appear unfair or unduly burdensome to the intervenor. This is because, in our experience, there is a low likelihood that the Commission will reverse a Licensing Board order denying admission of one or more contentions and remand for a hearing on the previously rejected contentions. Additionally, as the ANPR points out, another arguable advantage of Option 1 is that it imposes threshold requirements only on interlocutory appeals of individual contention admissibility, which "do not affect whether the party is admitted to the proceeding." 78 Fed. Reg. at 20,500. This approach "may save the Commission from attending to matters that, by the end of the proceeding, prove to no longer be an issue." *Id.*

We also view Option 1 as fair in giving an opposing party (e.g., the applicant) the right to appeal on grounds that none of the petitioner's contentions should have been admitted. Should the

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[3] In this regard, see *The History of Nuclear Regulatory Commission Standing and Contention Admissibility Standards Promoting the Effective and Efficient Public Participation* (NRC Office of General Counsel, Jan. 2013), which concludes that: "[M]eaningful public participation in NRC adjudicatory hearings is achieved, in part, through balancing the effectiveness and the efficiency of the adjudicatory hearing request process." The NRC Office of General Counsel characterizes the NRC rules of practice for adjudicatory proceedings as a compromise between the extremes of screening out all non-meaningful public input in hearings through rigorous threshold requirements and capturing all meaningful public input through minimal threshold requirements (*Id.*, at 32).

Commission reverse the Licensing Board on the admission of all contentions, the necessity of a hearing is avoided, saving time, money and resources.

2. *Is it fair that the standard focuses on whether or not a hearing should be granted which results in a an opposing party's ability to appeal the admission of all admitted contentions whereas the petitioner's ability to appeal is limited to the denial of all of its contentions?*

In our view, it is fair that the existing interlocutory review standard in 10 C.F.R. 2.311 focuses on whether or not a hearing should be granted. As the ANPR acknowledges, whether or not a party is admitted to a proceeding is perhaps the "most crucial" determination. 78 Fed. Reg. at 20,500. As noted above, if a party's petition to intervene and hearing request are granted, that petitioner will have the opportunity under Option 1 to participate in an NRC licensing hearing and adjudicate what is arguably its most viable contention or contentions. Given the relatively small probability that the Commission will reverse a Licensing Board decision and order the admission of contentions previously dismissed, the fact that Option 1 requires the petitioner to delay appealing the rejection of its other contentions (if any) does not appear unfair or unduly burdensome. Additionally, it seems fair that a petitioner be allowed the right to immediately appeal if all of its proposed contentions are denied. By the same token, an opposing party (e.g., the applicant) should have the right to appeal the admission of the petitioner's admitted contentions, where the request for hearing or petition to intervene should have been wholly denied, because the applicant/licensee will be immediately and significantly affected (in terms of time, money and resources spent on the licensing hearing) by such a ruling.

3. *Will Option 1 result in time and resource savings to the parties compared to the other options? Consider whether there are time and resource savings resulting from entertaining only some 10 CFR 2.311 appeals of contention admissibility determinations compared to the risk that the failure to resolve all contention admissibility determinations early in the proceeding will result in the Commission later finding a contention admissible and remanding the issue to the Licensing Board or later finding a contention inadmissible and invalidating the adjudication of a contention.*

Because Option 1 has been in effect for decades, it is difficult to predict whether the current interlocutory appeal process in 10 C.F.R. 2.311 saves more time and resources for parties than other approaches that have never been tried.

Similarly, the hypothetical calculation of relative risk posed by alternatives to Option 1 is necessarily based upon experience with Option 1 only. We assume there is some risk that failure to resolve all contention admissibility determinations early in the proceeding may result in some Commission determinations admitting a previously rejected contention or rejecting a previously admitted contention. On the other hand, development of statistics on the Commission reversal rate could be very useful in informing this discussion. For example, how often has the Commission found a contention admissible that the Licensing Board found inadmissible? How often has the Commission found a previously admitted contention to be inadmissible? Should the Commission proceed with this rulemaking, we recommend that the Licensing Board compile

such statistics in connection with NRC's preparation of a regulatory basis for the contemplated rulemaking.

Comments on Option 2

Option 2 would amend 10 C.F.R. § 2.311 (c) and (d) to allow *any* petitioner or party to appeal – in whole or in part – an order granting or denying a request for hearing or petition to intervene. As stated by the NRC, this option "would effectively allow all petitioners and parties to immediately appeal, without threshold requirements, rulings on the admissibility of any particular contention. . . . " 78 Fed. Reg. at 20,500. Licensing Board rulings on contention admissibility could not be challenged at the end of the proceeding (that is, after a decision on the merits of an admitted contention or after the final partial initial decision of the presiding Licensing Board).

The ANPR points out that Option 2 would allow for early resolution of all contention admissibility questions, and NEI agrees that this approach offers some advantages over the existing process. Most importantly, as recognized by the NRC, this option would provide early certainty regarding the scope of a proceeding, by resolving contention admissibility issues at the outset. Adoption of Option 2 would specifically eliminate the possibility of a Commission decision late in the licensing process that reverses a Licensing Board denial of admission of a contention, and remands the matter to the Licensing Board for a hearing. To our knowledge, this scenario has not arisen in practice with a frequency that would suggest that the current rule is problematic. (It would be useful if NRC would develop statistics on this occurrence.) Nonetheless, the scenario of a late reversal by the Commission is a concern to the industry because it could put a remanded hearing on critical path to the issuance of a license and potentially delay the license. Under Option 2, if a contention were improperly excluded, the error could be reversed and the hearing held promptly. This consideration alone might arguably warrant adoption of this option.

Other considerations identified by the NRC in support of Option 2 may also have merit. Use of this option would eliminate the possibility of a hearing being held on a contention that was improperly admitted and later determined to be inadmissible. Rather, Option 2 would allow such an error to 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. This would improve the efficiency (and decrease the cost) of the hearing process for all participants. Again, we are not aware that this scenario -- Commission reversal of the admission of a contention -- has occurred frequently in NRC adjudications. Further, the current interlocutory review rules do provide applicants with avenues outside of Section 2.311 to seek review of admitted contentions.

NRC also suggests that the current rules may appear to incentivize applicants to appeal the admission of all admitted contentions rather than only some contentions. While this may be theoretically true, it is unclear whether Option 2 would actually decrease applicants' appeals of all admitted contentions by leading to more surgical appeals of admitted contentions. Applicants still will likely appeal the admission of any contention that appears to be inadmissible.

Moreover, even if some current appeals may appear to be overbroad, the Commission will simply deny the applicant's appeal with respect to contentions correctly admitted by the Licensing Board. Thus, other than potentially drafting an additional portion of an appellate brief, petitioners' hearing rights are not harmed under the current rule. Responding to an appeal is simply part of the process for petitioners, just as applicants must respond to what appear to be clearly inadmissible proposed contentions.

Implementation of Option 2 would almost certainly increase the number of interlocutory appeals by petitioners. As noted above, such a change would likely move the appeal process forward on admissibility issues, which could be beneficial. At the same time, such a change to the interlocutory review process would also have implications for Commission resources. Further, we note that the Commission has considered this option quite recently and rejected it, citing no compelling justification to change the current process. *See* 77 Fed. Reg. at 46,565.

Another potential disadvantage to Option 2 is that it could exacerbate delays in Commission adjudicatory decision-making, which the industry and NEI would view as a very significant concern. Arguably, these concerns are somewhat mitigated considering that it is unclear that the change will significantly increase the total number of appeals (both early in and after the Licensing Board proceeding). Moreover, to the outside observer the Commission's current adjudicatory case load appears to be manageable. However, as a public stakeholder, NEI's knowledge is necessarily limited on this point. We would therefore urge the agency to gauge carefully the potential effect of Option 2 on Commission resources, and seek to avoid over-burdening the Commission and its Office of Commission Appellate Adjudication (OCAA) staff.

Responses to NRC Questions on Option 2

1. *Will the time and resource savings resulting from conducting a proceeding only after interlocutory appellate review of the admissibility of the contentions outweigh the time and resources that must be devoted to this appellate review by the parties, Licensing Board, and the Commission?*

Adoption of Option 2 could increase the resources spent on interlocutory reviews. However, it is not clear that interlocutory reviews and later appellate reviews will be significantly different *in the aggregate*. And while it is possible that Option 2 could increase the resources spent on interlocutory reviews, it would also eliminate later appellate reviews. The primary advantage of Option 2 is that it would shift reviews of contention admissibility to an earlier point in the proceeding, potentially avoiding unnecessary hearings and avoiding licensing delays at the end of the process. These benefits could outweigh the marginal increase in time and resources devoted to earlier review of admissibility decisions. Of course, it is difficult to know whether these predictions are accurate.

2. *Will this change likely result in the immediate appeal of contention admissibility in most or all cases? Consider whether there would be any incentive for parties to not automatically challenge all Licensing Board orders from either perspective of admitting or denying contentions.*

We concur that adoption of Option 2 would likely result in additional appeals (in "most or all cases") with respect to *contentions rejected as inadmissible.* We also agree that there would be no reason, other than a good faith assessment by the petitioner of its arguments, to not pursue an appeal of a contention ruled to be inadmissible. In fact, at the early stage of the process the petitioner may have more resources to pursue an appeal than later in the process.

We believe it is less clear whether adoption of Option 2 would significantly alter appeals by applicants of *admitted contentions.* As discussed above, under existing NRC rules applicants already have avenues to appeal admitted contentions, and may appeal *all* admitted contentions under Section 2.311. We are confident that applicants and their legal counsel carefully assess their positions prior to exercising appellate options, and will continue to do so in the future.

3. *Would the likely increase in the quantity of appeals result in a commensurate improvement in the efficiency of the adjudicatory process?*

As discussed above, it is not clear to NEI that implementation of Option 2 would necessarily increase the quantity of appeals overall. It might increase the number of early appeals, but the magnitude of that increase is difficult to predict.

Nor is it clear that more appeals would necessarily "result in a commensurate improvement in the efficiency of the adjudicatory process." Option 2 might, under some circumstances, create the potential to improve the efficiency of the adjudicatory process and avoid licensing delays. But the converse could also prove to be true. If the Commission's appellate review schedule were to become bogged down by a higher number of appeals, the resulting delays in issuing decisions could decrease the overall efficiency of the NRC's adjudicatory process.

In practice, we believe the current rules have been effective and the proposals for potential improvements are hypothetical. In brief, there is no documented basis that a persistent problem exists that must be addressed through a change to Section 2.311. (If NRC has any statistical information that bears on this point, it would be useful to stakeholders if that data were shared.) Nonetheless, we conclude that Option 2 could provide benefits in terms of overall efficiency in the adjudicatory process.

4. *Will the availability of a no-threshold appeal for all contention admissibility determinations incentivize petitioners and parties to appeal each contention admissibility determination regardless of merit?*

See the responses to Questions 2 and 3, above. We believe that adoption of Option 2 might affect the number and the timing of appeals. With respect to whether Option 2 would increase

appeals *regardless of their merits*, NEI recognizes that parties may differ on their views of the "merits." Regardless of the rule, petitioners and parties must act in good faith in accordance with their views of the merits of an issue. The availability of an interlocutory review should not incentivize any party to file an appeal without a good faith argument to support its position.

Comments on Option 3

If adopted, Option 3 would amend 10 C.F.R. 2.311(c) and (d) to allow any petitioner or party to appeal an order granting or denying, in whole or in part, a request for hearing or petition to intervene with the exception that, when a request or petition is granted in part, environmental contentions cannot be appealed until (a) after the issuance of a final Environmental Impact Statement, or (b) after the issuance of the Licensing Board's decision at the end of the hearing process. 78 Fed. Reg. at 20,501.

This option is similar to Option 2, except for the denial or admission of environmental contentions. Accordingly, the perceived benefits of early resolution of issues described in our comments to Option 2 (above) apply equally to Option 3. NEI does not agree, however, that contentions grounded in the National Environmental Policy Act (NEPA) and related environmental statutes should be treated any differently than contentions grounded in the Atomic Energy Act or other requirements. Nor does the ANPR provide a legal or policy basis for doing so. It merely suggests that Option 3 could "better align the timing of the review of environmental contentions with the requirements of NEPA," and that, unlike safety contentions, NEPA contentions are "concerned with NRC staff's performance of environmental reviews." *Id.* NEI does not agree that these asserted advantages support treating environmental contentions differently for the purposes of interlocutory review.

NRC license applications subject to NEPA must contain a complete environmental report (ER), "which is essentially the applicant's proposal for the [draft environmental impact statement (DES)]."[4] 10 C.F.R. 2.309(f)(2) requires petitioners to file contentions based on the applicant's environmental report.[5] The purpose of this requirement is to allow early identification and resolution of issues.[6] Likewise, prompt interlocutory review of a Licensing Board decision to admit or deny such environmental contentions allows for early resolution of issues, ultimately leading to a more efficient hearing process focused on material issues. Furthermore, if a

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[4] 54 Fed. Reg. 33,168, 33,172 (August 11, 1989).

[5] *See also* 54 Fed. Reg. at 33,172 (discussing amendments to contention admission standards formerly included at 10 C.F.R. 2.714 and stating that "[t]he rule makes clear that to the extent an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document.")

[6] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 130 (2004) ("Our contention pleading rule requires a petitioner to file NEPA contentions on the applicant's ER so that environmental issues are raised as soon as possible in the proceeding. The requirement that a petitioner raise NEPA contentions in response to the ER gives the Staff the opportunity to request additional information from the applicant and work to resolve any deficiencies as the Staff develops its own Environmental Impact Statement (EIS).").

proposed environmental contention based on the applicant's ER does not meet admissibility standards, the issuance of the NRC Staff NEPA documents will not cure the deficiency in the proposed contention. This would appear to undercut the NRC's rationale for proposing Option 3.

For a variety of reasons, we do not believe that Option 3 reflects a better approach to handling interlocutory appeals under 10 C.F.R. 2.311 than the existing NRC rules. We would not support this alternative as part of a rulemaking.

Responses to NRC Questions on Option 3

1. *Should contentions grounded in NEPA and related environmental statutes be treated differently than contentions grounded in the Atomic Energy Act of 1954, as amended (AEA), or other requirements, considering that NEPA and the AEA have different requirements?*

In our view, proposed environmental contentions based upon NEPA or other environmental statutes should not be treated any differently than safety contentions based on the Atomic Energy Act (or other relevant requirements). The purpose of requiring a petitioner to submit proposed contentions based on the applicant's Environmental Report, rather than waiting until the NRC Staff issues its NEPA-based licensing documents, is to allow early identification and resolution of issues. Early identification and resolution of adjudicatory issues is essential to the efficiency and effectiveness of adjudicatory proceedings. Likewise, prompt interlocutory review of a Licensing Board decision to admit or deny such environmental contentions allows for early resolution of issues, ultimately leading to a more efficient and properly-focused hearing process.

The fact that an environmental contention may be mooted by the issuance of the NRC's proposed and/or final Environmental Impact Statement (EIS) is analogous to a safety contention being obviated by NRC staff's preparation and issuance of the Safety Evaluation Report. In either case, the NRC staff may issue requests for additional information (RAIs) while reviewing the applicant's safety and environmental licensing documents. The licensee's RAI responses can resolve a contention. And if the proposed contention does not meet NRC admissibility standards, there is no reason for the staff or applicant to spend its resources addressing the subject of the contention.

2. *Would petitioners or other parties be prejudiced by treating environmental contentions differently than other contentions?*

NEI believes that both parties would be prejudiced by treating environmental contentions differently than safety contentions, because early contention review provides for timely and efficient hearings. Under the existing rules, improper admission of contentions can be promptly reversed, thus preserving the resources of all parties. Likewise, improper exclusion of all proffered contentions could be reversed without delay. The current approach allows contentions to be promptly addressed by the applicant (by supplementing its application), the NRC staff (in preparing its environmental documents), or settlement. Also, economies may be achieved by addressing all admissibility decisions at once, by preparing and ruling on a single brief, and by limiting the costly, time-consuming mandatory document disclosure process. Furthermore,

petitioners would not be prejudiced by the unavailability of the NRC's environmental documents prior to an appeal of their contentions, because current rules allow for new contentions to be submitted once the NRC Staff's NEPA documents are issued.[7]

3. *Will the time and resources savings potentially resulting from advancing the appeal of individual contentions, other than environmental contentions, result in efficiencies to the hearing process?*

As discussed in connection with the other options, the early review of contention admissibility would potentially avoid unnecessary hearings, focus hearings on material issues, and avoid delays at the end of the hearing process. It would also avoid the cost of compliance with the continuing document disclosure obligation, and needlessly having to prepare motions for summary disposition or otherwise prepare for hearing.

Comments on Option 4

Option 4 would amend 10 C.F.R. 2.311 to (still) allow petitioners/requestors to immediately appeal rulings in which a presiding officer wholly denies the petition/request, but 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. *See* 10 C.F.R. 2.311(d)(1). As a result, no party would be allowed to file a non-discretionary appeal of a ruling that denies part of a petition to intervene or request for hearing. These latter issues would be immediately appealable only under the interlocutory appeals processes of 10 C.F.R. 2.341(f)(1) or (f)(2). *See* 78 Fed. Reg. at 20,501.

According to the ANPR, the arguable advantage of this change is that it would remove the perceived incentive under the current rule for the applicant/licensee to appeal every admitted contention, regardless of merit. The ANPR also suggests that use of Option 4 would likely reduce the number of interlocutory appeals, and the resulting expenditure of time and resources to pursue those appeals. The apparent disadvantage of Option 4, states the ANPR, would be the removal of early determinations regarding the proper admission of some contentions, including eliminating the often helpful Commission guidance contained in such decisions. *Id.*

The agency's suggestion in the ANPR that the *current rule* may incentivize a party (*i.e.*, an applicant) to appeal the admission of all admitted contentions in order to get early Commission review lacks any factual basis. In our experience, this may or may not be the case in actual practice. (If the NRC staff or NRC Licensing Board has information to the contrary, distribution of that data to public stakeholders would be useful.) Further, it is unclear whether the application of Option 4 would actually reduce the number of interlocutory appeals. In particular, applicants would still be likely to appeal any contentions that they believe to have been improperly admitted, but could do so under the standards of 10 C.F.R. 2.341 rather than Section 2.311.

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[7] 10 C.F.R. 2.309(f)(2). See also the 1989 final rule amending 10 C.F.R. Part 2, 54 Fed. Reg.33,168, 33,172 (Aug. 11, 1989) (noting that "[t]he NRC staff in its DES or FES may well take a different position than the applicant" and that the contention admission rule "explicitly recognizes for environmental matters existing precedent regarding the right to amend or supplement contentions based on new information.")

Thus, the burden on the Commission and parties might be lessened, but perhaps not substantially.

In addition, even if it could be demonstrated that implementation of Option 4 would in fact reduce the number of interlocutory appeals and the associated expenditure of time and resources (which the NRC has not done), there would likely be no reduction in the time and resources spent on the overall contention admissibility and hearing processes. Without some immediate appellate review of contention admissibility decisions, the parties would have to expend significant time and resources litigating issues. Earlier Commission review would allow the parties to avoid such litigation expenses in situations where the Commission later finds a contention inadmissible in full or in part. Therefore, adoption of Option 4 might in fact result in an overall *increase* in the aggregate time and resources spent appealing and litigating admitted contentions.

The industry also agrees with the NRC staff that Option 4 would result in an imbalance in petitioner and applicant rights. The approach under Option 4 would allow petitioners to appeal denials of requests and hearings under the no-threshold standard of 10 C.F.R. 2.311, whereas other parties would have to file appeals under the threshold standards of 10 C.F.R. 2.341. Accordingly, this option unfairly tips the scale towards the rights of petitioners/requestors without a well-reasoned basis to do so.

For a variety of reasons, we do not believe that Option 4 reflects a better approach to handling interlocutory appeals under 10 C.F.R. 2.311 than the existing NRC rules. We would not support this alternative as part of a rulemaking.

Responses to NRC Questions on Option 4

1. *Will the inability to immediately appeal, without threshold requirements, rulings other than complete denials of hearing requests or petitions result in the unnecessary expenditure of time and resources dedicated to resolving a contention that is later determined by the Commission to be inadmissible?*

Yes. Removing 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 will very likely result in the unnecessary expenditure of substantial time and resources in litigation. For example, in recent license renewal proceedings involving interlocutory appeals under Section 2.311, the Commission has overturned NRC Licensing Boards' admission of a number of contentions. If admission of those contentions could only be appealed at the end of the proceeding, there is no reason to believe the Commission decision would be any different then, thus wasting the substantial time and effort spent litigating such contentions. Even if the original admission of the contention(s) is not appealed at the end of the proceeding, substantial party resources are nevertheless required to litigate contentions that may have been improperly admitted.

2. *Because this option limits interlocutory appeals to situations where a petition is wholly denied, will it result in saved resources from interlocutory appeals, or will it result in those appeals simply being deferred to the final Licensing Board decision, at which time the appeals will be filed?*

As noted above, while implementation of Option 4 would eliminate interlocutory appeals by applicants filed pursuant to 10 C.F.R. 2.311, it would not eliminate interlocutory appeals entirely. Applicants/licensees may still file an appeal under 10 C.F.R. 2.341 for any contention that the applicant determines in good faith was improperly admitted. And while potentially fewer contentions would be subject to interlocutory appeal under Option 4, the effort to file and review an appeal pursuant to Section 2.341 is still substantial, and would result in few, if any, saved resources.

Whether use of Option 4 would result in appeals simply being deferred until after the final Licensing Board decision could depend on the results of the Licensing Board decision. For example, an applicant might choose not to appeal a favorable Licensing Board decision on a contention even if the applicant thought the contention was improperly admitted. Similarly, a petitioner might not appeal denial of admission of a contention if it fully participated in a hearing on other contentions. In such cases, there may be saved resources on appeal. However, in the aggregate, the resources expended in litigating such issues very likely exceed, often substantially, any saved resources associated with fewer appeals.

3. *Are the potentially saved resources from limiting interlocutory appeals under this option balanced by the resources potentially spent on adjudicating contentions that should have been denied?*

Limiting interlocutory appeals under this option might lessen the workload on the Commission, but not on the parties to the proceeding. As recent history indicates, litigation of contentions in licensing proceedings can go on for years, requiring substantial resources and commitments by all parties, including petitioners, the NRC, and applicants. This includes, but is not limited to, resources necessary to comply with mandatory disclosure requirements, prepare testimony, prepare and respond to motions, participate in hearings, and prepare post-hearing filings. It is therefore difficult to envision a scenario where the resources saved from limiting interlocutory appeals would be balanced by resources spent adjudicating contentions. To be clear, we believe the resources spent on adjudication would be greater, in the aggregate, than the resources potentially saved by further limiting interlocutory appeals.

4. *Is it fair under this interlocutory appeal option to allow petitioners to appeal a complete denial with no threshold requirements, whereas other parties must appeal pursuant to 2.341, which has threshold requirements?*

To promote fairness, we believe that NRC adjudicatory procedures—including the right to appeal—should apply equally to all hearing participants.[8] Option 4, without sufficient justification, proposes to limit the rights of appeal to only certain parties to the proceeding. To the extent resource savings are the prime motivator for Option 4, it would be unlikely to achieve that objective in the aggregate. If the NRC proceeds with rulemaking to amend the existing interlocutory review process under 10 C.F.R. 2.311 ("Option 1"), only Option 2 offers a better potential for fairness and overall resource savings.

Combining Interlocutory Review Provisions in 10 C.F.R. 2.311, 2.323, and 2.341

NRC also invites public comment on whether the interlocutory review provisions in 10 C.F.R. §§2.311, 2.323, and 2.341 should remain separate or should "be consolidated in one section in order to provide clarity and consistency." 78 Fed. Reg. at 20,502.

Should the NRC decide to proceed with this proposed rulemaking, NEI would not object to inclusion of a proposed "clarifying reorganization" of the various interlocutory appeal provisions. As the ANPR suggests, the provisions in Sections 2.311, 2.323, and 2.341 governing interlocutory appeals could, for example, be consolidated into one section (e.g., Section 2.341). However, at this time we do not advocate the initiation of rulemaking to address only this topic, in the absence of other proposed modifications to the substance of these rules.

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[8] Jan. 8, 2013 Memorandum to the Commissioners from NRC General Counsel Margaret Doane, Enclosure 1, *The History of Nuclear Regulatory Commission Standing and Contention Admissibility Standards Promoting Effective and Efficient Public Participation,* p.6, which states that to promote fairness, "Boards should apply adjudicatory procedures equally to all hearing participants."

Speiser, Herald

From: COTTINGHAM, Anne <awc@nei.org>
Sent: Wednesday, July 03, 2013 1:56 PM
To: RulemakingComments Resource
Cc: GINSBERG, Ellen; COTTINGHAM, Anne
Subject: Nuclear Energy Institute Comments on Docket ID NRC-2013-0050
Attachments: NEI Comments ANPR Interlocutory Appeals FILED 07 03 13.pdf

Attached please find comments of the Nuclear Energy Institute on Advanced Notice of Proposed Rulemaking re Potential Changes to the Interlocutory Appeals Process under 10 CFR 2.311; 78 Fed. Reg. 20,498 (April 5, 2013); Docket ID NRC-2013-0050.

Cordially,

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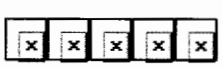

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