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79 FR 21958
(2)

Subject: Westinghouse Electric Company's Comments on Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses are Met (Docket No. NRC-2014-0077)

Dear Ms. Bladey:

Westinghouse Electric Company LLC (Westinghouse) appreciates the opportunity to comment on the Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses are Met (79 Fed. Reg. 21958 (Apr. 18, 2014) (NRC-2014-0077)). The timely and efficient conduct of these hearings is crucial to the success of the construction and start-up of the first new reactors to be licensed in the United States in over three decades. As the design certification applicant and primary vendor for the four **AP1000®**[1] reactors that are currently under construction at the Vogtle and V.C. Summer sites, Westinghouse plays a significant role in the completion of the Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC) for these sites and expects that it will be substantially involved in providing technical and legal support to its customers as part of these hearings. Needless to say, Westinghouse has a strong interest in ensuring the successful completion of any hearings if they should occur.

Westinghouse has closely examined the proposed procedures and commends the NRC staff for the excellent effort reflected in its proposal. The staff has made significant strides towards providing much needed clarity and predictability in these hearings. Westinghouse is appreciative of the staff's efforts.

However, Westinghouse believes that there are several key areas that require additional clarity. First, the process for granting interim authorization remains murky and the NRC staff's proposed interpretation of the Commission's authority to authorize interim operation is unnecessarily restrictive and contrary to the plain language of the Atomic Energy Act. Second, the standard for granting claims of incompleteness is unclear and does not appear to rely on a significant body of guidance that has been developed in collaboration between the NRC and industry to ensure that ITAAC closure notifications are sufficiently complete. Finally, Westinghouse believes that the procedures require additional clarity regarding access

[1] **AP1000** is a trademark or registered trademark of Westinghouse Electric Company LLC, its affiliates and/or its subsidiaries in the United States of America and may be registered in other countries throughout the world. All rights reserved. Unauthorized use is strictly prohibited. Other names may be trademarks of their respective owners.

to proprietary information that may arise in relation to claims of incompleteness. More detailed comments are provided in the attachment.

Westinghouse also supports the comments submitted by the Nuclear Energy Institute (NEI). In particular, Westinghouse encourages the NRC to consider NEI's recommendations regarding further consideration of using hearing approaches other that the modified Subpart L process, as a legislative hearing, and for considering use of the "inspections and tests" exception in the Administrative Procedure Act.

Westinghouse appreciates your consideration of its views, and looks forward to continued engagement on this matter.

Please feel free to contact me at 412-374-5121, or Jason Zorn, Senior Counsel, Nuclear Regulatory Affairs, at 724-940-8317, if you have any questions or concerns.

Very truly yours,

Thomas C. Geer
Vice President
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WESTINGHOUSE ELECTRIC COMPANY'S COMMENTS ON THE NRC'S PROPOSED PROCEDURES FOR CONDUCTING HEARINGS ON WHETHER ACCEPTANCE CRITERIA IN COMBINED LICENSES ARE MET

Westinghouse Electric Company LLC (Westinghouse) is pleased to have the opportunity to offer its comments on the NRC's proposed procedures for conducting hearings on whether the acceptance criteria in combined licenses are met. Westinghouse has provided comments in three general categories. First, Westinghouse believes that the NRC staff's proposed interpretation of the Commission's authority to authorize interim operation is unnecessarily restrictive and contrary to the plain language of the law. Second, the standard related to granting claims of incompleteness is not well defined in the proposed procedures, and does not rely on guidance that has been developed between the NRC and industry on ITAAC closure. Third, the proposed procedures need additional clarity regarding access to proprietary information as part of a claim of incompleteness.

In addition to these specific comments, Westinghouse supports the comments submitted by the Nuclear Energy Institute (NEI). In particular, Westinghouse encourages the NRC to consider NEI's recommendations regarding further exploration of using hearing approaches other than the Subpart L hearing procedures, such as a legislative-style hearing, and for further consideration of the use of the "inspections and tests" exception in the Administrative Procedure Act.

Comment 1: The NRC should interpret the interim operation authorization consistent with the plain language of Section 189.a so that the Commission maintains its broad discretion to grant interim operation.

Section 189.a of the Atomic Energy Act of 1954 (the Act) permits the Commission to authorize interim operation notwithstanding its granting of a hearing, if the Commission determines that "there will be reasonable assurance of adequate protection of the public health and safety." The Federal Register Notice for the proposed ITAAC hearing procedures[1] contains little discussion regarding what the considerations might be for granting interim operation, but refers instead to a discussion of these issues in SECY-13-0033, *Allowing Interim Operation under Title 10 of the Code of Federal Regulations Section 52.103* (Apr. 4, 2013). In SECY-13-0033, the staff looked to the legislative history of Section 189.a in assessing how the NRC "could make the adequate protection determination allowing interim operation even though the petitioner has made a *prima facie* showing that operation is contrary to reasonable assurance of adequate protection of public health and safety."[2] In its review, the staff cited language from the Senate debate on the amendment that led to the hearing provisions in Section 189.a stating that interim operation could not be granted unless there was "no question about the safety of the plant" and that the contested issues relate to issues that might have "long term implication for safety." Based solely on this discussion, the staff concluded in SECY-13-0033 that it was Congress's intent that the "interim operation was intended for situations in which the petitioner's *prima facie* showing relates to alleged safety consequences that will

[1] Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses are Met, 79 Fed. Reg. 21958, 21962 (Apr. 18, 2014). However, in Draft Template A, Notice of Intended Operation and Associated Orders, the template states that "the Commission will follow the legislative intent underlying the interim operation provision." Draft Template A at 13.

[2] SECY-13-0033 at 4.

not arise during the interim operation allowed, or in which mitigation measures can be taken to preclude potential safety consequences during interim operation."[3]

Reliance on the legislative history to understand the meaning of "reasonable assurance of adequate protection" in Section 189.a, however, is both unnecessary and inappropriate as a matter of both law and policy. A determination of whether to grant interim operation will be a highly fact-specific evaluation based on the specific contentions that are raised. This is precisely the type of scenario in which the Commission will want to retain the broadest possible discretion. The statutory language authorizing the grant of interim operation if the Commission finds reasonable assurance of adequate protection is clear in this regard, and the establishment of limiting criteria would unnecessarily restrict the Commission from a valid exercise of its authority in granting interim operation.

As a general rule of statutory construction, "[t]he starting point in statutory interpretation is the language [of the statute] itself."[4] Though the concept is found in many forms (e.g. the "reasonable assurance standard," or the "adequate protection standard"), the meaning of "reasonable assurance of adequate protection" in the overall context of the Act and the NRC's regulations has been well known to the Commission and to Congress for decades. As the Commission, Congress, and the courts have long recognized, "reasonable assurance of adequate protection" is the foundation of the NRC's regulatory framework under the Act.[5] Indeed, the Atomic Energy Commission noted in 1973 that "the regulatory process turns upon the concept of 'reasonable assurance' to the public health and safety."[6] Former NRC Commissioner Nils Diaz also summarized the principle well in 2001:

> The guiding legal principle of the Atomic Energy Act for the regulation of nuclear energy and radiation is the envelope established for reasonable assurance of adequate protection. The principle is sound, it has worked, and is being implemented increasingly well.[7]

Historically, the Commission has categorically refused to attempt to define reasonable assurance of adequate protection, and the courts have repeatedly not compelled it to do so. In fact, the Commission has strongly asserted its comfort with the lack of definition of "reasonable assurance of adequate protection:"

> [T]here is nothing unusual or imprudent, and certainly nothing illegal about decisions which ultimately turn on the application -- by duly constituted authority and after full consideration of all relevant information -- of phrases which are not fully defined. Consider, for instance, the "reasonable assurance" determination the Commission must make before issuing an operating license. Indeed, most of the Commission's rules and

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[3] *Id.*

[4] *United States v. James*, 478 U.S. 597, 604 (1986).

[5] *See, e.g., North Anna Environmental Coalition v. U.S. Nuclear Regulatory Commission*, 533 F.2d 655, 659 (D.C. Cir. 1976) ("The demand for [adequate] protection has consistently been construed by the Commission as a demand for "reasonable assurance" that such protections are present, and this interpretation has been upheld by the Supreme Court.").

[6] Memorandum and Order Regarding Filing of Petition for Shutdown of Certain Reactors, 38 Fed. Reg. 23815, 23816 (Sept. 4, 1973) (affirmed by *Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045, 1050 (D.C. Cir. 1975)).

[7] Commissioner Nils J. Diaz, Relevance of Radiation Protection, Remarks Before the American Radiation Safety Conference and Exposition (46th Annual Meeting of the Health Physics Society) Cleveland, Ohio (June 11, 2011).

> regulations are ultimately based on unquantified and, as we note below, presently unquantifiable ideas of what constitutes "adequate protection."[8]

The clearest articulation of the NRC's long-standing position on adequate protection is arguably found in its 1988 Final Rule revising the backfitting provisions at 10 C.F.R. § 50.109. There, the Commission unequivocally rejected demands to define or provide an objective definition of adequate protection, instead insisting that such determinations were reserved to the Commission itself to be made on a case-by-case basis. The Commission explained:

> There does not exist, and cannot exist, at least not yet, a generally applicable definition of "adequate protection" which would guard against every possible misuse of the phrase. Congress established "adequate protection" as the standard the Commission is to apply in licensing a plant ... and gave the Commission authority to issue rules and regulations necessary for protection of public health and safety ... but Congress did not define "adequate protection," nor did it command the Commission to define it.[9]

In addition, the NRC's position on the "reasonable assurance" standard has been subsequently articulated in numerous contexts by the Commission and the NRC staff. For instance, in its 2010 decision related to the Pilgrim license renewal, the Commission explained that "'reasonable assurance' is not quantified as equivalent to a 95% (or any other percent) confidence level, but is based on sound technical judgment of the particulars of a case and on compliance with our regulations."[10] In those same proceedings, the NRC staff argued before the Licensing Board that "[a]lthough reasonable assurance appears in many areas of the Commission caselaw and regulations, it is not specifically defined in either the Atomic Energy Act or the Commission's regulations..." and that "[r]easonable assurance is based upon technical judgment, not application of a mechanical verbal formula, a set of objective standards, or a specific confidence interval."[11] In policy space, the NRC recently reiterated these same concepts, explaining that:

> The term "adequate protection" is not defined in the AEA; it is a subjective, yet mandatory standard. Under applicable case law, the NRC must have "reasonable assurance" that there is "adequate protection" of public health and safety before approving a licensing action. In addition, case law has further clarified that the NRC does not have to regulate to zero risk and that there is no requirement for unanimity among technical experts as to what constitutes "adequate protection."[12]

These are just several examples demonstrating that the NRC has a long-held position that it understands the meaning of "reasonable assurance of adequate protection."

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[8] Final Rule, Revision of Backfitting Process for Power Reactors, 53 Fed. Reg. 20603, 20605 (June 6, 1988).
[9] *Id.* at 20606.
[10] *In the Matter of Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 71 N.R.C. 449, 467, CLI-10-14 (June 18, 2010).
[11] *In the Matter of Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.*, NRC Staff Proposed Findings of Fact and Conclusions of Law, and Order in the Form of an Initial Decision at 14-15 (June 9, 2008).
[12] SECY-12-0110, *Consideration of Economic Consequences with the U.S. Nuclear Regulatory Commission's Regulatory Framework*, Encl. 3 at 2 (Aug. 14, 2012).

The agency's view of its inherent statutory authority and discretion has been resoundingly endorsed by the courts. The Supreme Court long ago accepted the "reasonable assurance of adequate protection" standard as an acceptable interpretation of the agency's authority under the Act.[13] The 1989 D.C. Circuit decision in *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission* strongly endorsed the NRC's view of the adequate protection standard as articulated in the final backfitting rule published in 1988. The court held "[t]he determination of what constitutes 'adequate protection' under the Act, absent specific guidance from Congress, is just such a situation where the Commission should be permitted to have discretion to make case-by-case judgments based on its technical expertise and on all the relevant information."[14] The court went on to explain that "[w]e also agree with the Commission that the 'adequate protection' standard may be given content through case-by-case applications of its technical judgment rather than by a mechanical verbal formula or set of objective standards."[15] There are of course other cases, but none have contradicted the NRC's interpretation of the "reasonable assurance" standard.[16]

It light of the extensive regulatory and legal history on "reasonable assurance of adequate protection," there is no rational basis for the use of legislative history to obtain further understanding of a presumably well-understood concept. As an initial matter, the courts and legal commentators have long recognized that the use of "relying on legislative history to discern legislative intent should be done with caution...."[17] The basis for such caution is evidenced in this instance by the fact that the staff's reliance on legislative history to understand the meaning of "reasonable assurance of adequate protection" in Section 189.a contradicts the plain language in the Act and will result in an unwarranted restriction of the Commission's authority to exercise its discretion to authorize interim operation. The staff's proposed restriction on the Commission that interim operation authorization be limited to circumstances where there is "no question about the safety of the plant" and that the contested issues under which interim operation could be granted relate to issues that might only have "long term implication for safety" imports words into the statute that are simply not in the text.

More importantly, the interpretation that the staff has proposed in SECY-13-0033 is contrary to the overall plain meaning of the "reasonable assurance of adequate protection" standard in the Act. The NRC has repeatedly and consistently taken the position that reasonable assurance of adequate protection is not a "zero risk" standard.[18] The Atomic Energy Commission explained that "[w]e do not live in a riskless society..." and that "we cannot – and do not – claim 'assurance' as an absolute."[19] The courts have embraced this view as well. As the D.C. Circuit succinctly summarized, "the courts have long accepted the Commission's definition of its statutory mandate to 'provide adequate protection to the health and

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[13] *Power Reactor Development Corp. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961). *See also Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045, ("The Commission has long interpreted [Section 182 of the Act] as a demand for 'reasonable assurance' of [adequate] protection, and the Supreme Court, in its *Power Reactor* decision has squarely sustained that administrative construction.").

[14] *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 880 F.2d 552, 558 (D.C. Cir. 1989).

[15] *Id.*

[16] *See, e.g., Riverkeeper v. Collins*, 359 F.3d 156 (2nd Cir. 2004); and *Public Citizen v. Nuclear Regulatory Commission*, 573 F.3d 916 (9th Cir. 2009).

[17] *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006). *See also Saysana v. Gillen*, 590 F.3d 7, 16 (1st Cir. 2009) ("We approach all arguments based on legislative history with significant caution.").

[18] Final Rule, Revision of Backfitting Process for Power Reactors, 53 Fed. Reg. 20603, 20604 (June 6, 1988) (explaining that "adequate protection is not absolute protection or zero risk.").

[19] Memorandum and Order Regarding Filing of Petition for Shutdown of Certain Reactors, 38 Fed. Reg. 23815, 23816 (Sept. 4, 1973).

safety of the public' as requiring not a risk-free environment, but a 'reasonable assurance . . . that the reactor could be safely operated at the proposed location.'"[20]

In relying on comments by a single legislator in the Congressional Record that interim operation authorization would only be granted if the Commission concluded that there was "no question about the safety of the plant," the staff implies that a "zero risk" standard would be applied in the narrow instance of granting interim operation. Westinghouse suggests that the staff's interpretation, if adopted by the Commission, would unnecessarily constrict the Commission's authority and set a dangerous precedent inconsistent with the agency's historical interpretation of its authority.

It should be noted "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."[21] At the time Section 189.a was amended in 1992, the NRC's interpretation of the reasonable assurance standard had been established for several decades. In addition, at that time the NRC had recently completed the amendments to its backfitting regulation at 10 CFR § 50.109, and had successfully defended itself from legal challenges to the rule based partially on the argument that "adequate protection" could not be and should not be defined, and that the Commission was quite capable of understanding its meaning. Further, the Congressional Record cited by the staff in SECY-13-0033 contains correspondence from the Commission endorsing the amendments to Section 189.a because "overall [the amendment] appears to us to be compatible with Part 52, providing the Commission with flexibility that we believe to be necessary to carry out a licensing program ten or more years in the future."[22] It should be presumed, therefore, given the Commission's endorsement of the amendments to Section 189.a, the NRC's lengthy and public history regarding the "reasonable assurance" standard, and the validation by the courts of the NRC's interpretation, that Congress was well aware of the NRC's understanding of the reasonable assurance standard, and intended implementation of the interim operation provision of Section 189.a to be consistent with that interpretation.

To the extent that the staff is concerned with the regulatory conundrum with granting interim operation during the pendency of a hearing challenging the acceptance criteria, the Commission also has a long history of relevant precedent to guide its decision-making. Granting interim operation during the pendency of an ITAAC hearing is effectively no different from granting a licensee authorization to operate during the pendency of a hearing on a license amendment under the so-called "Sholly Amendment" regulations at 10 C.F.R. §§ 50.91 and 50.92. Statutory authority to do so is found in the same section of the Act as the ITAAC hearing provisions, Section 189.a. Under this scheme, the Commission may issue and make immediately effective an amendment to an operating or combined license if it determines that the amendment will involve no significant hazards considerations,

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[20] *Carstens v. Nuclear Regulatory Commission*, 742 F.2d 1546, 1557 (D.C. Cir. 1984). *See also Nader v. Nuclear Regulatory Commission*, 513 F.2d 1045, 1052 (D.C. Cir. 1975) ("The Commission has long interpreted [the adequate protection provision of Section 182 of the Act] as a demand for "reasonable assurance" of that protection, and the Supreme Court, in its *Power Reactor* decision has squarely sustained that administrative construction.").

[21] *North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982). *See also Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[22] 138 Cong. Rec. S1140 (Feb. 6, 1992).

notwithstanding the pendency of a hearing.[23] Legally, this permits an operating reactor licensee to resume operation of the facility even though there is a pending hearing challenging the merits of the underlying license amendment.[24] As the Commission explained when it implemented these regulations, such a determination is not a decision on the merits of a hearing request or the amendment request itself, for the "no significant hazards" consideration determination is effectively a "screening" device concerning whether the hearing should be held before or after the amendment was issued.[25] Although there is no license amendment involved, authorizing interim operation prior to the completion of a hearing on the ITAAC completion is in nature not different from the "screening" mechanism created by the "no significant hazards" regulation, since the key question is whether the licensee can operate the facility even though the safety of doing so has been questioned.

It is completely within the Commission's statutory authority to develop and apply something akin to the "no significant hazards consideration" evaluation process to an interim operation determination. Although the "no significant hazards consideration" language is found in Section 189.a(2) of the Act, the language in Section 189(a)(1) permitting the Commission to authorize interim operation is arguably far broader than the "no significant hazards" language. The interim operation provision permits the Commission to exercise authority to the limits of its general statutory authority -- "reasonable assurance of adequate protection" – whereas the more narrow Sholly provision limits the NRC to permitting operation only if it finds no significant hazards considerations. Considering the NRC's nearly 30 year history in implementing the "no significant hazards considerations" process, the Commission should account for and take advantage of this vast experience in the context of authorizing interim operation pending a hearing request on the ITAAC completion. The point here is not for the Commission to necessarily apply the exact "no significant hazards" formulation in the context of interim operation, but rather to remind the NRC of its extensive history of being able to competently make operation-related decisions even in context of unresolved adjudicatory disputes.

In sum, the Commission has long demonstrated its technical and legal competence to determine, on a case-by-case basis, whether reasonable assurance of adequate protection exists. Imposing constraints on the Commission's ability to do so again in the context of interim operation is unwarranted, unprecedented, and would surely end in a result that Congress did not intend.

Comment 2: NRC should clarify the standard for claims of incompleteness based on previously reviewed and approved guidance on ITAAC closure notifications

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[23] *See* 10 C.F.R. § 50.91(a)(4) ("Where the Commission makes a final determination that no significant hazards consideration is involved and that the amendment should be issued, the amendment will be effective on issuance, even if adverse public comments have been received and even if an interested person meeting the provisions for intervention called for in § 2.309 of this chapter has filed a request for a hearing. The Commission need hold any required hearing only after it issues an amendment, unless it determines that a significant hazards consideration is involved, in which case the Commission will provide an opportunity for a prior hearing.").

[24] *See, e.g., In the Matter of Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-08, 63 N.R.C. 235 (2006) (denying petitioner's request for the Commission to stay issuance of a licensing amendment to the licensee authorizing operation at uprated power because of an ongoing hearing proceeding on the license amendment request).

[25] Final Rule, Final Procedures and Standards on No Significant Hazards Considerations, 44 Fed. Reg. 7744, 7749 (Mar. 6, 1986).

Section 2.390(f)((1)(vii) of the NRC's regulations provides that "If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing." However, other than restating the existing regulatory language, the proposed ITAAC hearing procedures provide no further guidance regarding how the Commission will make its determination that a petitioner has made an adequate showing of incompleteness. The failure to have any articulated standard here could lend itself to an open-ended process through which initial operation could be indefinitely delayed.

Fortunately, there is existing guidance regarding what constitutes a "complete" ICN. The industry has worked closely with the NRC staff for a number of years regarding development and agreement on guidance associated with ITAAC closure. That guidance, NEI 08-01, *Industry Guideline for the ITAAC Closure Process under 10 CFR Part 52*, has long addressed the sufficiency of ICNs specifically in the context of ITAAC hearings. Such guidance specifically is contained in Sections 6 and 7, along with multiple examples of what constitutes sufficient information contained in Appendix D. The NRC currently endorses NEI 08-01, Revision 4, through Regulatory Guide 1.215, *Guidance for ITAAC Closure under 10 CFR Part 52* (Rev. 1) (May 2012), as an acceptable method to comply with 10 CFR 52.99. RG 1.215 specifically acknowledges the relationship between the sufficiency of ICNs for purposes of both satisfying the NRC's oversight role over the ITAAC closure process as well as facilitating the opportunity for hearing.

Revision 5 to NEI 08-01 is currently under review by the NRC as an acceptable method to meet the requirements for ITAAC closures. Sections 6 and 7 have been updated to provide even more detail regarding the sufficiency of ICNs than was previously provided under Revision 4. This is not by coincidence. Sections 6 and 7 were updated in part, to address guidance provided by the NRC in the intervening time between the issuance of RG 1.215 in 2009 and present. For instance, the NRC published revisions related to maintenance of ITAAC in August 2012 in which specific revisions to 10 CFR 52.99(c) were made to ensure "(1) The NRC has sufficient information to complete all of the activities necessary for the Commission to make a finding as to whether all of the ITAAC are met prior to initial operation, and (2) interested persons will have access to information on both completed and uncompleted ITAAC at a level of detail sufficient to address the AEA Section 189a(1)(B) threshold for requesting a hearing on acceptance criteria."[26] The Commission then went on to set forth its general expectations regarding the sufficiency of the ICNs. It stated: "The NRC would expect the notification to be sufficiently complete and detailed so that a reasonable person could understand the basis for the licensee's representation that the inspections, tests, and analyses have been successfully completed and the acceptance criteria are met."[27]

Further, in January 2013 regarding the first ICN that was submitted in November 2012. In its *Notice of Insufficient Information to Support Inspection, Test, Analysis, and Acceptance Criterion Closure Verification of Vogtle Electric Generating Plant Unit 3, ITAAC E.2.5.04.05.05.01, "Backfill Compaction,"* (Jan. 8, 2013) the NRC explained that:

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[26] Final Rule, Requirements for Maintenance of Inspections, Test, Analyses, and Acceptance Criteria, 77 Fed. Reg. 51880, 51887 (Aug. 28, 2012).

[27] *Id.* The description of the Commission's expectations regarding ITAAC closure notifications were also set forth in the Proposed Rule, published on May 13, 2011 (76 Fed. Reg. 27925, 27930).

> ICNs must contain sufficient information to allow the NRC staff to determine whether the ITAAC have been successfully completed and to allow interested persons to have access to information about completed ITAAC at a level of detail sufficient to address the threshold for requesting a hearing on whether the acceptance criteria in the ITAAC have been, or will be, met. RG 1.215 endorses the methodologies described in industry guidance document Nuclear Energy Institute (NEI) 08-01, "Industry Guidance for the ITAAC Closure Process under 10 CFR Part 52," Revision 4, issued July 2010. To be consistent with this guidance the ICN should contain, at a minimum, a summary description of the bases for the licensee's conclusion that it has performed the inspections, tests, or analyses and that it has met the prescribed acceptance criteria.

It is important to keep in mind that all of the guidance on the sufficiency and completeness of ITAAC notifications has been developed in a transparent and public process. The contents of NEI 08-01 and the specific subject of ICN sufficiency have been discussed at numerous public meetings dating back at least to 2007, and, as noted above, the NRC has published both rule changes and guidance revisions to the public for comment. Additionally, RG 1.215 undergoes a public review and comment process as part of each revision, providing members of the public opportunities to challenge the endorsement of NEI 08-01 as an acceptable standard for "sufficient information." As such, to the extent that it can be argued that the guidance of NEI 08-01 is inadequate to ensure that ICNs are de facto sufficient, the public has had ample opportunity to raise this issue.

However, the NRC's proposed procedures for ITAAC hearings contain no direct references or ties to the substantial body of work that currently exists on the sufficiency of ITAAC closure notifications. As such, Westinghouse suggests that the NRC expressly acknowledge the relationship between adherence to NEI 08-01 and RG 1.215 and the completeness of an ITAAC closure notification. As a general rule, ICNs that are consistent with this guidance should be deemed to be complete, notwithstanding a petitioner's challenge to the contrary.

Comment 3: The Proposed Processes Regarding Proprietary Information Require Further Clarity

There are several areas regarding the relevance of and access to proprietary information that require additional clarity. First, the relationship between claims of incompleteness and the availability of proprietary information is not clear from the proposed procedures. The NRC should acknowledge as an initial matter that petitioners should not be permitted to argue that ICNs are incomplete merely because the technical basis for an ITAAC closure might have relied in part on underlying technical information that is considered proprietary without some further demonstration of the relevance of such information. NEI 08-01, Rev. 5, addresses the need for ICNs to stand independently and not rely on non-public information. Section 6 states, for instance, that "Licensees should, to the extent possible, exclude from ITAAC closure notifications sensitive or proprietary information that would otherwise be withheld under 10 CFR 2.390." The practice to date for ICNs has been to ensure that, consistent with the guidance of NEI 08-01, the ICN itself contains enough information to sufficiently explain how the acceptance criteria are met for a particular ITAAC. Therefore, a petitioner's claim that access to proprietary information is necessary as part of a claim of incompleteness should be subjected to a high level of scrutiny.

As a result of the extensive work that has been done over the last several years with respect to the sufficiency of ITAAC Closure Notifications, Westinghouse does not believe that access to proprietary

information would be necessary for a petitioner to make a *prima facie* case. However, to the extent that additional, non-public references are associated with the ICN, those documents are clearly identified in the "List of References" section to the ICN that is published for the public at large. As such, if a petitioner believes that they need access to proprietary information to make a *prima facie* case, they should be expected to take all necessary steps in advance of the hearings to obtain such access following the NRC's established processes for obtaining access to proprietary information in adjudicatory proceedings. When evaluating a claim of incompleteness that involves access to any SUNSI or SGI, the NRC should take into consideration a petitioner's failure to exercise due diligence and avail him or herself of available processes.

Second, the proposed procedures do not address how the NRC would evaluate what would essentially be a late-filed request for access to SUNSI if such information is determined to be relevant to a claim of incompleteness. As noted above, Westinghouse does not believe that petitioners would need access to proprietary information associated with an ITAAC closure because the ICNs have been designed to ensure that enough information is present to understand whether the acceptance criteria have been adequately addressed. However, Westinghouse also recognizes that this does not preclude the possibility of a petitioner requesting access to proprietary information in the context of a licensee's response to a claim of incompleteness. Though the NRC has outlined a process to obtain access to such information in advance of a hearing request, the processes do not extend to how such requests will be dealt with as part of a claim of incompleteness. For instance, a petitioner could argue that it is unable to make a *prima facie* case on the acceptance criteria without access to proprietary information. The NRC's proposed procedures do not provide for a process or otherwise provide details regarding how such access might be provided (assuming there is agreement that such information is needed for a *prima facie* case). There will be little time once the hearings commence to resolve such issues on an ad hoc basis, so failure to clearly outline a process could have a substantial impact on the NRC's ability to conduct a hearing in accord with the time frames that have been established by Section 189.a of the Act and the Commission's regulations.

Westinghouse acknowledges that these are complex issues. As such, Westinghouse suggests that the NRC reconsider the practical implications of the issues raised above in refining the procedures. Westinghouse also suggests that the NRC work collaboratively with stakeholders to further refine the hearing procedures so that the framework for effectively managing access to sensitive information leaves no room for doubt.