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General Comment

See attached file(s)

Attachments

ND-14-1026 ITAAC Comments- FINAL

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SOUTHERN COMPANY

July 2, 2014

ND-14-1026

Ms. Cindy Bladey, Chief
Rules, Announcements, and Directives Branch
Office of Administration
Mail Stop: 3WFN–06–44M
U.S. Nuclear Regulatory Commission
Washington, DC 20555–0001

Re: Southern Nuclear Operating Company, Inc.'s Comments on the Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses are Met (Docket ID No. NRC–2014–0077)

Dear Ms. Bladey:

Southern Nuclear Operating Company, Inc. (SNC) appreciates the opportunity to provide the Nuclear Regulatory Commission (NRC) with comments on the Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met, 79 Fed. Reg. 21,958 (April 18, 2014) ("Proposed Procedures"). The Proposed Procedures are thorough, well-developed, and evidence a significant amount of time and careful thought from the NRC Staff, the Office of General Counsel, and the Office of Commission Appellate Adjudications. SNC recognizes and commends the effort and attention to detail that went into the development of the Proposed Procedures.

As explained in more detail in the attached comments, SNC believes that many aspects of the Proposed Procedures should be adopted in the final procedures without modification. SNC is providing comments regarding some provisions that will aid in streamlining the hearing process and in ensuring that the process is both practical and efficient. SNC also reviewed the NRC Staff's requests for comments on certain specific areas and has provided its suggestions. In support of the Staff's efforts to prepare final procedures, SNC believes that a second public meeting regarding the Proposed Procedures would be beneficial. Some of the issues raised are novel and complex, and an open forum for discussion will provide a useful opportunity to clarify and consider these issues.

SNC hopes that the attached comments aid in the preparation of the final hearing procedures. Please contact me if you would like additional information related to SNC's proposals or have any questions.

Sincerely,

Brian H. Whitley
Regulatory Affairs Director, Nuclear Development

cc:

Southern Nuclear Operating Company / Georgia Power Company
Mr. S. E. Kuczynski (w/o enclosures)
Mr. J. A. Miller
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Mr. S. Blanton, Balch Bingham
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Ms. A. Rice, South Carolina Electric & Gas Company
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SOUTHERN NUCLEAR OPERATING COMPANY, INC.'S COMMENTS ON THE PROPOSED PROCEDURES FOR CONDUCTING HEARINGS ON WHETHER ACCEPTANCE CRITERIA IN COMBINED LICENSES ARE MET

Southern Nuclear Operating Company, Inc. (SNC) appreciates the opportunity to provide the Nuclear Regulatory Commission (NRC) with comments on the Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met, 79 Fed. Reg. 21,958 (April 18, 2014) ("Proposed Procedures"). In addition to the comments provided herein, SNC also endorses the comments of the Nuclear Energy Institute (NEI) on the Proposed Procedures. The NRC developed these draft generic procedures for conducting hearings on whether acceptance criteria, part of the inspections, tests, analyses, and acceptance criteria (ITAAC) included in the combined license (COL) for a nuclear reactor are met. As the NRC noted, "[w]hile NRC regulations address certain aspects of the ITAAC hearing process, they do not provide detailed procedures for the conduct of an ITAAC hearing." *Id.* at 21,960. The Proposed Procedures, once finalized, should provide the needed specificity and predictability.

The Proposed Procedures are thorough, well-developed, and evidence a significant amount of time and careful thought from the NRC Staff, the Office of General Counsel, and the Office of Commission Appellate Adjudications. SNC recognizes and commends the effort and attention to detail that went into the development of the Proposed Procedures. After careful review, SNC has determined that, in many respects, the Proposed Procedures are acceptable and should be finalized without substantial alteration. SNC has identified some areas where modifications would improve the Proposed Procedures and, additionally, has considered the questions where the NRC requested comments. In considering the Proposed Procedures and drafting these comments, SNC has attempted to approach the complexities of the ITAAC hearing process from a very practical perspective. As a COL holder with recent experience in hearings before the NRC and with the expectation of a Notice of Intended Operation (NIO) for SNC's Vogtle Unit 3 being issued within the next two years, SNC believes that the final procedures should be issued as soon as is reasonably practical to provide all stakeholders adequate time to prepare and to support the NRC Staff's resource planning needs. In support of the Staff's efforts to prepare final procedures, SNC believes that a second public meeting regarding the Proposed Procedures would be beneficial. Some of the issues raised are novel and complex, and an open forum for discussion will provide a useful opportunity to clarify and consider these issues.

SNC hopes that these comments will aid the NRC in developing more streamlined final procedures that meet the NRC's "overarching statutory requirement for the expeditious completion of an ITAAC hearing found in [Section 189a.(1)(B)(v) of the Atomic Energy Act (AEA)]." *Id.* at 21,961.

I. Elements of the Proposed Procedures that the Final Procedures Should Retain

The Proposed Procedures correctly emphasize the importance of schedule adherence, meeting deadlines, and the timely resolution of any ITAAC hearing granted. ITAAC hearings have an "expedited schedule". *Id.* at 21,963. As the Proposed Procedures succinctly explain, "[t]o meet the statutory objective for timely completion of the hearing, the NRC must complete the hearing process much faster

than is usually achieved in NRC practice for other hearings." *Id.* In recognition of the compressed schedule for ITAAC hearings, the Proposed Procedures contain the following provisions, which should be retained: (a) a strict deadline for issuance of the Presiding Officer's initial decision after a hearing (*Id.* at 21,964); (b) the expectation that deadlines will be strictly adhered to; (c) the shortened timeframe for filing and answering motions (*Id.* at 21,968); (d) the shortened timeframe for filing and answering stay applications (*Id.* at 21,969); and (e) the prohibition on requests to stay the effectiveness of the Commission's decision that there is adequate protection during the period of interim operation (*Id.* at 21,966).

In addition to these provisions, the Templates setting out the particular processes that will apply to different types of issues admitted for hearing also provide schedule certainty and include timeframes that are appropriate for the ITAAC hearing context. Although SNC does believe, as discussed below, that Track 2 should be the applicable process for hearings requiring witness testimony, SNC believes that both Tracks 1 and 2 correctly provide for early issuance of a Scheduling Order and simultaneous filings of pre-filed initial testimony. Additionally, the separate process for legal contentions will allow those issues to be resolved without committing unnecessary time and resources to more complex hearing procedures that are not appropriate for a legal issue that can be addressed through briefing.

II. Modifications to Enhance and Streamline the Proposed Procedures

As explained above, the core elements of the Proposed Procedures correctly emphasize schedule constraints while retaining a robust hearing process, but SNC recommends that one key clarification be made in the final procedures. Specifically, to ensure all potential parties to an ITAAC hearing understand the role of the ITAAC hearing in the context of the NRC Staff's ongoing consideration of ITAAC closure and ultimate issuance of the § 52.103(g) finding, the final procedures should include a specific discussion on this point. Additionally, SNC believes that the final procedures should include more specific guidance related to claims of incompleteness, as well as include some additional, minor procedural modifications that will streamline the Proposed Procedures.

A. Distinction Between the § 52.103(g) Finding and Hearing Procedures

SNC understands that the required § 52.103(g) finding must be made prior to operation (whether interim or full operation) under a COL.[1] This finding will be made by the Staff, if supported,

[1] This understanding is based on Staff's statements in SECY-13-0033 and the Proposed Procedures indicating that the Staff has determined that a full finding under § 52.103(g) as to all ITAAC is necessary to support interim operation. *See* SECY-13-0033 at p. 5 (referring to "the requirement that operation not begin until the Commission finds under 10 CFR 52.103(g) that the acceptance criteria in the ITAAC are met"); 79 Fed. Reg. at 21,962 (stating that "interim operation cannot be allowed until the NRC finds under 10 CFR 52.103(g) that all acceptance criteria are met, including those acceptance criteria that are the subject of an ITAAC hearing"). SNC's comments presume that this position is retained in the final procedures. SNC understands that the comments of SCE&G address whether this presumption should be retained and propose a different relationship between the § 52.103(g) process and authorization for interim operation. SNC does not intend anything in these comments to conflict with SCE&G's comments on this point. If the final procedures retain the finding that the Staff's full § 52.103(g) finding is necessary to allow for interim operation, SNC urges that the Staff adopt in the final procedures SNC's proposals

regardless of whether any ITAAC hearing is requested or convened. As such, although an ITAAC hearing can, in some limited respects, impact whether authorization to operate is issued under § 52.103(g), the § 52.103(g) process generally will occur separate from and in parallel with any ITAAC hearing. The § 52.103(g) finding is not based on filings made in the ITAAC hearing process, but rather on "the staff's inspection activities and its review of ITAAC notifications received from the licensee." *Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103*, SECY-13-0033 (April 4, 2013), at p. 5. The Proposed Procedures do not clearly articulate the separation between the § 52.103(g) finding and the ITAAC hearing procedures, particularly where an interim operation finding may be involved. SNC suggests that the final procedures include the following clarifications:

- If no ITAAC hearing has been granted at the time that the licensee submits its 10 CFR § 52.99(c)(4) *All ITAAC complete notification*, NRC Staff will issue the § 52.103(g) finding as soon as Staff determines all acceptance criteria are met. Pending appeals, motions to reopen, requests for stay, or other pending pleadings filed in the ITAAC hearing context will not impact the Staff's § 52.103(g) finding process, so long as the Commission has not ordered that an ITAAC hearing will be held.
- If an ITAAC hearing has been granted at the time the licensee submits its § 52.99(c)(4) notification, the NRC Staff will issue the § 52.103(g) finding and an order authorizing interim operation despite the ongoing hearing if (a) the Staff has determined all acceptance criteria are met and (b) the Commission has determined that, as to all contentions admitted for hearing, there will be adequate protection of the public health and safety during interim operation. Pending appeals, motions to admit late-filed contentions or claims of incompleteness, or other pending pleadings filed in the ITAAC hearing context will not impact the Staff's § 52.103(g) process where a hearing is pending, and interim operation will be authorized, so long as the Commission has made the § 52.103(c) finding for all admitted contentions.[2]
- If an ITAAC hearing has been granted at the time the licensee submits its § 52.99(c)(4) notification, the Staff's § 52.103(g) finding will await the outcome of the ITAAC hearing process only where, as to one or more of the contentions admitted for hearing, the Commission has not made the adequate protection finding under § 52.103(c).

SNC believes that the above correctly summarizes the intent of the Proposed Procedures' provisions regarding the § 52.103(g) finding, but the final procedures should include a similar summary. The discussion on this point in the Proposed Procedures was difficult to follow and may lead to confusion if not clarified.

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related to clarifying the relationship between the Commission's action under § 52.103(c) and the Staff's action under § 52.103(g).

[2] Where the Commission has made the adequate protection finding under § 52.103(c), when the Staff issues its § 52.103(g) finding, it will concurrently issue an order that would allow interim operation and include any terms and conditions on interim operation that are imposed by the Commission as part of its adequate protection determination. Proposed Procedures, 79 Fed. Reg. at 21,966.

In summary, the only item in an ITAAC hearing which can impact the Staff's § 52.103(g) finding authorizing operation is an admitted contention, which is still pending in the hearing, for which the Commission has either not yet made the § 52.103(c) finding allowing interim operation or has determined interim operation should not be authorized. Unless such an admitted contention is pending, regardless of other pending filings, the Staff will proceed with its § 52.103(g) finding based on its inspection activities and its review of ITAAC notifications received from the licensee.

B. Clarifications Regarding Claims of Incompleteness

SNC appreciates the provisions included in the Proposed Procedures as initial steps to better define how claims of incompleteness will be processed. The specific standard for filing claims of incompleteness in 10 CFR § 2.309(f)(1)(vii) is unique to hearings under 10 CFR § 52.103 and has never before been applied by the NRC: "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." As evidenced by this unique regulatory standard, a claim of incompleteness is not equivalent to a contention.

To be admitted, a contention in a § 52.103 hearing must include the *prima facie* showing described in § 2.309(f)(1)(vii) and § 52.103(b). A claim of incompleteness is, by definition, a claim that the required *prima facie* showing cannot be made. *See* 79 Fed. Reg. at 21,967. Thus, the Commission finding a claim of incompleteness valid will not cause a hearing to be granted; instead, the Commission finding a claim of incompleteness valid triggers only a Commission order requiring the licensee to submit additional information, as described in Draft Template D. After that additional information is submitted, no further procedures are necessary unless the petitioner then submits a contention based on the additional information (which will be subject to the late-filed contention requirements). The Proposed Procedures further, correctly, note that claims of incompleteness will not trigger the Commission requirement to make the adequate protection finding for interim operation under § 52.103(c), because such a finding is only required when the *prima facie* showing under § 52.103(b) has been made. *Id.* at 21,967. SNC agrees with the distinction made in the Proposed Procedures between the impact of a valid claim of incompleteness and the impact of an admitted contention.

As described, the Proposed Procedures process for claims of incompleteness is appropriate, but it lacks the necessary level of detail and guidance. Claims of incompleteness are a completely untested concept, with no existing NRC precedent to aid potential hearing participants in preparing to submit or respond to such claims. SNC, therefore, suggests that two aspects of the process should be clarified and an additional step added to the claims of incompleteness process to allow for their early resolution:

1. Standard for Assessing the Validity of a Claim of Incompleteness

Pursuant to § 52.103(f)(1)(vii), for a valid claim of incompleteness, the petitioner must demonstrate that the relevant notice (ITAAC closure notification (ICN) or uncompleted ITAAC notification (UIN)) does not comply with § 52.99(c) by referencing a specific portion of the notice. In order for a potential petitioner to assess whether or not a claim is potentially valid, the petitioner must

have a basic understanding of what § 52.99(c) requires for a notice to be considered compliant. Unfortunately, the Commission statements on when a § 52.99(c) notice is sufficient are general, open-ended, and as acknowledged by the Commission itself, do not explain the functional requirement under § 52.99(c):

> The NRC is revising § 52.99(c)(1) ... to clarify that the notification must contain sufficient information to demonstrate that the prescribed inspections, tests, and analyses have been performed and that the prescribed acceptance criteria have been met. The NRC is adding this clarification to ensure that [COL] applicants and holders are aware that (1) it is the licensee's burden to demonstrate compliance with the ITAAC and (2) the NRC expects the notification of ITAAC completion to contain more information than just a simple statement that the licensee believes the ITAAC has been completed and the acceptance criteria met. The NRC expects the notification to be sufficiently complete and detailed for a reasonable person to understand the bases for the licensee's representation that the inspections, tests, and analyses have been successfully completed and the acceptance criteria have been met. The term 'sufficient information' requires, at a minimum, a summary description of the bases for the licensee's conclusion that the inspections, tests, or analyses have been performed and that the prescribed acceptance criteria have been met. *The NRC plans to prepare regulatory guidance, in consultation with interested stakeholders, to explain how the functional requirement to provide 'sufficient information' with regard to ITAAC submittals could be met.*

Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, at 49,366 (Aug. 28, 2007) (emphasis added).

In recognition that the standard for "sufficient information" required guidance for implementation, the NRC Staff has been engaged with stakeholders to develop comprehensive guidance regarding ITAAC closure and maintenance. Between April 2013 and April 2014 alone, Staff "facilitated 10 public workshops to solicit input, exchange views, and reach consensus on issues involving industry guidance on ITAAC closure, develop additional [ICN] examples for use in guidance, and other construction inspection program topics. Members of the public, NEI, industry representatives, and other external stakeholders participated in these public workshops." *Construction Reactor Oversight Process Self-Assessment*, SECY-14-0049, Enclosure 1 at p. 1 (April 24, 2014). At the core of the work to refine the guidance regarding ICNs and UINs is the Staff's review and consideration of NEI 08-01, "Industry Guidance for the ITAAC Closure Process under 10 CFR Part 52." Since endorsing NEI 08-01, Revision 4 in Regulatory Guide (RG) 1.215, Revision 1, "Guidance for ITAAC Closure under 10 CFR Part 52" in May 2012, the Staff has held additional public meetings and NEI has submitted Revision 5 to NEI 08-01. The Staff is currently assessing whether additional updates are needed in NEI 08-01 to support an update to RG 1.215. SECY-14-0049, Enclosure 1 at 2.

The Staff's review of NEI 08-01 has been a transparent, public process. NEI 08-01, as it is continually modified to incorporate experience in ITAAC closure, represents the most practical, functional understanding of what § 52.99(c) requires, including, for instance, examples that can be easily compared with actual ICNs. In light of the limited explanation from the Commission on § 52.99(c) requirements, and the thorough process used to develop RG 1.215 and the endorsed NEI 08-01, the final procedures should specify that the content of RG 1.215 and NEI 08-01 will be given significant weight in assessing whether an ICN or UIN is incomplete for purposes of a claim of incompleteness. Without this clarification, potential petitioners and licensees will not be able to assess whether claims are potentially valid or are appropriate for agreed-to resolution outside the hearing process.

Moreover, the final procedures should clarify that, in most cases, in order for a claim of incompleteness to be valid, the petitioner will need to show that the allegedly missing information is material to a potential *prima facie* showing. Stated differently, the allegedly missing information must be reasonably calculated to support a *prima facie* showing. This clarification helps to apply the § 2.309(f)(1)(vii) standard that the claim of incompleteness must explain how the missing information prevents the petitioner from making the *prima facie* showing in practice. The *prima facie* showing is a stringent standard, requiring a showing "that one or more of the acceptance criteria in the [COL] have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety." § 2.309(f)(1)(vii). A claim of incompleteness, founded on the assertion that such a *prima facie* showing cannot be made due to the omission, must be subject to a similarly stringent standard. To meet the § 2.309(f)(1)(vii) standard, a claim of incompleteness cannot be based on mere suspicion, the intent to double-check the licensee, or on an unfounded belief that the additional information may show an error or deficiency. Rather, the claim must articulate that the petitioner has a reasonable foundation for believing that a *prima facie* showing could be made and the missing information must be material to that showing.

A claim of incompleteness requesting more detail on objective test results generally should not be valid because the additional information would not be material to a potential *prima facie* showing, since the information provides only more details confirming the existing content of the ICN; put another way, the additional information is not reasonably calculated to support a *prima facie* showing. For example, if the ICN states that "all results were between 1.2% and 1.7%," a claim that each individual result should be listed would typically not be able to show that the individual results within the already-known range are reasonably calculated to support a *prima facie* showing because any *prima facie* showing regarding the test results was possible based on the already-known range. Rather, the claim for all the individual results is attempting to double-check the representation of the licensee. In another illustration, a claim of incompleteness that attacks the veracity of licensee statements without support should not be found valid. If the claim maintains that additional information must be provided to prove the licensee's statement that an inspection was performed, without any reasonable foundation for challenging the truth of the statement, the proponent of the claim would not have a reasonable foundation for believing a *prima facie* showing could be made and the requested "proof" would not be material to any proposed *prima facie* showing. The petitioner would not be able to show that a *prima*

facie claim regarding the inspection was impossible without the additional information, but rather the claim is based only on suspicion without any basis that the licensee's statement was incorrect. By clarifying that a claim of incompleteness, to be valid, will require that the petitioner have a reasonable foundation for believing that a *prima facie* showing could be made and that the missing information be material to that showing, the final procedures will simplify the application of 2.309(f)(1)(vii).

2. Information to be Provided by the Licensee

As discussed above,§ 2.309(f)(1)(vii) requires that a claim of incompleteness point to a specific portion of the § 52.99(c) notice and, in order to meet the § 2.309(f)(1)(vii) standard, explain what information is not included, why that information should be included under the requirements of § 52.99(c) and NEI 08-01, and explain how it not being included prevents the petitioner from making the *prima facie* showing necessary for a contention. In the event that a claim of incompleteness is found valid, the information the licensee is required to provide under Template D should be limited to documents that are relevant to the specific portion of the § 52.99(c) notice cited. Due to the limited nature of ITAAC hearings, the version of Template D included in the final procedures should explain that information relevant to the specific portion of the § 52.99(c) notice cited includes documents contained in the ITAAC completion package supporting the specific portion of the § 52.99(c) report cited in the claim found to be valid and documents directly referenced therein.

Where there is only a valid claim of incompleteness, the Proposed Procedures correctly avoid triggering the general discovery rights associated with an actual grant of a hearing. This further clarification of what information the licensee will be expected to provide will help the licensee prepare so that it can timely provide such information in the event of a valid claim and will aid petitioners in drafting their claims to obtain the correct information. SNC recognizes that the Commission would retain discretion in unusual circumstances to order the licensee to provide additional or different information, but a general guideline would help the Commission address most claims of incompleteness efficiently in the short timeframe provided.

3. Provisions for Early Resolution of Claims of Incompleteness

SNC believes that many claims of incompleteness may be able to be addressed simply and efficiently. Draft Template D implicitly recognizes this by generally providing only that the licensee submit additional information after a claim of incompleteness is found valid. The final procedures should rely on the licensee and potential parties to resolve claims of incompleteness where appropriate, rather than presuming that all claims of incompleteness must be addressed by the Commission initially. The Commission has recognized the value of communication between litigants in other, similar contexts. For example, 10 CFR § 2.323(b), governing motions, provides that "A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the

motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."[3] As a result of this requirement, parties routinely resolve issues amongst themselves.

Adding a requirement similar to the § 2.323(b) requirement for claims of incompleteness would allow for early resolution of issues where possible and ensure that claims of incompleteness filed actually require the Commission's attention. This requirement works particularly well in tandem with SNC's suggestion above, that the final procedures adopt a general standard for the information the licensee will be expected to provide after a valid claim of incompleteness. For example, if a potential petitioner was expecting to file a claim of incompleteness regarding a particular ICN, a requirement to confer would mean that the petitioner would contact the licensee and generally explain the basis for the claim. In some situations, the licensee may agree to go ahead and make some or all of the requested information available to the potential petitioner for review, regardless of whether the licensee agrees that the ICN is actually incomplete. There is no reason for such claims to go directly to the Commission without the parties attempting to resolve the issue first.

SNC believes that potential petitioners should be required to contact the licensee and make an effort to resolve the claimed incompleteness within 21 days of the NIO. If the licensee and the potential petitioner reach an agreement and the licensee provides additional information, any contention based on that additional information would be due 60 days from the NIO, the same as the original deadline for proposed contentions, provided that the licensee turned over additional information within 10 days of the parties' conference. If the licensee and the potential petitioner reach an agreement to resolve the claim of incompleteness as to a particular ITAAC and the licensee provides the agreed-to information voluntarily, any additional claim of incompleteness as to that ITAAC would be treated as *per se* invalid. Any claims of incompleteness that the licensee and the potential petitioner were not able to resolve in the conference would also be due 60 days from the NIO.

The addition of this requirement benefits petitioners by providing the opportunity to access requested information earlier without requiring significant resources and benefits the Commission by ensuring that claims brought actually require Commission consideration. Additionally, because contentions filed based on the new information provided after a claim of incompleteness would, under the Proposed Procedures, be filed after the original deadline, these contentions are likely sources of delay and are subject to the late-filed contention requirements, requiring an additional action by the Commission to consider their admissibility. Provision of the information earlier, allowing contentions based on the additional information to be submitted along with other contentions would allow the Commission to consider the contentions together and issue only one order while avoiding the delay associated with a late-filed contention that is ultimately found admissible.

In summary, SNC believes the requirement to confer is a practical, low-resource way to streamline the ITAAC hearing process.

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[3] *See, e.g., In re Entergy Nuclear Vermont Yankee LLC, et. al*, LBP-05-33, 62 NRC 828, 837 (2005) (stating that the consultation requirement in § 2.323(b) "seeks to avoid unnecessary litigation by requiring the movant to make a reasonable effort to discuss and perhaps resolve the problem or misunderstanding before involving the Board.").

C. Modifications to Streamline the Proposed Procedures

In addition to the two broader improvements suggested regarding clarifying the independence of the § 52.103(g) finding and the standards applicable to claims of incompleteness, SNC's review of the Proposed Procedures revealed a few areas where some fine-tuning could result in substantial benefits for schedule, predictability, and efficiency.

1. More Practical Process for the § 52.103(c) Interim Operation Finding

As discussed in SECY-13-0033, the interim operation finding can appear to be somewhat confusing in practical terms. Interim operation requires the Commission find that a *prima facie* showing has been made that the acceptance criteria will not be met such that a hearing is required, the Commission find as to that same ITAAC that there will be adequate protection of the public health and safety during interim operation, and the Staff find as to that same ITAAC as well as all other ITAAC that the acceptance criteria have been met. The Proposed Procedures do not resolve this complexity, but instead likely cause more confusion by contemplating that an interim operation finding under § 52.103(c) and a § 52.103(g) finding will occur in tandem with one another, with communication back-and-forth between the Commission and the NRC Staff, just before (or even right at) the scheduled date for initial fuel load. SNC has carefully considered the issue and believes there is a better mechanism for addressing interim operation that will be more straightforward but remain consistent with all applicable regulatory requirements.

The final procedures should provide that the Commission issue the interim operation determination under § 52.103(c) either in the order granting a hearing or, where additional briefing is required, within 45 days of the order granting a hearing.[4] The determination under § 52.103(c) would be limited to a finding, based on the *prima facie* showing and answers thereto, that, as to the admitted contention(s), there will be adequate protection of the public health and safety during the period of interim operation. The determination would be issued separately, either standing alone or as a distinct portion of the order granting a hearing. This standalone § 52.103(c) determination would not authorize interim operation.

Separate from the § 52.103(c) determination by the Commission, the Staff would issue the § 52.103(g) finding and order authorizing interim operation concurrently after the all ITAAC complete notification and its determination that the acceptance criteria are met.[5] This sequence is consistent with the stated purpose in the Proposed Procedures that the § 52.103(c) determination precede the § 52.103(g) finding. 79 Fed. Reg. at 21,966. This clear separation also ensures that "the actions of the Commission in determining adequate protection during the period of interim operation cannot be construed as prejudicing the staff's findings with respect to ITAAC closure." *Staff Requirements Memorandum,* SECY-13-0033 (July 19, 2013), at 1.

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[4] The 45-day period suggested contemplates 15 days for additional briefing with another 30 days for the Commission to issue its determination.

[5] *See supra* note 1.

In contrast to SNC's proposed method of a standalone interim operation determination, the Proposed Procedures indicate that the Staff would send the Commission notification of its coming issuance of the § 52.103(g) finding, then the Commission would respond by making the § 52.103(c) determination, after which the NRC Staff would actually issue its § 52.103(g) finding. This creates the appearance that the Commission's interim operation finding may somehow impact the Staff's plan to issue the § 52.103(g) finding and/or that the Commission's adequate protection finding is somehow based on the Staff's finding that the acceptance criteria are met. The Commission has been clear that its decision on adequate protection should not impact the Staff's finding with respect to ITAAC closure. *Id.* at 1. Furthermore, the Commission awaiting the Staff's § 52.103(g) finding unnecessarily blurs the delegation of that finding to the NRC Staff. In the situation where, for example, the admitted contention was based on the UIN, the Commission should make the § 52.103(c) determination based on the *prima facie* showing and answers thereto and rely on the NRC Staff to determine in accordance with its processes whether the involved ITAAC have been closed and the acceptance criteria have been met. By instead calling for the Commission to wait to review the NRC Staff's finding on the acceptance criteria before making the § 52.103(c) determination, the Proposed Procedures unnecessarily confuse the Staff's ITAAC closure process with the Commission's § 52.103(c) determination.

SNC's proposed standalone § 52.103(c) finding within 45 days of the order granting a hearing has the added benefit of providing licensees and other hearing participants with predictability and avoids delays in initial fuel load. The Proposed Procedures state that "an interim operation determination will be sufficiently expeditious if it is made by scheduled fuel load." 79 Fed. Reg. at 21,966. This conclusion, while legalistically correct in that the Commission will have met its statutory directive by allowing interim operation the day of scheduled fuel load, is practically unworkable. In order to actually begin to load fuel on the scheduled date, the licensee will need to complete many preparations. Knowing whether or not the Commission has made the adequate protection determination allows the licensee to prepare where appropriate or wait to make preparations, as appropriate.

The final procedures can simplify the interim authorization process by making the following simple modifications:

- The Commission's § 52.103(c) determination is a standalone determination that, for an admitted contention, there will be adequate protection of the public health and safety during the period of interim operation. This determination shall be made at the time of the order granting a hearing or, where additional briefing is necessary, within 45 days of the order granting a hearing.
- The § 52.103(c) determination does not address whether any acceptance criteria have been or will be met. The finding that the acceptance criteria have been met has been fully delegated to the NRC Staff. *See* SRM-SECY-13-0033.
- The § 52.103(c) determination does not, alone, authorize interim operation. The NRC Staff will issue an order authorizing interim operation concurrently with its § 52.103(g) finding, provided that the NRC Staff finds through its processes that all acceptance criteria have been met.

SNC believes that this mechanism for interim operation authorization is more clear, will result in less last-minute action by the Commission and NRC Staff, and will avoid delays in initial fuel load caused by licensee uncertainty regarding whether or not they will be able to proceed with fuel load on the scheduled date.

2. Choice of Presiding Officer

SNC suggests that the final procedures include a decision on who the presiding officer will be for an ITAAC hearing, as well as for review of an NRC Staff SUNSI/SGI access determination. *See* 79 Fed. Reg. at 21,963. With regard to the ITAAC hearing, the period leading up to an order granting a hearing will be extremely busy, with licensees and NRC Staff gathering information related to proposed contentions and claims submitted and the Commission considering those claims. Waiting until this hectic period to choose whether a single judge, an Atomic Safety and Licensing Board (ASLB), or the Commission will preside adds an additional decision and, with it, another possible source of delay. SNC does not express a preference as to who the presiding officer will be, but believes the Commission can consider its experience with the COL mandatory hearings as well as recent ASLB proceedings and decide in the final procedures which presiding officer is appropriate.

To the extent that the Commission decides to retain flexibility as to choosing the presiding officer for ITAAC hearings, SNC suggests that the final procedures include any guidelines or factors the Commission plans to use in its choice of presiding officers. For example, if the Commission is considering using an ASLB but wants to retain the single judge option for proceedings with only one or two admitted contentions, the final procedures should explain that the number of admitted contentions will be a key factor in the decision whether to use a single judge or an ASLB in a particular hearing. The more items or issues the Commission sets out in the final procedures, the more straightforward and less time-consuming the choice of presiding officer will be, which helps the Commission work efficiently and helps potential hearing participants prepare.

With regard to the choice of presiding officer for review of the NRC Staff SUNSI/SGI determination, SNC suggests that, rather than leaving that question open, the final procedures should specify that whoever is acting as presiding officer in the hearing at the time review is sought should review the NRC Staff's determination. *See id.* at 21,968. If there is no hearing pending at the time of the request for review, the request for review should be filed with the Commission. This approach ensures that the presiding officer ruling on the request for review is aware of the current status of the hearing and familiar with the parties and avoids needless uncertainty for the hearing participants and the potential presiding officer(s).

3. Protective Order/Nondisclosure Agreements

SNC agrees with the SUNSI/SGI pre-clearance process included in the Proposed Procedures and believes that this process will avoid most delays attributable to SUNSI/SGI access. *Id.* at 21,965. As a part of the pre-clearance process, SNC suggests that the final procedures include a requirement that the licensee and all parties seeking pre-clearance consult regarding the provisions for any future protective order and related nondisclosure obligations. As noted in the pre-clearance procedures, the pre-

clearance process "do[es] not address information possessed solely by a licensee or applicant." Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information, at p.3 n.2. SNC believes that early consultation between potential parties regarding access to proprietary information maintained by the licensee and not the NRC will avoid potential future delays related to this issue in the same manner that the pre-clearance process will avoid delays related to Staff access determinations. Relatedly, SNC suggests that, either as a part of the final procedures or as part of later-issued guidance, the NRC Staff develop a pro forma, generic protective order for use in ITAAC hearings. The requirement to consult along with such a general protective order to use as a starting point should facilitate early negotiations and exchange of draft orders and agreements with likely hearing participants, eliminating the need for this process later, during the crunch of the hearing process.

4. Deadline and Schedule Computation

As recognized in the Proposed Procedures, the timeframe for completing an ITAAC hearing is challenging. Rather than recommend more abbreviated deadlines throughout the hearing, SNC suggests that the final procedures clarify how deadlines are computed. First, any deadline triggered by a prior action should be adjusted in parallel if the trigger action is completed early. For example, if the licensee (and NRC Staff, if applicable) submits its answer to a hearing request 15 days after the hearing request rather than 25 days after, then the Commission order on the hearing request should still issue 30 days after the answer. If the oral hearing is held 12 days after initial testimony, the initial decision should still have a strict deadline of 30 days after the hearing, and not be computed as if the oral hearing was held 15 days after initial testimony. This movement in parallel should occur regardless of the Scheduling Order entered by the presiding officer. By clarifying this point, the final procedures will give parties in individual proceedings the flexibility to reduce timeframes where reduction makes sense.

III. Comments in Response to Questions Raised

As SNC noted in its introduction to these comments, SNC recognizes and appreciates the Staff's attention to detail in the Proposed Procedures. In several places, comments were requested on specific topics. SNC has considered those questions raised and offers the following comments.

A. Early Issuance of the NIO

The Proposed Procedures requested comments regarding the feasibility of early issuance of the notice of intended operation, as well as the voluntary early submittal by the licensee of the UIN. 79 Fed. Reg. at 21,964. SNC believes that voluntary early submittal of the UIN is feasible as is associated early issuance of the NIO, and that completing these milestones early will provide significant schedule margin.

The language of § 52.99(c)(3) does not prohibit early submission of the UIN, only stating that the UIN "must be provided no later than the date 225 days before the scheduled date for initial loading of fuel...." SNC believes that early licensee submittal is practical and beneficial to the licensee, the NRC Staff, and the public, by allowing the ITAAC hearing process to begin earlier without any detrimental impact. SNC suggests that, for clarity, the final procedures specify that any UIN submitted more than

255 days before the scheduled initial fuel load date (*i.e.*, more than 30 days "early" relative to the § 52.99(c)(3) requirement) specify the ITAAC closure period covered by UIN, with all other ITAAC not covered by the UIN period continuing to be closed per the normal ICN process. To illustrate: Assume the licensee submits the UIN 345 days prior to planned initial fuel load, and the UIN specifies that it covers the period beginning at 315 days prior to fuel load and after. ITAAC scheduled to be completed more than 315 days prior to fuel load would not be included in the UIN but would be closed per the normal ICN process. Staff should publish the NIO as expeditiously as possible, for instance in this illustration approximately 300 days prior to planned fuel load. SNC believes that the NIO could reasonably be issued as much as three to four months prior the 210 day target in the Proposed Procedures, or between 300 and 330 days before scheduled initial fuel load.

This voluntary submittal process allowing the UIN to specify the period covered avoids the scenario where the licensee submits an UIN including an ITAAC and then, within just a few days, submits an ICN for the very same ITAAC. Such overlap is confusing to the public and is an inefficient duplication of resources for the licensee and NRC Staff. This process also provides NRC Staff time to review the UIN and, by providing this additional time, allows the Staff to continue to devote the necessary resources to incoming ICNs. SNC believes that the early issuance of the NIO, made possible by the early submittal of the UIN, is beneficial to all potential hearing participants. The early NIO takes some pressure off of the stringent deadlines imposed in the ITAAC hearing procedures, such that, in the event the hearing falls over a holiday period or there is an unexpected hearing delay (for example, emergency weather closure), those events can be managed without unnecessary delay to fuel load or unreasonable expectations for the hearing participants.

Early issuance of the NIO will mean that more ITAAC remain uncompleted at the time that hearing requests must be submitted, however, this should have no material impact on the hearing process. Much like an ICN, the "sufficient information" required in a UIN "includes, but is not limited to, a description of the specific procedures and analytical methods to be used for performing the inspections, tests, and analyses and determining that the acceptance criteria have been met." 72 Fed. Reg. at 49,366. The requirements in § 52.99(c) were adopted "to ensure that interested persons will have sufficient information to address the Atomic Energy Act, Section 189.a(1), threshold for requesting a hearing with respect to both completed and as-yet uncompleted ITAAC." *Id.* at 49,367. The Commission designed the UIN and found that it gave would-be petitioners the basis to meet the threshold for admissible contentions in an ITAAC hearing, and, as such, issuing an NIO early where more ITAAC are covered by the UIN does not alter the ability of any prospective hearing participant to make the required showing. SNC strongly suggests that the final procedures adopt a process for voluntary early submittal of the UIN because it provides substantial benefits without corresponding negative impacts on the hearing process.

B. Standards Applicable to Late-Filed Contentions

The Proposed Procedures request comment regarding the timeliness expectations for late-filed contentions. 79 Fed. Reg. at 21,966-67. SNC believes that 14 days from the new information is adequate in most cases for a petitioner to submit a contention based on the new information, and the

answer to such a new contention should be due seven days after its filing. Because the § 2.309(c) requirements are subject to the discretion of the presiding officer, in unusual or extreme cases, a contention could be found timely submitted if it was not submitted within 14 days. Although the Proposed Procedures contemplate periods longer than 14 days for submitting contentions based on new information, setting a shorter expectation for submission of contentions achieves two key benefits: (1) it encourages petitioners to be as efficient as possible, and (2) it encourages early dialogue between the hearing participants. In the unlikely case where the petitioner cannot, for some reason, meet the 14-day timeliness requirement, the petitioner can consult with counsel for the licensee and NRC Staff, explain the situation, and possibly secure agreement for an extension, or, if no agreement is reached, the petitioner can file a request for an extension with the presiding officer. This gives the licensee and NRC Staff the benefit of earlier knowledge that a new contention will be filed, so that they can prepare and allocate resources, while still allowing the petitioner additional time where appropriate. Given that a late-filed contention is, by its very nature, a schedule risk, SNC suggests that the final procedures include a shorter timeframe than those offered in the Proposed Procedures, with reasonable accommodation for modification where needed.

If the final procedures retain one of the options for late-contention timeliness included in the Proposed Procedures, SNC suggests Option 2, giving the petitioner 20 days from the new information to make its filing and the other parties 15 days to answer. SNC further suggests that the requirement that a late-filed contention be based on "new" information should be clarified for the particular context of ICNs. Specifically, the final procedures should state that the closure of a previously uncompleted ITAAC is not "new" information unless the ICN contains materially different methodology, results, or is in some other way materially different from the description for that ITAAC in the UIN.

C. Applicability of Motion to Reopen Standard

"Reopening the administrative record in an NRC proceeding is an 'extraordinary action'." *N.J. Envtl. Fed'n v. NRC*, 645 F.3d 220, 232 (3d Cir. 2011) (citing 51 Fed. Reg. 19,535 at 19,538 (May 30, 1986)). The NRC's motion to reopen standards in 10 CFR § 2.326 are long-standing and serve the important purpose of preserving the finality of the hearing process. In order to successfully reopen the record, "[t]he proponent must meet a very heavy burden and 'present[] material, probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgment of the presiding officer, it must be considered anyway.'" *Id.* (citing 51 Fed. Reg. 19,535 at 19,538). The Proposed Procedures sought comment on whether to eliminate the need to address the standards for a motion to reopen for a hearing request, intervention petition, or motion for leave to file a new or amended contention filed after the original deadline. 79 Fed. Reg. at 21,967. SNC strongly objects to the elimination of these standards.

The ability to rely on the result of a completed hearing is important in all cases, but particularly in the ITAAC hearing context where schedule needs are so pronounced. The higher motion to reopen standards should be applied to ITAAC hearings in the same manner as they applied in the original COL hearings. The Proposed Procedures contemplate that the purposes served by the reopening provisions to ensure an orderly and timely disposition of the hearing might be addressed by the requirements

applying to late-filed contentions. However, the motion to reopen standards in § 2.326(a)(3) include the requirement that "[t]he motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." Eliminating this requirement effectively lowers the decades-old threshold for reopening an NRC proceeding. The Proposed Procedures do not include a supporting rationale as to why such a significant procedural change should be made for ITAAC hearings, and SNC does not believe the elimination of the § 2.326 standards is appropriate.

D. Presumption for Hearing Track 2 (No Rebuttal)

The Proposed Procedures requested comment on the factors the Commission should consider in choosing between Track 1 and Track 2 in an individual proceeding. 79 Fed. Reg. at 21,970. SNC, after reviewing both Tracks, does not believe that two different Tracks are necessary. Rather, SNC suggests that Track 2, with no rebuttal, be the presumed schedule in all proceedings. However, the order granting the hearing should include a provision allowing the presiding officer in a particular proceeding to order rebuttal either (a) in the initial scheduling order, based on the prehearing conference, in which case rebuttal would be due seven days after initial testimony, or (b) within five days of initial testimony, with rebuttal due seven days after the entry of the order. This eliminates a decision point for the Commission in granting a hearing, streamlining and easing the process of issuing the order granting the hearing, and allows the decision regarding rebuttal to be made by the presiding officer, who is in the best position to determine whether rebuttal is necessary. Further, by including only option (a) and (b) described herein with the applicable time periods in the order granting a hearing, any potential delays associated with providing flexibility for the presiding officer to order rebuttal are mitigated.

E. Findings of Fact and Conclusions of Law

The Proposed Procedures requested comment on whether to generally allow proposed findings of fact and conclusions of law unless the presiding officer dispenses with them, or whether the final procedures should not permit proposed findings of fact and conclusions of law. *Id.* at 21,972. SNC suggests Option 1, generally allowing proposed findings of fact and conclusions of law unless the presiding officer, on its own motion or upon a joint agreement of all the parties dispenses with the proposed findings and conclusions. Proposed findings and conclusions may aid the presiding officer, because they can be incorporated in the initial decision. *See In re Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.*, LBP-11-18, 74 NRC 29, 56 n.141 (2011) ("The Board hereby adopts and incorporates by reference in this Order all of the findings of fact proposed by Entergy and the NRC Staff not otherwise addressed herein."). Because the proposed findings and conclusions offer the parties an opportunity to summarize and clarify the proceeding, aiding the presiding officer, SNC believes the proposed findings and conclusions have value. Unlike rebuttal testimony, discussed above, which would be filed during the period when the parties are also trying to prepare for a hearing, the proposed findings and conclusions are filed after the hearing, when the parties should have resources available to prepare the filing without making hearing preparation more difficult. Additionally, according to the schedules in the Proposed Procedures, the filing of the proposed findings and conclusions does not

impact the strict deadline for the Initial Decision, thus, there appears to be little or no downside to including proposed findings and conclusions. 79 Fed. Reg. at 21,971.

F. Motions for Reconsideration

In the Proposed Procedures, three potential options were set out related to motions for reconsideration, and the NRC requested comments on which option should be included in the final procedures. "In Option 1, the 10 CFR 2.323(e) provisions for motions for reconsideration will be retained with the only modification being the reduced filing period described previously. ... Option 2 restricts motions for reconsideration to a presiding officer's initial decision and Commission decisions on appeal of a presiding officer's initial decision." *Id.* at 21,968. Finally, Option 3, which SNC suggests should be included in the final procedures, "prohibits motions for reconsideration." *Id.* Given the schedule-intensive nature of an ITAAC proceeding, resources should not be focused on reconsideration when the ability to appeal will be available so close in time. By clearly prohibiting motions for reconsideration, all parties understand that, to the extent they wish to pursue it, they must seek their remedy either from the Commission or, where appropriate, the appellate court. This certainty allows parties to proceed with any appeal expeditiously, rather than having to assess whether they should file for reconsideration. For the condensed ITAAC hearing structure, this certainty along with the preservation of the parties' resources outweighs the slight benefit enjoyed (which may never accrue) when an issue is corrected on reconsideration rather than on appeal.

G. Interlocutory Appeal

The Staff requested comment in the Proposed Procedures as to two options related to interlocutory review. For both options, "an interlocutory appeal as of right for a licensing board decision on access to SUNSI or SGI" would be retained. *Id.* at 21,970. "Under Option 1, no other requests for interlocutory review of licensing board decisions would be entertained.... Under Option 2, the interlocutory review provisions of 10 CFR § 2.341(f) are retained without modification." *Id.* The Proposed Procedures went on to explain that "even under Option 2, interlocutory review will be disfavored, except in the case of decisions on access to SUNSI or SGI, because of the expedited nature of an ITAAC hearing." *Id.* SNC believes that Option 1, no interlocutory review except from an ASLB decision on access to SUNSI or SGI, is the appropriate choice. Similar to the rationale above for prohibiting motions for reconsideration, due to the short timeframe for ITAAC hearing procedures and how quickly any applicable appeal rights will accrue, the need for interlocutory review is less in the ITAAC hearing context than in most other hearings. On the other hand, interlocutory appeals, if allowed, would likely occur when the parties are in the middle of the most time-intensive portion of the hearing, such that the resource commitment to allow them outweighs their potential benefit.

H. Minor Extension Requests

In the Proposed Procedures, the Staff also requested comment regarding motions for extension of time – in particular, (a) whether "very minor extensions" should be defined more objectively in the final procedures; (b) "whether a showing of unavoidable and extreme circumstances should be required for all extension requests, no matter how minor"; and (c) whether a deadline- or event-based trigger

should be used to determine the timeliness of a motion for an extension. *Id.* at 21,968. As to the first question, SNC does not believe that "very minor extensions" should be defined more objectively, in large part because the showing of unavoidable and extreme circumstances should be required for all extension requests, no matter how minor. This required showing is crucial for the ITAAC hearing process, which relies on strict schedule adherence.

The idea of a "very minor extension" in the context of an ITAAC hearing which, according to the Proposed Procedures, could end literally on the day scheduled fuel load is set to begin, is a nonstarter. For example, a one-day extension could easily cause a subsequent deadline to fall on a Saturday, such that it then rolls to Monday (*see* § 2.306(a)). Thus, the one-day extension causes three days of impact. Moreover, even one day of delay in initial fuel load is serious for the licensee and can result in a sizeable commercial loss. SNC encourages the final procedures to strictly enforce a requirement for a showing of unavoidable and extreme circumstances for all extension requests. To the extent that the final procedures do retain the concept of a "very minor extension," it should be defined as one calendar day or less. Given the schedule ramifications in an ITAAC hearing, and all parties being on notice of the importance of schedule adherence, extensions should be rarely granted.

In response to Staff's consideration of whether a deadline- or event-based trigger is appropriate, SNC generally agrees with the use of an event-based trigger, particularly in combination with the high standard for extension requests just described. Practically, when last-minute extension requests are needed and will meet the required showing, it will usually be due to an unforeseen, sudden event (*e.g.*, inclement weather that shuts down the city where the party is located). A deadline-based trigger likely will not adequately provide coverage for those events.

IV. Conclusion

SNC hopes that its comments aid the Staff in streamlining and finalizing the ITAAC hearing procedures so that the NRC and all potential hearing participants will be well-equipped when the first NIOs under § 52.103 are issued. Again, as SNC noted in its introduction to these comments, the Proposed Procedures are a solid starting point and do not require any wholesale changes. The NRC Staff's approach was carefully thought-out and, for the most part, addresses the unique needs of an ITAAC hearing. SNC believes that its suggestions, in combination with the work already undertaken by Staff, will result in robust, efficient hearing procedures.