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General Comment

See attached file(s)

Attachments

2014 07 02 NEI Comments on ITAAC Hearing Procedures

SUNSI Review Complete
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NUCLEAR ENERGY INSTITUTE

July 2, 2014

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

Subject: Comments on "Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met" (79 Fed. Reg. 21,958, dated April 18, 2014; Docket ID NRC-2014-0077)

Dear Ms. Bladey:

The Nuclear Energy Institute, Inc. (NEI)[1] is pleased to provide the following comments on the NRC's "Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met." NEI appreciates the considerable efforts by the NRC staff, Office of the General Counsel, and Office of Commission Appellate Adjudication to develop the proposed generic ITAAC hearing procedures. It is important for the NRC to issue final ITAAC hearing procedures as soon as reasonably possible because it will likely need these procedures to authorize operation for the four reactors currently under construction. Finalizing these procedures in the near-term will allow stakeholders (and the NRC) sufficient time to prepare for the first ITAAC hearings.

For new reactors granted a combined license under 10 CFR Part 52, the NRC must provide the public with an opportunity to request a so-called "ITAAC hearing." This activity occurs late in the construction process, shortly before fuel is loaded. Recognizing the significant and adverse consequences hearing delays would have on licensees, Congress amended the Atomic Energy Act to require that the Commission address any such hearing request "expeditiously." Congress also directed the NRC, "to the maximum possible extent," to issue a decision on issues raised by the hearing request before the reactor's scheduled fuel load date. To ensure the Commission would meet this deadline, Congress granted the Commission broad discretion to craft "appropriate hearing procedures, whether informal or formal," for ITAAC hearings.

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

We strongly agree with the NRC on the importance of eliminating from the ITAAC hearing process procedures "that are time-consuming, resource-intensive, and unnecessary under the particular circumstances of an ITAAC proceeding." 79 Fed. Reg. 21,958, 21,963-64. Similarly, the NRC's final ITAAC hearing procedures should "instill discipline with respect to meeting the hearing schedule" and require adherence to a "strict deadline" for the presiding officer to issue the initial decision after the hearing. To that end, NEI supports much of what the NRC has proposed.

Our main concern with the NRC's proposal is that it does not "to the maximum possible extent" ensure the NRC will issue a decision on issues raised by a hearing request before the reactor's scheduled fuel load date. The proposed ITAAC procedures provide no margin whatsoever to ensure NRC timely completes the hearing process before scheduled fuel load. A review of Table 1 in the NRC proposal, which contains the target dates for the agency's two proposed hearing tracks (79 Fed Reg. at 21,971), shows that by the NRC's own calculation, the presiding officer's initial decision will not be issued until the scheduled fuel load date—if not later. If any earlier deadline falls on a weekend or federal holiday, or if there is any unforeseen delay, the hearing process would be pushed beyond the scheduled fuel load date, contrary to the clear direction provided by Congress. To minimize the potential for the ITAAC hearing to delay fuel load and ensure NRC complies with its statutory mandate, we suggest numerous ways for the NRC to add necessary schedule margin to the ITAAC hearing procedures and more expeditiously complete any ITAAC hearing (see attachment).

Thank you in advance for your consideration of these comments. If you have any questions or require additional information, please contact me (202-739-8140; ecg@nei.org) or Anne Cottingham (202-739-8139; awc@nei.org).

Sincerely,

Ellen C. Ginsberg

Ellen C. Ginsberg

Attachment

cc: Brooke Poole, Esq., Director, OCAA, NRC
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July 2, 2014

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE, INC.
ON
NRC PROPOSED PROCEDURES FOR
CONDUCTING HEARINGS ON WHETHER
ACCEPTANCE CRITERIA IN COMBINED LICENSES ARE MET

(NRC-2014-0077)

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July 2, 2014

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE, INC. ON NRC PROPOSED PROCEDURES FOR CONDUCTING HEARINGS ON WHETHER ACCEPTANCE CRITERIA IN COMBINED LICENSES ARE MET
(NRC-2014-0077)

I. OVERVIEW

The Nuclear Energy Institute, Inc. (NEI)[1] is pleased to provide the following comments on the NRC's "Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met" (NRC-2014-0077) (79 Fed. Reg. 21,958, *et seq.* (April 18, 2014)) (hereafter, "NRC Proposal"). NEI appreciates the significant time and effort that the NRC staff, the NRC Office of the General Counsel, and the NRC Office of Commission Appellate Adjudication have devoted to the development of the proposed ITAAC hearing procedures. Additionally, the information provided during the May 21, 2014 NRC public meeting enhanced our understanding of the NRC Proposal.

For new reactors that are granted a combined license (COL) under 10 CFR Part 52, Section 189a.(1)(B)(i) of the Atomic Energy Act (AEA) and 10 CFR 52.103(a) provide an opportunity to request a so-called "ITAAC hearing" late in the construction process, before fuel is loaded.[2] The hearing opportunity is triggered by the NRC's publication in the Federal Register of a notice of intended operation at least 180 days before the scheduled initial fuel load date. This notice must provide that any person whose interest may be affected by operation of the plant may, within 60 days, request an NRC hearing on whether the facility, as constructed, complies—or upon completion of construction will comply—with the acceptance criteria in the COL. See 79 Fed. Reg. at 21,961. The "acceptance criteria" are part of the inspections, tests, analyses, and acceptance criteria (ITAAC) included in the COL. If the NRC grants a petition seeking a hearing, the scope of that "ITAAC hearing" is limited to contentions alleging that the constructed facility does not comply (or upon completion will not comply) with the acceptance criteria in the facility license.

Because the NRC regulations in 10 CFR Part 52 did not include detailed procedures for the conduct of an ITAAC hearing when promulgated, the agency is now proposing such procedures for public comment. To date, the NRC has issued combined licenses for four new reactors under 10 CFR Part 52. Although the agency has not yet conducted an ITAAC hearing, it is anticipated that NRC will need to provide an opportunity for such a hearing on several dockets during the next few years. As the NRC recognizes, there is a clear need to finalize generic ITAAC hearing procedures on an expedited basis "to support preparation for upcoming hearings for reactors currently under construction." 79 Fed. Reg. at 21,958. We also agree that the timely

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

[2] AEA Section 189.a.(1)(B)(i) provides: "Not less than 180 days before the date schedules [sic] for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185.b., the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license."

development of adjudicatory procedures "that can be quickly and easily adapted to the specific features of individual proceedings" is needed to enhance the predictability and efficiency of the ITAAC hearing process. *Id.* at 21,960. We encourage the NRC to issue the final ITAAC hearing procedures as soon as reasonably possible to allow stakeholders (and the NRC) sufficient time to prepare.

NEI strongly supports the agency's goal of establishing "an efficient and feasible process that is consistent with existing law and policy and that will allow the presiding officer and the parties a fair opportunity to develop a sound record of decision." 79 Fed. Reg. at 21,962. In addition to the need for a robust hearing process, we agree on the importance of eliminating "time-consuming, resource-intensive, and unnecessary" procedures that are ill-suited to the particular circumstances of an ITAAC proceeding, and the need to "instill discipline" with respect to meeting the hearing schedule and deadlines. *Id.* at 21,963-64. To that end, NEI supports much of what the NRC has proposed. However, the NRC should clarify and revise some aspects of the NRC Proposal to make the ITAAC hearing procedures more expeditious, more predictable, and more efficient for all participants, including NRC licensees, the Commission, the Atomic Safety and Licensing Board, the NRC staff, and members of the public.

NEI's comments address the NRC's general approach to ITAAC hearings in the context of the underlying regulatory framework as well as specific choices relating to the projected hearing format and schedule, including the following points:

- The final ITAAC hearing procedures should further streamline the hearing format and deadlines applicable to proposed hearing tracks 1 and 2, which are based on modified 10 CFR Part 2 Subpart L procedures. As proposed, the hearing would apparently extend beyond the scheduled fuel load date if there were delays for any reason, which is inconsistent with the NRC's statutory mandate. (See the Attachment to the comments.)

- The final ITAAC hearing procedures should provide the option of an additional hearing track of shorter duration for use in appropriate proceedings. For this purpose NEI proposes a new "hearing track 3," which is based on a modified Part 2 Subpart N approach, to provide additional schedule margin. (See Attachment.)

- The final ITAAC hearing procedures should clarify the interplay between the ITAAC hearing, interim plant operation, and the 10 CFR 52.103(g) finding.

- The final ITAAC hearing procedures should retain NRC's proposed use of case-specific Commission orders to establish hearing procedures.

- While it is appropriate for the Commission to choose the presiding officer for ITAAC evidentiary hearings, the final ITAAC hearing procedures should provide criteria explaining how the Commission will make this decision, and/or set forth the Commission's preference for the presiding officer.

- The final ITAAC hearing procedures should address the application of Administrative Procedure Act, 5 U.S.C. Section 554(a)(3) to eliminate the need for an ITAAC hearing on contentions where the underlying agency decision rests "solely on inspections, tests, or elections."

- The final ITAAC hearing procedures should retain NRC's proposal to provide additional schedule margin by allowing accelerated submittal of the licensee's Uncompleted ITAAC Notification (UIN) and publication of the NRC notice of intended operation and ITAAC hearing opportunity.

- The final ITAAC hearing procedures should reflect other procedural revisions relating to the exclusion or limitation of various motions, stay requests, and interlocutory appeals in ITAAC hearings, the treatment of "claims of incompleteness," untimely new or amended contentions, and the management of requests for access to SUNSI and SGI information.

It is worth reiterating that the NRC's proposed ITAAC hearing procedures should be "developed with an eye toward the overarching statutory requirements for the expeditious completion of an ITAAC hearing found in AEA 189a.(1)(B)(v)." 79 Fed. Reg. at 21,961. To the extent additional discussion of some of the questions raised in the NRC Proposal may facilitate their resolution, we would support additional NRC public meetings on the subject of ITAAC hearing procedures.

In addition to the observations and recommendations below, NEI also endorses the ITAAC hearing procedure comments submitted by Southern Nuclear Operating Company and South Carolina Electric & Gas Company.

II. COMMENTS ON THE NRC'S GENERAL APPROACH AND ASSUMPTIONS RELATING TO THE PROPOSED ITAAC HEARING PROCEDURES

As context for discussion of NRC ITAAC hearings, the NRC Proposal highlights the central role of ITAAC and ITAAC completion in the Part 52 reactor licensing process:

> The ITAAC are an essential feature of Part 52. To issue a COL, the NRC must make a predictive finding that the facility will be constructed and will be operated in accordance with the license, the AEA, and NRC rules and regulations. The ITAAC are used to ensure that, prior to facility operation, the facility has been constructed and will be operated in accordance with the license, the AEA, and NRC rules and regulations. The ITAAC are verification requirements that include both the means of verification (the inspections, tests, or analyses) and the standards that must be satisfied (the acceptance criteria). Facility operation cannot commence until the NRC finds, under 10 CFR 52.103(g), that all acceptance criteria in the COL are met. Consistent with the NRC's historical understanding, facility operation begins with the loading of fuel into the reactor. After the NRC finds that the acceptance criteria are met, 10 CFR 52.103(h) provides that the ITAAC cease to be requirements either for the licensee or for license renewal. All of the ITAAC for a facility, including those reviewed and approved as part of an ESP or a design certification, are included in an appendix to the COL. 79 Fed. Reg. 21,959 (footnote omitted).
>
> As the licensee completes the construction of structures, systems, and components (SSCs) subject to ITAAC, the licensee will perform the inspections, tests, and analyses for these SSCs and document the results onsite. NRC inspectors will inspect a sample of the ITAAC to ensure that the ITAAC are successfully completed. This sample is chosen using a comprehensive selection process to provide confidence that both the ITAAC that have been directly inspected and the ITAAC that have not been directly inspected are successfully completed. 79 Fed. Reg. 21,960 (footnote omitted).

Against this regulatory background, Sections IV and V of the NRC Proposal discuss the NRC's general approach to ITAAC hearing procedure development. See 79 Fed. Reg. at 21,958, 21,961-65.

A. The Proposed ITAAC Hearing Procedures Are Generally Consistent with Existing Law and Policy

The NRC's proposed ITAAC hearing procedures are generally consistent with existing law and policy and reflect the NRC's effort to address the overarching statutory requirement for the "expeditious completion of an ITAAC hearing." 79 Fed. Reg. at 21,958, 21,961. That requirement is found in AEA § 189a.(1)(B)(v), which provides that the Commission shall, to the maximum possible extent, render a decision on issues raised by the ITAAC hearing request within 180 days of (i) publication of the NRC notice of intended operation or (ii) the anticipated date for initial loading of fuel into the reactor, whichever is later. See also 10 CFR 52.103(e).

With regard to fuel load timing, NEI disagrees with the statement in Footnote 10 of the NRC Proposal (79 Fed. Reg. at 21,963) that a licensee cannot load fuel earlier than its previously predicted fuel load date ("a contraction of the initial fuel load schedule after the issuance of the notice of intended operation is contrary to the intent of the AEA"). This conclusion is not required by the AEA or NRC regulations, and should be deleted. A licensee should not be delayed in loading fuel merely because it has improved its schedule, provided all other requirements have been met. Delays in fuel load would have substantial economic costs for a licensee.

As discussed in more detail below, the agency's proposed hearing procedures may not reflect the most efficient approach to completing all ITAAC hearings expeditiously, as required by the AEA. More streamlined ITAAC hearing procedures could and should be used in appropriate cases. Should the NRC wish to gain some experience with ITAAC hearings before introducing additional hearing options, we encourage the Commission to conduct the first ITAAC hearings under "pilot" procedures and then reassess the efficiency and effectiveness of those procedures.[3]

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[3] In the Supplementary Information accompanying issuance of the 2007 final rule amending 10 CFR Part 52, the Commission stated that with regard to the Section 52.103 ITAAC hearing opportunity, Section 52.103(d) "provides that the Commission will determine the appropriate hearing procedures in accordance with 10 CFR part 2 for any hearing under paragraph (a) of this section. Under § 2.309, as adopted by the Commission in 2004 (69 FR 2182; January 14, 2004), such a hearing would ordinarily be conducted under subpart L of part 2. *However*, the Commission may direct, in the notice required by paragraph (a) or in a subsequent order, that any hearing that may be conducted in a particular combined license proceeding under paragraph (a) use other, less formal hearing procedures, consistent with the requirements of the AEA. Any such Commission direction is consistent with the Commission's statement in the SOC for the 1989 final part 52 rulemaking (54 FR 15372, 15383; April 18, 1989) that any hearing held under former § 52.103(b)(2)(i) (§ 52.103(b) in this final rule) will use informal procedures to the maximum extent practical and permissible under law." See 72 Fed. Reg. 49,352, 49,451 (emphasis added).

B. The Use of Case-Specific Orders to Specify ITAAC Hearing Procedures in Individual Proceedings Is a Reasonable Approach

NEI supports the agency's decision to use case-specific Commission hearing orders in individual license proceedings to set forth the applicable ITAAC hearing procedures. See 79 Fed. Reg. at 21,958, 21,960. As a legal matter, the agency's proposed use of orders is fully consistent with AEA Section 189.a.(1)(B)(iv) and 10 CFR 52.103(d). The Commission has broad discretion to determine "appropriate hearing procedures," whether formal or informal adjudicatory, for ITAAC hearings. Although other approaches are possible (e.g., a Commission policy statement), use of case-specific orders is advantageous because this approach will take less time than conducting a rulemaking to specify ITAAC hearing procedures and is supported by ample Commission precedent involving the use of hearing orders in individual licensing proceedings.

The use of case-specific orders is also useful in affording the Commission flexibility to consider the circumstances surrounding a particular ITAAC hearing request, "allowing the NRC to tailor the procedures to the specific matters in controversy to conduct the proceeding more efficiently." 79 Fed. Reg. at 21,960. Another potential advantage is that "the NRC can more swiftly implement lessons learned from the first ITAAC hearings to future proceedings." We concur that this approach is "particularly beneficial given that this is a first-of-a-kind hearing process." *Id.*

C. Suggestions for Streamlining ITAAC Hearing Procedures

1. NRC Should Consider Further Modifications to Simplify and Shorten the Duration of its Proposed 10 CFR Part 2, Subpart L Hearing Procedures

The relevant statutory and regulatory provisions do not prescribe detailed procedures for the conduct of an ITAAC hearing but rather leave that decision to the Commission. 10 CFR 52.103(d) provides that: "The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under paragraph (a) of this section, and shall state its reasons therefore." *See also* 10 CFR 2.310(j). The hearing procedures described in the NRC Proposal are based on NRC rules of practice in 10 CFR Part 2, modified to "conform to the expedited schedule and specialized nature of ITAAC hearings." 72 Fed. Reg. at 21,958, 21,963. The NRC proposes various departures from Part 2 Subpart L procedures to allow ITAAC hearings to be completed "much faster than is usually achieved in NRC practice for other hearings." *Id.* at 21,963-64. Most importantly, in the agency's view, the hearing preparation period (e.g., preparation of written testimony and position statements) will begin as soon as the hearing request is granted.

Although the NRC intends these measures to "dramatically reduce" the duration of the ITAAC hearing process and reduce overall resource burdens on the parties, they do not go far enough. The suggested Track 1 and Track 2 hearing schedules will require 95 and 80 days, respectively, from granting of the hearing request to the issuance of an initial decision. 79 Fed. Reg. at 21,971. Although NRC proposes to issue a notice of intended operation and opportunity for hearing 210 days from fuel load, by its own calculation *the ITAAC hearing will run almost until the scheduled fuel load date, if not beyond.* NRC proposes to accelerate initiation of the hearing by 30 days, but uses up the time savings in setting hearing procedure deadlines. Because this is a significant concern, we are suggesting herein how valuable schedule margin can be added before the date for fuel load. See the Attachment to these comments, which compares the NRC's

proposed hearing tracks 1 and 2 to NEI's more abbreviated proposed timelines, and outlines a third type of informal hearing procedure for NRC's consideration.

As proposed, if a contention goes to hearing on Track 1 it would take 210 days to reach an Initial Decision, assuming everything remains on schedule. Track 1 allows no margin for delays and relies upon accelerating certain key activities, *e.g.*, publishing the notice of intended operation 210 days before fuel load. As a practical matter, meeting this ambitious schedule could present significant challenges, particularly since there is no agency precedent for a hearing of this kind. In fact, *even using this schedule,* some of the deadlines would need to be shortened to allow for deadlines that fall on weekends or federal holidays. Moreover, to ensure sufficient time to administratively authorize fuel load after the Initial Decision, it is not feasible for the schedule to contemplate issuance of the Initial Decision on the very same day that a licensee is scheduled to load fuel. We therefore support the use of hearing Track 2 over hearing Track 1.

NRC states that its decision to model the proposed ITAAC hearing procedures on the existing rules of practice in 10 CFR Part 2 recognizes that "the existing rules have proven effective in promoting a fair and efficient process in adjudications and there is a body of experience and precedent interpreting and applying these provisions." NRC also argues that using existing rules to the extent possible "could make it easier for potential participants in the hearing to apply the procedures if they are already familiar with the existing rules." 79 Fed. Reg. at 21,963. While the agency's preference to use familiar and long-established adjudicatory procedures in conducting ITAAC hearings is understandable, the NRC Proposal does not make a compelling case for this choice to the exclusion of other approaches.

In particular, it is not obvious that Subpart L hearing procedures are always best suited to govern a first-of-a-kind, late-stage hearing opportunity that will be narrowly focused on whether or not technical acceptance criteria have been or will be met. As described by the NRC, the ITAAC that will be the subject of such hearings are "verification requirements" relating to either the means of verification (inspections, tests, analyses) or the standards that must be satisfied (the acceptance criteria). In addition to the typical NRC requirements for hearing requests, a petition seeking an ITAAC hearing must show that one or more of the acceptance criteria in the combined license have not been or will not be met, *and* the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. Given the objective, scientific and/or fact-based nature of the issues in dispute, formal hearing procedures appear unnecessary and perhaps even counter-productive.

Nor is it obvious that Part 2, Subpart L procedures (although slightly modified for use in ITAAC hearings) are always best suited to hearings in which the need for timely, expeditious resolution of issues is critically important. The AEA, NRC regulations, and agency discussion in the rulemakings promulgating and revising 10 CFR Part 52 all highlight the need to resolve ITAAC hearing issues "expeditiously."

In cases in which the NRC uses a modified Part 2, Subpart L hearing framework, we suggest that the final ITAAC hearing procedures reflect shorter deadlines than those proposed, to facilitate completion of the hearing before scheduled fuel load (as required by the AEA "to the maximum possible extent"). As set forth in the Attachment to the NEI comments, possible changes to the

timeframes include the following. These revisions, if adopted, could save more than a month on the schedule, and would bring the overall hearing process to within 180 days:

- Answers to Hearing Requests — reduce from *25 to 20 days* after hearing request
- Decision on Hearing Requests — reduce from *30 to 21 days* after answers[4]
- Pre-filed Initial Testimony — reduce from *35 to 25 days* after grant of hearing request
- Pre-filed Rebuttal Testimony (if Track 1 is used) — reduce from *15 to 7 days* after initial testimony
- Answers to Motions for Cross-Examination — reduce from *5 to 3 days* after motion for cross-examination
- Oral Hearing — reduce from *15 to 10 days* after last pre-filed testimony

2. The Final ITAAC Hearing Procedures Should Include an Additional Hearing Track 3 Based on 10 CFR Part 2, Subpart N

The Commission has broad flexibility in determining the ITAAC hearing procedures to be followed. We therefore encourage the NRC to provide other hearing format options besides the use of modified Part 2, Subpart L procedures, to shorten the proposed hearing process. In that regard, the NRC's cursory explanation for rejecting the use of Subpart N of 10 CFR Part 2, "Expedited Proceedings with Oral Hearings," does not seem to justify that decision. 79 Fed. Reg. at 21,964-65. As the Commission explained in the 2004 final rule amending 10 CFR Part 2, Subpart N is intended to provide a "'fast track' process for the expeditious resolution of issues in cases where the contentions are few and not particularly complex, and therefore may be efficiently addressed in a short hearing using simple procedures and oral presentations." 69 Fed. Reg. 2214-15 (Jan. 14, 2004), cited in 79 Fed. Reg. at 21,964-65. Although there is as yet no NRC experience with ITAAC hearings, we think some ITAAC hearings could fit this description. If so, the use of modified Subpart N procedures could be both effective and efficient, as the NRC itself recognizes. Subpart N procedures were developed "to permit a quick, relatively informal proceeding where the presiding officer could easily make an oral decision from the bench, or in a short time after conclusion of the oral phase of the hearing." *Id.* at 21,965.

Given the Commission's latitude in choosing "appropriate" formal *or informal* procedures, we believe the agency should consider the use of a more streamlined hearing format. Accordingly, we recommend that the ITAAC hearing procedures include a third option (which we have labeled "hearing Track 3") that would allow for a hearing process similar to that in Part 2, Subpart N for non-complex cases. This alternative Track 3 would proceed directly to the oral hearing, without pre-filed testimony. If permitted by the presiding officer, the parties could brief the question of which hearing track procedures should be applied in the hearing request and answers to that petition. The Commission would then specify, on a case-by-case basis, which hearing format should be used as part of its decision on the hearing request. It appears

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[4] This shorter deadline is consistent with 10 CFR 2.309(j)(2) ("The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under §52.103 of this chapter.") and AEA Section 189(a)(1)(B)(iii).

that use of a modified Subpart N process could save at least 20 days or more from the NRC staff's proposed schedule.[5] *See* the Attachment to NEI's comments.

The NRC Proposal indicates that the NRC considered and rejected use of Subpart N because of the lack of experience on ITAAC hearings and because there did not appear to be significant schedule benefit. *See* 79 Fed. Reg. at 21,964-65. Some proceedings, however, may involve only a few contentions, none of which is "particularly complex," and which therefore "may be efficiently addressed in a short hearing using simple procedures and oral presentations." In those cases, the use of Subpart N procedures would have clear benefits. Additionally, given the strict statutory deadline, any shortening of the schedule further achieves the objectives of an expedited ITAAC hearing.

Draft Template C sets forth proposed procedures for hearings not involving testimony (*i.e.*, hearings involving only legal contentions). This Template contemplates resolving the contentions solely on the basis of written briefs. But another viable option for non-complex factual contentions is to resolve the issues on the basis of oral presentations under the modified Subpart N (Track 3). An oral hearing under this approach could accomplish the same objectives as an all-paper hearing, and could possibly do so more expeditiously.[6]

D. The Final ITAAC Hearing Procedures Should Discuss the Application of APA Section 554(a)(3) to ITAAC Hearings

We recommend that the final ITAAC hearing procedures address the Administrative Procedure Act (APA) hearing exception for matters on which the agency decision is based upon inspections and tests. The APA provides that adjudication is not required in cases in which the agency decision rests "solely on inspections, tests, or elections." *See* 5 U.S.C. §554(a)(3). The NRC has long been aware of this provision in the context of ITAAC hearings held under 10 CFR 52.103. Regarding this hearing exception, in the 1989 NRC final rule promulgating 10 CFR Part 52 the Commission made the following statement regarding new plant hearings held after construction is complete:

> The Commission agrees that findings which rest solely on the results of tests and inspections should not be adjudicated, and the final rule so provides. *See* § 52.103. However, not every finding the Commission must make before operation begins under a combined license will necessarily always be based on wholly self-implementing

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5 The model milestones for Subpart N would not be applied to ITAAC hearings. The "front end" of the hearing process (*i.e.*, filing of the intervention petition and responses to the intervention petition) would be consistent with NEI's proposed schedules for Tracks 1 and 2. The main benefit of using a modified Subpart N approach would be the time savings resulting from the lack of pre-filed testimony and motions/questions for cross-examination. A proposed schedule for a Track 3 modified Subpart N hearing is included in the Attachment to these comments.

6 If the agency deems it infeasible at this time to incorporate an additional expedited hearing track in the final ITAAC hearing procedures, this need not be the end of the discussion. In that case, after the NRC conducts the first several ITAAC hearings it should reassess the usefulness of Subpart L for that purpose and perhaps agree to offer modified Subpart N procedures as an additional alternative hearing format in appropriate cases going forward. This would be similar to the Commission's decision in SRM-SECY-10-0082, "Mandatory Hearing Process for Combined License Application Proceedings Under 10 C.F.R. Part 52," (Dec. 23, 2010), which directed the staff to evaluate the efficiency and effectiveness of the mandatory hearing procedures after gaining experience with two mandatory hearings.

> acceptance criteria and therefore encompassed within the APA exception. The Commission does not believe that it is prudent to decide now, before the Commission has even once gone through the process of judging whether a plant built under a combined license is ready to operate, that every finding the Commission will have to make at that point will be cut-and-dried—proceeding according to highly detailed "objective criteria" entailing little judgment and discretion in their application, and not involving questions of "credibility, conflicts, and sufficiency", questions which the Court in *UCS v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), held were marks of issues which should be litigated at least under the facts of that case. Indeed, trying to assure that the tests, inspections, and related acceptance criteria in the combined license are wholly self-implementing may well only succeed in introducing inordinate delay into the hearing on the application for a combined license." (54 Fed. Reg. 15,372, 15,380 (April 18, 1989)).

The Commission further stated that the final rule in 10 CFR 52.103 "makes issues of conformity with the terms of the combined license part of any post-construction hearing, unless those issues are excepted from adjudication by the APA exception for findings which are based solely on the results of tests and inspections. The final rule does not attempt to say in advance what issues might fall under that exception." 54 Fed. Reg. 15,372, 15,381.

Notably, the language of 10 CFR 52.103 as promulgated in 1989 explicitly referenced the APA Section 554(a)(3) exception, stating that: "Matters exempt from adjudication under 5 U.S.C. 554(a)(3) may be decided by the Commission solely on the basis of the showing of good cause and any responsive pleadings." This language was removed in 1992 when the wording of Section 52.103 was changed to more closely track relevant language of the Energy Policy Act of 1992. *See* 57 Fed. Reg. at 60,976.

In connection with the 2006 NRC rulemaking to amend 10 CFR Part 52, NEI proposed revisions to the NRC's ITAAC hearing process to recapture the APA exception. *See* May 25, 2006 comment letter from NEI to the Commission. Among other things, NEI argued that in deciding whether to grant a hearing request under Section 52.103, the presiding officer should determine whether a proposed contention is exempt from adjudication under APA Section 554(a)(3):

> APA Section 554(a)(3) exempts from APA formal adjudication requirements those matters in which decisions "rest solely on inspections, tests and elections." The scope of the Section 554(a)(3) exemption has generally been construed to include 'technical facts ... as to which administrative hearings have long been thought unnecessary' and situations where an agency relies on the 'judgment' of a tester or inspector. *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952); *see also* Attorney General's Committee on Administrative Procedure, Final Report to President and the Congress, at 37 (1941) (noting that "resort to formal procedures [for inspections, tests, and elections] ... is not desired or utilized ... because it gives no added protection"); S.Rep. No. 752, 79th Cong., 1st Sess. 16 (1945) (exempting inspections, tests, and elections "because those methods of determination do not lend themselves to the hearing process").
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> We believe that the APA Section 554(a)(3) exemption relieves the NRC from the obligation to conduct any hearing under Section 52.103 when the question of whether a new facility complies with an ITAAC can be decided solely on the basis of inspections or test results. In *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, the Court acknowledged that Congress did not mean to require a hearing where a hearing would serve no purpose. 735 F.2d 1437, 1449-1450 (D.C. Cir. 1984). In the UCS

> case, the Court described the generic APA provision as an exemption from AEA 'Section 189(a)'s hearing requirement,' not as an exemption from APA Section 554 procedures.

In its response to NEI's comment letter, the NRC stated:

> The Commission agrees with the commenter that Section 554(a)(3) exception of the Administrative Procedure[s] Act (APA) may be used [] in appropriate circumstances to avoid a § 52.103 hearing on whether a specific ITAAC (or portion of an ITAAC) has been satisfied. However, as the commenter notes, there are many alternative approaches for the NRC to make the determination of which ITAAC fall within the ambit of the APA exception. (*See* May 25, 2006 NEI letter, p. 14.) There has never been a § 52.103 hearing, so there is no applicable experience that the Commission could draw upon when formulating a generic rulemaking requirement. None of these alternatives (and other alternatives identified within the NRC) were discussed in the SOCs for either the 2003 or 2006 proposed rules. Adopting by rule a particular approach for invoking the APA Section 554(a)(3) exclusion, under these circumstances, is likely to result in adverse public assessments of the Commission's actions. Finally, the need for resolution of this issue as part of this rulemaking is not clear, given that such hearings are unlikely to occur until well into the next decade. Accordingly, the Commission concludes that adoption of detailed rulemaking requirements governing the use of the APA Section 554(a)(3) exception in this final rulemaking would not be prudent.

NRC Comment Summary Report, Final Rule for 10 CFR Part 52 (July 2007), p. 75.

Finally, the 2007 NRC final rule amending 10 CFR Part 52 also addressed this APA hearing exception: "[T]he scope and nature of the NRC finding that ITAAC have been met is constrained by the ITAAC itself (indeed, the NRC has always recognized the possibility that ITAAC could be written such that the 'inspections and tests' exception in Section 554(a)(3) of the APA could be invoked to preclude the need to provide an opportunity for hearing on § 52.103(g) findings)." NRC final rule, 72 Fed. Reg. 49,352, 49,428 (Aug. 28, 2007).

We recommend that the final NRC ITAAC hearing procedures explicitly recognize this APA exception and provide clear guidance on when and how the exception may be applied to ITAAC contentions, including a process by which a party might petition for the exception to be applied. The agency's 2007 comments on this topic suggest the Commission agrees that the exception may be used in appropriate circumstances to decline to hold a hearing on whether a specific ITAAC has been satisfied. Now, seven years later and with the possibility of ITAAC hearings on the horizon, the need for resolution of this question has become timely. Eliminating the need for an ITAAC hearing on this category of contentions could save valuable time and effort for everyone, and decrease the risk of a delay in fuel load.

As the NRC has previously noted, there are a number of possible approaches for applying the APA exception in the ITAAC hearing context. We agree, and we ask that the NRC address the use of APA Section 554(a)(3) in appropriate circumstances in the final ITAAC hearing procedures. NEI proposes that the procedures allow the licensee or NRC staff to first raise the APA exception in their answers to intervention petitions. The licensee or NRC staff would provide the basis for a conclusion that the ITAAC in question involves detailed objective criteria entailing little judgment and discretion in their application, and does not involve questions of credibility, conflicts, and sufficiency. Other parties would then be allowed to file a prompt response. This approach relieves petitioners of the need to address the APA exception for

proposed contentions where the licensee and NRC staff will not raise the issue, but still provides the Commission with a means to invoke the exception and avoid unnecessary hearings. There are other viable approaches, however. Another option would be to have all hearing participants – including petitioners – affirmatively address in their hearing request or answers to a hearing request whether the ITAAC at issue falls within the APA hearing exception. If the Commission deems further responses necessary, it could authorize such filings on an expedited basis (*e.g.*, 5 days after answers to the hearing request). Of course, the Commission also could raise the issue *sua sponte* while it considers a hearing request. Regardless of how the issue is first raised, as presiding officer, the Commission would be obligated to rule on the APA exception as part of its decision on a hearing request.

E. The Availability of ITAAC Closure Information Supports Accelerated Publication of the 10 CFR 52.103(a) Notice

The NRC's proposed schedule for publishing the notice of intended operation and notice of opportunity for hearing at least 210 days before scheduled fuel load is workable because considerable information on ITAAC status and closure will be publicly available well before that notice.[7] To recap:

- *The licensee must submit ITAAC closure notifications (ICN)* notifying NRC that "prescribed inspections, tests, and analyses have been performed and that the prescribed acceptance criteria are met." These ICNs are not merely pro forma; they must provide sufficient information to demonstrate to the NRC that inspections, tests, and analyses

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7 The NRC Proposal states:

"For every ITAAC, the licensee is required by 10 CFR 52.99(c)(1) to submit an ITAAC closure notification to the NRC explaining the licensee's basis for concluding that the inspections, tests, and analyses have been performed and that the acceptance criteria are met. These ITAAC closure notifications are submitted throughout construction as ITAAC are completed. Licensees are expected to 'maintain' the successful completion of ITAAC after the submission of an ITAAC closure notification. If an event subsequent to the submission of an ITAAC closure notification materially alters the basis for determining that the inspections, tests, and analyses were successfully performed or that the acceptance criteria are met, then the licensee is required by 10 CFR 52.99(c)(2) to submit an ITAAC post-closure notification documenting its successful resolution of the issue. The licensee must also notify the NRC when all ITAAC are complete as required by 10 CFR 52.99(c)(4). These notifications, together with the results of the NRC's inspection process, serve as the basis for the NRC's 10 CFR 52.103(g) finding regarding whether the acceptance criteria in the COL are met.

One other required notification, the uncompleted ITAAC notification, must be submitted at least 225 days before scheduled initial fuel load and must describe the licensee's plans to complete the ITAAC that have not yet been completed. 10 CFR 52.99(c)(3). An important purpose served by this notification is to provide sufficient information to members of the public to allow them a meaningful opportunity to request a hearing and submit contentions on uncompleted ITAAC within the required timeframes. When the uncompleted ITAAC are later completed, the licensee must submit an ITAAC closure notification pursuant to 10 CFR 52.99(c)(1).

As the Commission stated in the ITAAC Maintenance Rule (77 FR 51887), the notifications required by 10 CFR 52.99(c) serve the dual purposes of ensuring (1) that the NRC has sufficient information to complete all of the activities necessary for it to find that the acceptance criteria are met, and (2) that interested persons will have access to information on both completed and uncompleted ITAAC sufficient to address the AEA threshold for requesting a hearing under Section 189a.(1)(B) on conformance with the acceptance criteria." 79 Fed. Reg. at 21,958, 21,960.

have been performed and that the corresponding acceptance criteria are met. *See* 10 CFR 52.99(c)(1); *see also* 72 Fed. Reg. at 49,366, which sets forth the NRC's definition of "sufficient information."[8] The ICN process is currently underway for work completed at 10 CFR Part 52 power reactors.

- *The licensee must submit an ITAAC post-closure notification* if it discovers new information "that materially alters the basis for determining that either inspections, tests or analyses were performed as required, or that acceptance criteria are met." This ITAAC post-closure notification must contain "sufficient information to demonstrate that, notwithstanding the new information, the prescribed inspections, tests, or analyses have been performed as required, and the prescribed acceptance criteria are met." *See* 10 CFR 52.99(c)(2); *see also* 72 Fed. Reg. at 49,366.

- *The licensee must notify the NRC of its scheduled date for initial fuel loading no later than 270 days (9 months) before scheduled fuel load. See* 10 CFR 52.103(a). This schedule information, which is publicly available, is updated every 30 days and the updates also are publicly available. NRC will use the information in the licensee fuel load schedule in developing the agency's notice of intended operation. 72 Fed. Reg. at 49,451.

- *No later than 225 days before scheduled fuel load, the licensee must make another notification to the NRC (the "uncompleted ITAAC notification") if it has not already provided the Section 52.99(c)(1) notification described above for all of the ITAAC at the facility in question. See* 10 CFR 52.99(c)(3); *see also* 72 Fed. Reg. at 49,366-67. This UIN communicates to NRC that the prescribed ITA for all uncompleted ITAAC will be performed and the prescribed acceptance criteria will be met prior to plant operation. As with the other notifications required by 10 CFR 52.99, the information must include "sufficient information to demonstrate that the prescribed inspections, tests, or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met." The required detail includes (but is not limited to) "a description of the specific procedures and analytical methods to be used for performing the prescribed inspections, tests, and analyses and determining that the prescribed acceptance criteria are met."

Notably, this information on ITAAC closure will be accessible to members of the public. 10 CFR 52.99(e) requires that, in addition to ensuring that the prescribed inspections, tests, and analyses in the ITAAC are performed, "the NRC shall make publicly available" the licensee notifications submitted under 10 CFR 52.99(c). *See also* Section 52.99(e)(1) (NRC must periodically publish in the Federal Register NRC staff determinations of the successful completion of inspections, tests and analyses). The Commission has stated its expectation that the information the licensee submits related to uncompleted ITAAC must be "sufficiently detailed such that the NRC can determine what activities it will need to undertake to determine if the acceptance criteria for each of the uncompleted ITAAC have been met, once the licensee notifies the NRC that those ITAAC have been successfully completed and their acceptance criteria met." 72 Fed. Reg. at 49,367.

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[8] In the 2007 final rule amending 10 CFR part 52, the NRC stated that "sufficient information" in the context of a submittal under 10 CFR 52.99(c)(1) "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." 72 Fed. Reg. at 49,352, 49,366.

F. Accelerating Publication of the Uncompleted ITAAC Notification and the Notice of Intended Operation and Opportunity for Hearing Will Add Valuable Margin to the Schedule

1. The 225-Day Uncompleted ITAAC Notification

At least 225 days before scheduled fuel load the licensee must notify the NRC (if it has not already provided the Section 52.99(c)(1) notification for all ITAAC) that the prescribed inspections, tests, and analyses for all uncompleted ITAAC will be performed and the prescribed acceptance criteria will be met prior to plant operation. This is the "Uncompleted ITAAC Notification" or UIN. NRC requests comments on early voluntary submittal of the licensee's 225-day letter, and also "how early the NRC might reasonably issue the notice of intended operation." 72 Fed. Reg. at 21,958, 21,964.

In our view, the final ITAAC hearing procedures should explicitly allow for licensee submittal of the Uncompleted ITAAC Notification earlier than 225 days before scheduled fuel load. This would add valuable margin to the schedule. However, submittal earlier than 225 days before scheduled fuel load must be optional for the licensee. Early submittal cannot be mandatory, as 10 CFR 52.99(c)(3) provides that the UIN "must be provided no later than the date 225 days before the scheduled date for initial loading of fuel."

Submittal of the UIN earlier than 225 days before fuel load would allow additional time to complete any required ITAAC hearing —assuming that the filing of the UIN would accelerate publication of the notice of intended operation.[9] In turn, allowing additional time for the possible ITAAC hearing would decrease the risk that the hearing might impact the scheduled fuel load date. This approach should not adversely affect participants' ITAAC hearing rights. Early submittal may place additional burden on the licensee to prepare the UIN earlier, but this decision is entirely within the licensee's discretion. Overall, the possibility of additional uncompleted ITAAC in the UIN (if filed earlier than 225 days before scheduled fuel load) should not be a significant concern, because 10 CFR 52.99(c)(3) requires that the UIN demonstrate how the uncompleted ITAAC will be completed. This simply would make available information to the NRC Staff and members of the public on those uncompleted ITAAC earlier than otherwise would be available.

The exact timing of early submittal of the UIN should be left to the licensee's discretion. We understand that it might be reasonable for a licensee to voluntarily submit the UIN up to several months prior to the 225-day deadline, which would be permissible under NRC regulations. In any event, as described below, the NRC notice of intended operation should be issued as expeditiously as possible after receipt of the UIN, or within approximately 15 days of the first ITAAC covered by the UIN.

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9 If a licensee submits its 225-day UIN letter early, that event should trigger issuance of the notice of intended operation on a correspondingly earlier schedule. If the early publication of the UIN does not automatically accelerate the notice of intended operation, neither the licensee, the NRC nor the public would benefit from filing the UIN early. For clarity, the final ITAAC procedures should explain how deadlines are to be computed, and should explicitly state that a deadline triggered by a prior filing or action should be adjusted in parallel if the triggering event occurs early. This "parallel movement" should occur regardless of the original dates in the Scheduling Order issued by the presiding officer.

2. The Notice of Intended Operation and Opportunity for Hearing

The agency requests comment on the schedule for issuing the NRC notice of intended operation. *See* 79 Fed. Reg. at 21,958, 21,964. The AEA and NRC regulations require the NRC to publish a Federal Register notice of intended operation "not less than 180 days" before the scheduled initial fuel load date. That notice also will provide that any person whose interest may be affected by operation of the facility may within 60 days request a hearing on whether the facility as constructed complies, or upon completion will comply, with the acceptance criteria of the facility license. Notably, neither the AEA nor NRC regulations prohibits NRC from issuing this notice earlier than 180 days before scheduled fuel load. *See* AEA Section 189a.(1)(B)(i) and 10 CFR 52.103(a); *see also* 2007 NRC final rule amending 10 CFR Part 52, 72 Fed. Reg. 49,352, 49,367 (Aug. 28, 2007). NEI strongly supports the NRC's stated goal of publishing the notice of intended operation 210 days before the scheduled fuel load date, and "even earlier, if possible."

The public availability of the various ITAAC-related notifications that the COL holder must submit to the NRC under Section 52.99(c) supports the agency's proposed schedule for publishing the notice of intended operation earlier than 180 days before fuel load. This ITAAC information will provide interested persons with sufficient information to address the AEA Section 189.a(1) threshold for requesting a hearing with respect to both completed and as-yet uncompleted ITAAC. 72 Fed. Reg. 49,352, 49,367. Nevertheless, the NRC Proposal notes the "factual difficulty" with issuing the notice of intended operation before issuance of the licensee's UIN letter, because until the uncompleted ITAAC notifications are received, members of the public "will not have a basis on which to file contentions with respect to uncompleted ITAAC." *Id.* at 21,964.

After the NRC receives and publishes the licensee's UIN letter in the Federal Register, it should be feasible for the NRC to publish the notice of intended operation somewhat sooner than fifteen days later. The NRC Proposal suggests 210 days before scheduled fuel load, but states support for earlier publication. While the agency will require some time to review and process the licensee's UIN submittal (*see* 72 Fed. Reg. 49,352, 49,367), we ask the NRC to consider the possibility that the agency might be able to publish the notice of intended operation earlier than 210 days before fuel load—*e.g.*, between 220 and 210 days before scheduled fuel load.

If the licensee files its UIN earlier than 225 days before scheduled initial fuel load (*see* 10 CFR 52.99(c)(3)), we urge the NRC to accelerate issuance of the notice of intended operation and opportunity for hearing in parallel, such that the early submittal results in additional hearing schedule margin. The agency is authorized to do so, and nothing suggests that any potential party would be prejudiced by this earlier issuance of the notices.

On a related point, we ask the NRC to consider requiring some form of advance notice from potential petitioners who plan to submit ITAAC hearing requests and proposed contentions. Given the timing of the opportunity to seek an ITAAC hearing, petitions for ITAAC hearings will almost certainly be filed when the licensee will be involved in intensive efforts to complete construction and close ITAAC. Many of the licensee and NRC staff resources who will be involved in these activities will necessarily also be involved in evaluating and responding to any hearing requests. Given this reality, and also given the condensed time period allowed to respond to hearing requests, early notification that an entity plans to submit a hearing request would facilitate greater efficiency in the overall ITAAC process.

We therefore ask NRC to consider adding language in the final ITAAC hearing procedures mandating that any person who plans to submit an ITAAC hearing request notify the NRC Staff and the affected licensee *within 30 days after the notice of intended operation,* and identify the ITAAC that will be the subject of the hearing request. This notice should allow the affected entities to collect relevant information, settle or otherwise resolve potential contentions (*e.g.*, claims of incompleteness), prepare for a possible hearing earlier, and thereby reduce the risk of a delay in fuel load.

G. It Is Appropriate for the Commission to Choose the Presiding Officer to Conduct the Evidentiary Hearing

The Commission has decided that it will be the presiding officer for purposes of deciding whether to grant hearing requests, designating hearing procedures, and determining whether there is adequate protection during interim operation. 79 Fed. Reg. at 21,958, 21,963. This choice is appropriate and well-supported by NRC regulations; *see* 10 CFR 52.103(c). However, the Commission has not yet decided which entity will serve as the presiding officer for an evidentiary hearing on admitted contentions. *Id.* For an evidentiary hearing, the Commission or an NRC Atomic Safety and Licensing Board might serve as presiding officer, or the Commission might opt to use a "single legal judge (assisted as appropriate by technical advisors)." As each of these possible choices offers a different balance of advantages and disadvantages, we take no position on who the presiding officer should be.

The NRC's proposed procedures will accommodate all of these possibilities. More specifically, the NRC Proposal calls for the Commission to delegate to the Chief Administrative Judge the choice of whether to employ a licensing board or a single legal judge; the latter would have the option of assistance from one or more technical advisors. However, the agency proposes that the Commission "retain the option of choosing who will conduct the evidentiary hearing in each proceeding." 79 Fed. Reg. at 21,963. This is an appropriate exercise of Commission discretion, but we nevertheless urge the NRC to communicate its likely preference for presiding hearing officer sooner rather than later, perhaps in the final ITAAC procedures.[10]

With the exception of procedures that specifically relate to interactions between the Commission and a licensing board or single legal judge, the proposed ITAAC hearing procedures are the same regardless of the choice of presiding officer. Depending upon the Commission's choice of presiding office in any given evidentiary hearing, procedures will be adjusted accordingly, *e.g.*, "procedures pertaining to interactions between the Commission and a licensing board (or single legal judge assisted as appropriate by technical advisors) will be retained or omitted." 79 Fed. Reg. at 21,963 (footnote omitted).

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[10] To the extent the Commission wishes to retain flexibility in the choice of presiding officer, we suggest that the final ITAAC hearing procedures contain criteria to be applied in the selection of the presiding officer for the evidentiary hearing. For example, a large number of contentions might suggest the use of one or more Atomic Safety and Licensing Boards. If the admitted issues are "legal" contentions (*see* draft Template C), that might suggest that the Commission or a single judge act as presiding officer. In any event, the availability of such factors would provide increased transparency in the final procedures and clarity for all stakeholders.

H. Interim Plant Operation Issues

1. The Hearing Procedures Should Clarify the Interim Operation Process

The NRC Proposal explicitly acknowledges the important purpose of the interim operation provisions in 10 CFR 52.103(c): "As is evident from the statutory text, Congress included the interim operation provision to prevent an ITAAC hearing from unnecessarily delaying plant operation if the hearing extends beyond scheduled fuel load." 79 Fed. Reg. at 21,962 (footnote omitted). The AEA and NRC regulations in 10 CFR 52.103(c) contemplate "interim operation," which in this context is defined as "operation of the plant pending the completion of an ITAAC hearing." *Id.* at 21,962.

The potential for an interim operation decision arises if the Commission grants an ITAAC hearing request, in which case the statute directs the Commission to allow interim operation under the combined license if it determines, after considering the petitioner's *prima facie* showing and any answers thereto, there will be reasonable assurance of adequate protection of the public health and safety during the interim operation period.[11] AEA Section 189a.(1)(B)(iii); 10 CFR 52.103(c). No request to stay a Commission decision allowing interim plant operation will be entertained, and the Commission decision becomes final agency action once the NRC staff issues an order allowing interim operation. 79 Fed. Reg. at 21,966.

NEI recognizes that authorization for interim operation cannot be granted until after the Commission's Section 52.103(c) "adequate protection for interim operation determination" has been made. However, the NRC Proposal should more clearly define the timing for the Commission's Section 52.103(c) adequate protection finding, the Section 52.103(g) finding, and the order authorizing interim operation.

Regarding the *timing* of the Section 52.103(c) finding on interim operation, the NRC Proposal states: "The Commission has discretion regarding the timing of the adequate protection determination for interim operation, but since the purpose of the interim operation provision is to prevent the hearing from unnecessarily delaying fuel load, an interim operation determination will be sufficiently expeditious if it is made by scheduled fuel load." 79 Fed. Reg. at 21,966; *see also* Draft Template A at 12-14, 24. NEI disagrees.

It is important for the Commission to make the Section 52.103(c) adequate protection determination as early as possible. A licensee may be able to load fuel before its scheduled fuel load date and, in any event, will need time to mobilize its workforce to support fuel load. To account for this possibility, the Commission should expeditiously make the Section 52.103(c) adequate protection determination on contested ITAAC, followed by the staff's issuance of an order authorizing interim operation. To that end, we urge the Commission to make the Section 52.103(c) adequate protection determination with respect to any particular ITAAC

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[11] The contention admissibility rules for ITAAC hearings require that petitioners make a *prima facie* showing that the conformance of the ITAAC at issue would have operational consequences contrary to reasonable assurance of adequate protection. 10 C.F.R. 2.309(f)(1)(vii). NEI notes that this showing does not affect the Commission's Section 52.103(c) finding of adequate protection for interim operation. The Section 52.103(c) finding is a narrow one related only to the period of interim operation. Construing the contention admissibility requirement as determinative of the interim operation adequate protection determination would render meaningless the purpose of the interim operation finding.

challenged in an admitted contention when it admits the contention for hearing or shortly thereafter (*e.g.*, shortly after any additional briefing on mitigation measures is complete).[12]

In addition to the Section 52.103(c) finding, a timely Section 52.103(g) finding by the NRC staff is also necessary to support an order authorizing interim operation. NEI believes that the Section 52.103(g) finding made to support interim operation should be limited to only uncontested ITAAC. Therefore, interim operation would be authorized when the Commission makes the Section 52.103(c) finding regarding contested ITAAC, and the NRC Staff makes the Section 52.103(g) finding regarding uncontested ITAAC. Although the timing of the Section 52.103(g) finding on uncontested ITAAC may vary in each case depending on when the licensee completes its ITAAC, the Commission should establish a goal that the finding should be made within 10 days of the licensee notifying the NRC that the ITAAC have been completed, or by the scheduled fuel load date, whichever is earlier. The objective of this goal would be to further facilitate efficient and timely decisions on interim operation.

One specific point regarding interim operation should be emphasized by the NRC: 10 CFR 2.340(j) does not apply in cases of interim operation. Section 2.340(j) states that the Section 52.103(g) finding will be made within 10 days of the initial decision. But, as stated in the NRC Proposal, "if interim operation is allowed, then the 52.103(g) finding will have been made prior to the initial decision." 79 Fed. Reg. at 21,962. In that case, the staff will issue its Section 52.103(g) finding once it is satisfied that all uncontested ITAAC have been met and will authorize operation in advance of the initial decision. Because the text of Section 2.340(j) does not specifically state that it does not apply in cases of interim operation, NEI proposes that the final hearing procedures clearly call out this exception to avoid any confusion regarding the timing of the findings necessary to authorize interim operation.

In summary, the Commission should clarify the process as follows:

- If no admitted contentions are pending for hearing at the time all ITAAC are closed (regardless of pending appeals, motions to reopen, or late filed contentions, etc.), then the NRC staff would issue the Section 52.103(g) finding as soon as it determines that all acceptance criteria are met.

- If an admitted contention is pending for hearing, then the NRC staff would issue the Section 52.103(g) finding on all uncontested ITAAC despite a hearing as soon as it can determine that all uncontested ITAAC are met.

- Separate from the Section 52.103(g) finding, if an admitted contention is pending for hearing, the Commission will make a Section 52.103(c) adequate protection determination for any admitted contentions despite a hearing. The Section 52.103(c) finding should be made concurrent with a decision to admit a contention (or as soon as possible thereafter).

- The NRC staff would issue an order authorizing interim operation and incorporating any conditions the Commission found necessary to support its adequate protection finding as

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[12] The NRC Proposal suggests that the Commission may order additional briefing on licensee mitigation issues "to support an adequate protection determination." 79 Fed. Reg. at 21,966. Although the Commission clearly has the authority to request such additional briefings, the final ITAAC hearing procedures should not require such briefing.

soon as the Section 52.103(g) finding on uncontested ITAAC and the Section 52.103(c) finding on contested ITAAC have been made.

2. Clarifying the Section 52.103(c) Adequate Protection Finding

In making the adequate protection finding, Section 52.103(c) states that the Commission "must consider the petitioner's *prima facie* showing and any answers thereto." This requires the Commission to consider the positions of all parties on whether there is reasonable assurance of adequate protection during interim operation, assuming an intervenor has made a *prima facie* case that an ITAAC has not been met. The Commission may find reasonable assurance for interim operation even though the intervenor has made a *prima facie* case that the ITAAC is not or will not be met, provided that the NRC staff or the licensee presented persuasive evidence that there will be reasonable assurance of adequate protection during interim operation.[13]

The NRC Proposal suggests Congress intended the Commission to allow interim operation only in narrow circumstances, such as when a safety issue would not arise during the interim operation period. *See* 79 Fed. Reg. at 21,962. The NRC has relied on the statement of one Senator (Senator Johnston) to support its position on the limited applicability of interim operation. But that statement simply indicates that interim operation may not be appropriate in every scenario, and that the focus of the determination is on the safe operation of the plant during the interim period. It does not detract from the Commission's broad discretion to authorize interim operation or to craft procedures governing these decisions. The broad declaration in the NRC Proposal inappropriately limits the Commission's authority to permit interim operation, which is a very fact-specific inquiry that should be evaluated only after petitioners submit hearing requests challenging specific ITAAC.

Moreover, both AEA Section 189a.(1)(B)(iii) and 10 CFR 52.103(c) are clear on their face—interim operation is allowed if the Commission determines that "there will be reasonable assurance of adequate protection of the public health and safety." Although the Commission is required to "consider" the intervenor's *prima facie* showing on that issue, there is no requirement that the Commission base its reasonable assurance determination on the intervenor's *prima facie* showing. Given the plain language of the AEA and the regulations, the legislative history should not be determinative—the Commission has ample knowledge and experience in determining reasonable assurance of adequate protection.

In sum, the discussion of interim operation and the adequate protection finding in the NRC Proposal (79 Fed. Reg. at 21,962 and 21,966-67) raises a number of novel and complex regulatory concepts, not all of which are self-evident. Given the number of stakeholder comments filed on this issue, it is clear that there can be more than one valid approach to interim operation questions. As such, additional discussion is warranted to resolve these important matters and provide additional clarity in the final hearing procedures. In view of the significance of interim operation to the Part 52 licensing process, we ask the NRC to consider holding an additional public meeting on this topic, preferably during the next several months.

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[13] This preliminary merits decision is similar to the preliminary merits decision the Commission makes for stay requests. *See, e.g.*, 10 CFR 2.342(e)(1). The broad discretion the Commission has in crafting ITAAC hearing procedures allows the Commission to weigh the information presented by the parties at this initial stage to the extent necessary to make an informed interim operations decision.

I. Initial Decision of the Presiding Officer on Whether Acceptance Criteria Are or Will Be Met

The NRC Proposal discusses the presiding officer's issuance of an initial decision under 10 CFR 2.340(c) on whether the acceptance criteria have been or will be met, and the fact that this decision is immediately effective unless good cause is shown why it should not be so. *See* 79 Fed. Reg. at 21,958, 21,962. We recommend that the NRC implement a stringent "good cause" standard, and discuss that standard in the case-specific hearing order templates.

NEI concurs with the points made in this section of the NRC Proposal, including the staff's recognition that Section 2.340(j) is not intended as an "exhaustive roadmap" to a possible Section 52.103(g) finding and that there may be some situations (such as interim operation) in which "the mechanism and circumstances described by 10 CFR 2.340(j) are not wholly applicable."

NEI also proposes that the Commission or its delegate (the NRC staff) use best efforts to make the full Section 52.103(g) finding earlier than 10 days from the date of issuance of the initial decision. First, any ITAAC hearing should not delay the ability to make the necessary findings relating to those acceptance criteria *not within the scope* of any initial decision. *See* 10 CFR 2.340(j)(1). Second, the issuance of a positive decision concerning the contested acceptance criteria will immediately support a Section 52.103(g) finding: an additional 10 days is not needed. Third, it is certainly possible to resolve pending petitions or motions such as those listed in Section 2.340(j)(3) in less than 10 days. On the other hand, this 10-day time period may be extremely important to the licensee that seeks to load fuel as scheduled.

III. COMMENTS ON SPECIFIC PROPOSED HEARING PROCEDURES AND TEMPLATES FOR ORDERS

Section VI of the NRC Proposal discusses in greater detail the proposed ITAAC hearing format and the content of the draft templates containing procedures for the conduct of ITAAC hearings. *See* 79 Fed. Reg. at 21,965-73.[14]

A. Hearing Issues Related to the NRC Notice of Intended Operation (Draft Template A)

As a preliminary matter, NEI supports the following aspects of the NRC Proposal:

- Application of heightened requirements to ITAAC hearing requests and proposed contentions

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[14] Questions relating to draft Template A, "Notice of Intended Operation and Associated Orders," include the content of the notice of intended operation, the *prima facie* showing required to obtain an ITAAC hearing, claims of incompleteness, interim operation, hearing requests, intervention petitions, motions, document filing and computation of time, notifications of new developments, stays, interlocutory appeals, licensee hearing requests, and SUNSI-SGI access orders. *See* 79 Fed. Reg. 21,965-69. Matters relating to draft Template B, "Procedures for Hearings Involving Testimony," include schedule and format for hearings involving witness testimony, mandatory disclosures and the role of the NRC staff, and certified questions or referred rulings. *See* 79 Fed. Reg. 21,969-73. Topics relating to draft Template C, "Procedures for Hearings not Involving Testimony," and draft Template D, "Procedures for Resolving Claims of Incompleteness," are discussed at 79 Fed. Reg. 21,973.

- Disallowing discretionary intervention
- Requiring a *prima facie* showing by the ITAAC hearing petitioner that applies "[i]n addition to the normal requirements for hearing requests"
- Imposing requirements relating to claims of incompleteness in Section 52.99(c) notifications
- Precluding contentions on environmental issues
- Applying firm deadlines for answers to petitions requesting a hearing
- Precluding an opportunity to reply to an answer to a petition
- Strict adherence to the requirement that the Commission "expeditiously grant or deny the hearing request"
- Disallowing appeals under 10 CFR 2.311 from a Commission ruling granting or denying a petition for an ITAAC hearing. *See* 79 Fed. Reg.at 21,961-62.

1. Hearing Requests, Intervention Petitions, Motions to File Untimely New or Amended Contentions or Claims of Incompleteness after the Original Deadline

In response to the staff's request for comment (79 Fed. Reg. at 21,958, 21,966-67), NEI believes that the NRC's notice of intended operation can and must establish clear expectations for timeliness in meeting hearing deadlines. We also agree that the suggested time periods for a number of hearing milestones should be shortened (compared to those used in typical Part 2, Subpart L proceedings) in the interest of expediting the proceeding. *Id.*

a. The Prima Facie Showing Requirement

NEI agrees with the first paragraph of this discussion in the NRC Proposal, which describes the showing that a petitioner must make to obtain a hearing on whether the facility, as constructed, complies (or upon completion will comply) with the acceptance criteria in the COL. This deliberately stringent showing is based on statutory requirements in AEA Section 189a.(1)(B)(ii) and regulatory requirements in 10 CFR 2.309(f)(1)(vii). 79 Fed Reg. at 21,965.

NEI also supports the NRC proposal to require that, in making the necessary *prima facie* showing, the "additional procedures order" must provide that any declaration of an eyewitness or expert witness offered in support of contention admissibility must be signed by the eyewitness or expert witness in accordance with 10 CFR 2.304(d). 79 Fed. Reg. at 21,966. However, the following sentence appears to undercut this directive by proposing that if the declaration is not signed, "their content will be considered, but they will not be accorded the weight of an eyewitness or an expert witness . . . with respect to satisfying the *prima facie* showing required by 10 CFR 2.309(f)(1)(vii)."

The final sentence of this section states that the purpose of this requirement "is to ensure that a position that is purportedly supported by an expert witness or an eyewitness is actually supported by that witness." 79 Fed. Reg. at 21,966. If that is the case, then petitioners should be

held to the requirement of a signed declaration. As proposed, the suggestion that the unsigned declaration will be considered but given less weight dilutes the overall purpose of the provision, and sends the message that the NRC does not mean what it says. Potential petitioners will likely be encouraged to circumvent this requirement if the only penalty for doing so is an ambiguous warning that their declaration will "not be accorded the weight of an eyewitness or an expert witness . . . ."

b. Claims of Incompleteness

10 CFR 2.309(f)(1)(vii) provides a process for petitioners to claim that a licensee's notification under 10 CFR 52.99(c) is incomplete—and that this incompleteness prevents the petitioner from making the necessary *prima facie* showing. 79 Fed Reg. at 21,966. Petitioners' requests for an ITAAC hearing must fully satisfy the requirements of 10 CFR 52.103(b)(1)-(2) and 10 CFR 2.309(f)(1)(vii). The information included "must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license 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." This information must include "the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (*i.e.*, fails to contain the necessary information required by §52.99(c))." 10 CFR 2.309(f)(1)(vii). If the requestor identifies a specific portion of the Section 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. 10 CFR 2.309(f)(1)(vii).

The final ITAAC hearing procedures should establish more specific criteria against which claims of incompleteness would be evaluated. The NRC should use the NRC-endorsed industry guidance on ITAAC closure packages as a guidepost for determining the sufficiency of an incompleteness claim. If an ICN or UIN meets the standard in the guidance, it should be considered complete. Detailed suggestions are contained in Section III.E., below.

c. Late Filings After Initial Deadlines

The NRC Proposal requests comments on three options regarding the timing of filings after initial deadlines. *See* 79 Fed. Reg. at 21,967, column 1; *see also* Draft Template A at 30-31; Draft Template B at 26-27, 29. Of those choices, NEI supports option 2: if a filing based on the availability of new information is made, the presiding officer can find that "good cause" is satisfied if the filing is made within 20 days of the availability of the information on which the new proposed contention is based. The other parties will have fifteen (15) days to answer. 79 Fed. Reg. at 21,967. NEI believes that 20 days from the time new information becomes available is ample time in which to prepare and file a new proposed contention.

Ideally, we would prefer that the staff reduce this schedule even further. Ten (10) days to make a filing and seven (7) days to respond would be sufficient. In making this recommendation, we have considered the need for expeditious completion of the ITAAC hearing before scheduled fuel load, the narrow focus of the ITAAC hearing and the specificity of any new information, which should not require significant time or effort to address. In some situations, adoption of this shorter deadline could obviate the need for the NRC to make a decision on interim operation.

NEI also requests that NRC clarify the requirement that late-filed contentions be based on "new" information in the context of ICNs. The closure of a previously completed ITAAC is not "new" information unless the ICN contains a materially different methodology, results, etc., from the previously submitted uncompleted ITAAC notification. In that regard, a petitioner should not be allowed to file a late contention with respect to an ICN filed more than 20 days previously (or such shorter period as the NRC may select). Allowing late contentions on ICNs presents a substantial potential for delayed operation.

On a different point, NEI concurs with the suggestion that *the Commission* should ordinarily rule on all hearing requests, intervention petitions, and motions to file new or amended contentions or claims of completeness filed after the original deadline. 79 Fed. Reg. at 21,967. This is intended to add predictability to the ITAAC hearing process. The Commission also would designate the hearing procedures for any newly admitted contentions and determine whether there will be adequate protection during the period of interim operation with respect to those contentions, as well as retaining the option of delegating rulings on amended contentions to a licensing board. *Id.*

d. New or Amended Contentions

New or amended contentions, including late filed hearing requests, present the potential for significant delay in fuel load. In recognition of this risk, the NRC Proposal states that "the deadline for an initial decision on the amended contention (which is a strict deadline) would be the same date as the deadline for an initial decision on the original contention." 79 Fed. Reg. at 21,967. NEI agrees. We therefore suggest that the NRC's final ITAAC hearing procedures be clarified to state that it may not be possible to apply the same timeframes for answers to and decisions on new or amended contentions as the timeframes applied in the case of originally-filed contentions. This will depend, of course, on when during the hearing process the new or amended contention is filed. But in order to ensure that an initial decision on a new or an amended contention is issued within the statutory timeframe, it is likely that other portions of the hearing process regarding that contention will need to be compressed.

New contentions should only be allowed in very narrow circumstances. They should only be permitted for ITAAC that were not completed at the time of the NRC's Notice of Intended Operation, and then only if the new contention: 1) pertains to the subsequent completion of the ITAAC; and 2) does not involve any allegations of deficiencies in the procedures and analytical methods discussed in the UIN. The final hearing procedures should emphasize this point.

Amended contentions should not be allowed, except to address a licensee's ITAAC completeness notifications or ITAAC maintenance letters that invalidate a completed ITAAC. Again, the final hearing procedures should emphasize this point.

e. Licensee Requests for ITAAC Hearings

The NRC Proposal notes that a dispute between the COL holder and the NRC staff as to whether or not certain acceptance criteria are met could trigger a licensee request for an ITAAC hearing. *See* 79 Fed. Reg. at 21,969; Draft Template A at 11. NEI concurs with the NRC that it is not necessary to develop separate hearing provisions for this unusual scenario. *Id.* NEI generally agrees that if a licensee-initiated ITAAC hearing is held, many of the hearing procedures described in the NRC Proposal "could be adapted, with little change, to serve the purpose of a

hearing requested by the licensee." 79 Fed. Reg. at 21,969. Any such procedural modifications made should have the effect of simplifying and shortening the hearing process.

Additionally, it is unclear from the NRC Proposal whether NRC believes that the licensee would need to satisfy other standards for obtaining a hearing, *e.g.*, submission of a contention that meets the 10 CFR 2.309(f) requirements. The NRC Proposal does state that the *prima facie* requirements do not apply; *see* 79 Fed. Reg. at 21,969. Given that a dispute over satisfaction of acceptance criteria would automatically provide an adequate basis for a hearing, the procedures should clarify that a licensee need only request a hearing for it to be granted. This would be similar to an applicant's right to demand a hearing under 10 CFR 2.103(b) under certain circumstances. This approach would usefully reduce the burden and time required for any licensee hearing requests and expedite resolution of any disputes.

Unlike 10 CFR 2.103(b), there would be no notice of proposed denial or notice of denial of an application that would initiate the right of the licensee to request a hearing. Therefore, the licensee should have 20 days from the date that the staff determines that an ITAAC has not been satisfied to request a hearing.

2. Filing of Documents and Time Computation

With one exception, we concur with each of the NRC's proposals to modify document filing requirements and time computation requirements for ITAAC hearings. *See* 79 Fed. Reg. at 21,968. The exception is that we do not believe filing documents by "hand delivery" to the NRC should be permitted. Filing time-sensitive documents by hand delivery to the agency is inefficient and is an unreasonable burden on NRC staff.

3. Motions in ITAAC Hearings

Issues relating to motions are discussed at 79 Fed. Reg. at 21,968-69. The NRC Proposal recommends that the time period for filing and responding to motions be shortened from those time periods specified in 10 CFR Part 2, Subpart C to accommodate the expedited timeline for ITAAC hearings. NRC recommends that all motions except for motions to file new or amended contentions or claims of incompleteness filed after the deadline must be filed "within 7 days after the occurrence or circumstance from which the motion arises, and answers to motions shall be filed within 7 days of the motion." *Id.* at 21,968. NEI agrees with this proposal.

As to the questions of motions for extensions of time, we urge the NRC to adopt a firmer stance disallowing any extensions of time in all but the most compelling situation. As the agency states on this point, "deadlines must be adhered to strictly and only exceptional circumstances should give rise to delay." 79 Fed. Reg. at 21,968.

a. Motions for Extensions of Time—Very Minor Extensions

NRC requests comments on whether "very minor extensions" should be defined in a more objective manner or whether "a showing of unavoidable and extreme circumstances should be required for all extension requests, no matter how minor." *See* 79 Fed. Reg. at 21,968; *see also* Draft Template A at 25; Draft Template B at 8. NEI's view is that a showing of "unavoidable and extreme circumstances" should be required for *all extension requests*, no matter how "minor." This more stringent standard is necessary given the abbreviated schedule for completing ITAAC hearings before scheduled fuel load. Additionally, creating two standards for extension requests

adds further unnecessary complexity to the hearing process and would not appear to serve a useful purpose.

NEI concurs that motions for extension of time must be filed as soon as possible, normally not more than two business days after the moving party discovers the event that gives rise to the motion. *See* 79 Fed. Reg. at 21,968. Also, if the NRC adopts the "very minor extensions" standard, then the term should be defined in a more objective manner as an extension of 1-2 days.

c. Motions for Extension—Deadline-Based or Event-Based Trigger

The NRC requests comments on whether a deadline-based trigger should be used in lieu of, or in combination with, an event-based trigger, for the filing of an extension request. *See* 79 Fed. Reg. at 21,968; *see also* Draft Template A at 25; Draft Template B at 7-8. The staff chose an event-based trigger for the filing of an extension request "because meritorious motions will likely be based on events outside the party's control given the strict interpretation of good cause." We suggest that the procedures include both an event-based trigger and a deadline-based trigger to satisfy the good cause requirements for extension requests, and should require the movant to submit the motion by the earlier of the two deadlines. The use of a deadline-based trigger is beneficial for those circumstances in which the event giving rise to the need for the extension does not have a clear origin.

d. Motions to Reopen

The NRC Proposal requests 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. *See* draft Template A at 32-33; Draft Template B at 35. As an initial matter, NEI's view is that there should be no opportunity for the parties to file motions to reopen a *closed* record or proceeding, whether in conjunction with an admitted contention or a late-filed new or amended contention. Given the tight timeframes imposed on ITAAC hearings by statute, entertaining motions to reopen has the potential to cause significant delay without corresponding benefit.

If motions to reopen a closed record are entertained, the Commission should adopt strict standards when considering new or amended contentions. In that context (*e.g.*, no contentions were admitted, or contentions were admitted and the record was closed after the hearing), if an intervenor seeks to file an intervention petition or new/amended contentions, the NRC should continue to apply the reopening standards. Those standards should not be eliminated or diluted. Applying the "good cause" standard in 10 CFR 2.309(c) to filing new or amended contentions after the deadline is not sufficient when the record has been closed.

Regarding the NRC's specific question on reopening standards, our view is that the party moving to reopen in connection with a hearing request, intervention petition, or motion for leave to file a new or amended contention filed after the original deadline should be required to affirmatively address the standards for a motion to reopen. A motion to reopen is an extraordinary request for relief, and there is no compelling reason why the agency should depart from its established practice. Additionally, the higher standard is clearly more appropriate given the potential for such requests to delay resolution of the hearing.

We also recommend that the final heading procedures contain precise deadlines as to when the record should be closed.

d. Motions for Reconsideration

NRC requests comments on three options with respect to motions for reconsideration and motions for clarification in ITAAC hearings. Option 1 is to retain the 10 CFR 2.323(e) provisions for motions for reconsideration, but with a reduced filing period. With regard to this option NRC comments that it may be "premature" to limit the opportunity to seek reconsideration given the lack of experience with ITAAC hearings. Option 2 is to restrict motions for reconsideration to a presiding officer's initial decision and Commission decisions on appeal of a presiding officer's initial decision. Option 3 is to prohibit motions for reconsideration. *See* 79 Fed. Reg. at 21,968; Draft Template A at 25-27; Draft Template B at 9-10.

We recommend that the staff recommend Option 3 to the Commission, which would disallow motions for reconsideration in ITAAC hearings. Given the extremely abbreviated schedule for ITAAC hearings, the resources of the presiding officer, the parties, and the NRC staff should not be focused on reconsideration when appeal rights will be available so close in time. However, if the NRC selects Option 1, the hearing procedures should specify that a pending motion for reconsideration will not prevent or stay further actions by the NRC such as the 10 CFR 52.103(g) finding.

e. Stay Requests

In addition to not permitting motions on interim operation decisions, no stay motions should be entertained in the ITAAC hearings. Stay motions have the potential to cause substantial delays. Given the high "irreparable harm" standard applied to stay motions, NEI does not believe that the benefits derived from the ability to request a stay outweigh the significant harm that could be caused by delaying scheduled fuel load.

4. Notifications of Relevant New Developments in the Proceeding

The NRC proposes that the ASLB and parties be informed the same day when a licensee makes an ITAAC closure notification or ITAAC post-closure notification for a challenged ITAAC. *See* 79 Fed. Reg. at 21,958, 21,969; Draft Template A at 28-29; Draft Template B at 23-24). That notice also would be required to "state the effect that the notice has on the proceeding." 79 Fed. Reg. at 21,970. NEI supports the notification requirement, but we recommend expanding the notification deadline from the same day to within one day. This will allow the parties and their legal counsel time to make the requisite filing and explain the effect on the proceeding.

5. Interlocutory Review Petitions

In addition to an interlocutory appeal as of right in response to a licensing board decision on access to SUNSI or SGI, NRC requests comments on whether, and if so to what extent, there should be an additional opportunity to petition for interlocutory review.[15] Under NRC Option 1, no requests for interlocutory review of licensing board decisions would be entertained other than on requests for access to SUNSI or SGI. 79 Fed. Reg. at 21,970. Under NRC Option 2, the

[15] Interlocutory appeals of decisions on access to SUNSI are discussed in connection with other SUNSI-SGI access issues (*see* section III.C., below).

interlocutory review provisions of 10 CFR 2.341(f) are retained without modification. In either case, NRC states that interlocutory review (except for decisions on access to SUNSI or SGI) will be "disfavored" because of the expedited nature of an ITAAC hearing. *Id.*; Draft Template A at 34; Draft Template B at 38-39.

NEI believes NRC should select Option 1, which would preclude requests for interlocutory review of licensing board decisions other than those dealing with requests for access to SUNSI or SGI. As stated by the NRC Proposal, interlocutory review of decisions other than on requests for access to SUNSI or SGI is "unnecessary and unproductive given the expedited nature of the proceeding." Additionally, the need for interlocutory review with respect to certain decisions (*e.g.*, rulings on hearing requests and late-filed contentions) will not be possible anyway given that the Commission will be the presiding officer for those decisions.

B. Procedures for ITAAC Hearings Involving Testimony (Draft Template B)

1. Schedule and Format for Hearings Involving Witness Testimony

The NRC Proposal recommends a Part 2, Subpart L-type approach to evidentiary hearings that features pre-filed written testimony, an oral hearing, and questioning by the presiding officer rather than the parties' legal counsel. NRC requests comment on factors the Commission should consider in choosing between Track 1 (which includes pre-filed rebuttal testimony) and Track 2 (which features no pre-filed rebuttal testimony) in an individual proceeding. *See* 79 Fed. Reg. at 21,970; *see also* Draft Template B at 5-6. NEI notes that the time to prepare pre-filed initial testimony is not strictly limited to the timeframe set forth in the NRC Proposal (35 days after the hearing request is granted). As a practical matter, parties can begin preparing their initial testimony as soon as hearing requests are filed. And intervenors could conceivably begin preparing their initial testimony even earlier, concurrent with preparing their hearing request. Thus, if the NRC chooses to retain the deadline for pre-filed testimony as a certain number of days after a hearing request is granted, it should be recognized that the parties, in fact, have a considerably longer period in which to do so.

NEI believes that proposed Track 2 better meets the needs of ITAAC hearing participants than proposed Track 1. Adherence to Track 2 is designed to achieve a hearing that is 15 days shorter than a Track 1 hearing (80 day versus 95 days). However, as described in the NRC Proposal, instead of Track 2 resulting in an additional 15 days, the extra time is allotted to making a decision on the hearing request. Thus, instead of the 30 days to decide a hearing request under Track 1, the Commission would have 45 days under Track 2. In our view this allocation is not the most prudent approach, and that the additional 15 days should be left as a cushion before fuel load, to accommodate unforeseen (and possibly unavoidable) delays that occur during the hearing process. There is no basis to allow more time for a decision in Track 2 versus Track 1. A savings of 15 days can be significant in achieving a timely decision and avoiding the possibility of delaying scheduled fuel load.

Other time savings can be achieved through slight modifications to the NRC's proposed Track 1 hearing schedule. As described in Section II, above, a modest tightening of certain deadlines (*e.g.*, answers to hearing requests, decisions on hearing requests, pre-filed testimony, etc.) will allow room for scheduling contingencies without compromising the timeliness of an initial

decision before scheduled fuel load. The following table depicts the NRC's proposed Track 1 schedule compared to NEI's suggested Track 1 schedule.[16]

	Track 1 NRC Proposed		**Track 1 NEI Proposed**	
Event	**Target Date**	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**
Notice of Intended Operation/Opportunity for Hearing		210		210
Hearing Requests	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150
Answers to Hearing Request	Within 25 days of hearing request	125	Within 20 days of hearing request	130
Decision on Hearing Request	30 days after answers to hearing request	95	21 days after answers to hearing request	109
Prehearing Conference	Within 7 days of grant of hearing request	88	Within 7 days of grant of hearing request	102
Scheduling Order	Within 3 days of prehearing conference	85	Within 3 days of prehearing conference	99
Document Disclosures	15 days after grant of hearing request	80	15 days after grant of hearing request	94
Pre-filed initial testimony	35 days after grant of hearing request	60	25 days after grant of hearing request	84
Pre-filed rebuttal testimony	15 days after initial testimony	45	7 days after initial testimony	77
Proposed Questions; Motions for Cross-Examination	7 days after rebuttal testimony	38	7 days after rebuttal testimony	70
Answers to Motions for Cross-Examination	5 days after motion for cross-examination	33	3 days after motion for cross-examination	67
Oral Hearing	15 days after rebuttal testimony	30	10 days after rebuttal testimony	67
Transcript Corrections	7 days after hearing	23	7 days after hearing	60
Findings (if needed)	15 days after hearing	15	15 days after hearing	45
Initial Decision	**30 days after hearing**	**0**	**30 days after hearing**	**37**

2. Rebuttal Testimony

As part of its comparison of Track 1 and Track 2 ITAAC hearing schedule options, NRC requests comments on the value of requiring pre-filed rebuttal testimony. The hearing schedule in Track 1 includes use of pre-filed rebuttal testimony; the schedule in Track 2 does not envision use of

[16] Of the NRC's two proposed tracks, NEI prefers Track 2. But should the NRC endorse Track 1, we encourage the agency to adopt NEI's modified schedule.

pre-filed rebuttal testimony. *See* 79 Fed. Reg. at 21,970; *see also* Draft Template B at 5-6. The NRC Proposal addresses the advantages and disadvantages of using pre-filed rebuttal testimony; *see* 79 Fed. Reg. at 21,970. NRC states that pre-filed rebuttal testimony may not be necessary in cases where the contested issues and the parties' positions are sufficiently well-defined to allow the parties to advance their own positions in their initial testimony, while simultaneously rebutting the positions taken by the other parties. *Id.* Moreover, notes NRC, further development of the record, if necessary, can be accomplished during the oral hearing, "and Track 2 allows the parties to propose questions to be asked of their own witnesses to respond to the other parties' filings (this is a form of oral rebuttal)." *Id.* In any case, the presiding officer possesses sufficiently broad authority to allow him or her to direct that one or more parties file rebuttal testimony if it is needed to develop and adequate record in any given ITAAC hearing. The Proposal also points out the possible advantages of pre-filed testimony. If a party is unable to effectively rebut the other parties' positions in their initial filings, the presiding officer may not possess "a complete understanding of the parties' positions until the oral hearing," possibly creating a delay in reaching a decision. *Id.*

On balance, this perceived risk is not sufficient to support building in additional hearing time for the preparation and filing of rebuttal testimony *on all ITAAC hearing contentions.* As noted, if the presiding officer concludes that he or she does not possess a complete understanding of the parties' positions, he or she has ample discretionary authority to simply direct additional briefing on some or all topics.

Consistent with our support for the more expedited hearing procedures in Track 2 (79 Fed. Reg. at 21,971), NEI does not believe that the hearing procedures must contain a presumption that pre-filed rebuttal testimony will be allowed. Another alternative would be to allow for pre-filed rebuttal testimony for all hearings, but reduce the time for submitting the rebuttal testimony from 15 days to 10 days after the initial testimony (as suggested in NEI's modified Track 1 schedule).

Even without rebuttal testimony, the NRC's proposed Track 2 schedule leaves no room for unanticipated or unavoidable delays. The time savings from eliminating pre-filed rebuttal testimony should not be reallocated to the time allotted for a decision on the hearing request. Additionally, NEI proposes scheduling modifications similar to those we propose for Track 1. The following table compares the NRC's proposed Track 2 schedule with NEI's suggested Track 2 schedule.

	Track 2 NRC Proposed		Track 2 NEI Proposed	
Event	**Target Date**	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**
Notice of Intended Operation/Opportunity for Hearing		210		210
Hearing Requests	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150
Answers to Hearing Request	Within 25 days of hearing request	125	Within 20 days of hearing request	130
Decision on Hearing Request	45 days after answers to hearing request	80	21 days after answers to hearing request	109
Prehearing Conference	Within 7 days of grant of hearing request	73	Within 7 days of grant of hearing request	102
Scheduling Order	Within 3 days of prehearing conference	70	Within 3 days of prehearing conference	99
Document Disclosures	15 days after grant of hearing request	65	15 days after grant of hearing request	94
Pre-filed initial testimony	35 days after grant of hearing request	45	25 days after grant of hearing request	84
Pre-filed rebuttal testimony	No rebuttal	—	No rebuttal	—
Proposed Questions; Motions for Cross-Examination	7 days after initial testimony	38	7 days after initial testimony	77
Answers to Motions for Cross-Examination	5 days after motion for cross-examination	33	3 days after motion for cross-examination	74
Oral Hearing	15 days after initial testimony	30	10 days after initial testimony	74
Transcript Corrections	7 days after hearing	23	7 days after hearing	67
Findings (if needed)	15 days after hearing	15	15 days after hearing	59
Initial Decision	**30 days after hearing**	**0**	**30 days after hearing**	**44**

3. Discovery

The NRC Proposal recommends limiting discovery to mandatory disclosures required by 10 CFR 2.336(a), with certain modifications. 79 Fed. Reg. at 21,972. The proposed procedures explain that "[a]ll parties would provide disclosures of documents *relevant to* the admitted contentions..." *Id.* (emphasis added) However, given the narrow purpose of an ITAAC hearing, the strict statutory deadline for a decision on the hearing, and the goal of streamlining the ITAAC hearing procedures, NEI believes that the proposed standard for discovery—producing documents "relevant" to admitted contentions—is too broad. Instead, discovery should be limited to documents upon which parties intend to rely. It would also be beneficial to explicitly exclude from discovery documents such as draft, emails, data compilations (to the extent they

are not part of the ITAAC closure package), and other categories of documents that may have limited probative value in the context of a hearing on objective inspections, tests, and analyses.

Additionally, the orders should specify what documents each party must disclose. For example, the discovery disclosure obligations could be specified as follows:

- The discovery obligations of the licensee should include the ITAAC completion package for the particular ITAAC subject to the hearing, along with those documents directly referenced therein.

- The discovery obligations for the NRC staff should include inspection reports and inspections records that relate to the ITAAC subject to the hearing.

- The discovery obligations of the petitioner should include all claims, witness statements, expert reports, or other analyses that relate to the ITAAC subject to the hearing.

Furthermore, given the short periods involved, discovery updates should not be required (or the obligation should terminate upon the close of the hearing). Additionally, if the nature of the admitted contention is such that further discovery is warranted, the Commission could provide such direction in its decision admitting a particular contention.

NEI believes that the suggested approach for document disclosure will be more efficient and will reduce all parties' burdens in both producing documents and reviewing documents produced by other parties, while still meeting the objective of ensuring that documents important to the litigating the contention are made available.

C. Issues Relating to Access to SUNSI and SGI Information

1. Use of a Pre-Clearance Process for SUNSI-SGI Access

As the NRC recognizes, the templates as drafted do not address the potential for delay caused by the need for individuals to undergo a background check (including a criminal history records check) for access to NRC safeguards information (SGI), which can take several months. Delay in the ITAAC hearing could occur if the persons seeking access to SGI are not already cleared for access and do not seek SGI clearance until the notice of intended operation is issued (which will likely occur between 210 and 180 days before scheduled fuel load). 72 Fed. Reg. at 21,965.

NEI supports the agency's proposal for addressing this potential for delay. The agency's 2008 SUNSI-SGI Access Procedures (ADAMS No. ML080380626) contains a "pre-clearance" process by which a potential party who might seek access to SGI is allowed to request initiation of the necessary background check in advance of the notice providing an opportunity to request a hearing. To alleviate the risk of delaying the start of an ITAAC hearing cause by security background checks, NRC staff contemplates that a plant-specific Federal Register notice announcing a pre-clearance process would be published 180 days prior to the expected publication of the notice of intended operation for that nuclear plant. This pre-clearance notice would presumably be issued approximately 390 days (13 months) before the scheduled fuel load date for that facility. *See* 79 Fed. Reg. at 21,965, note 16.

Notably, the pre-clearance notice would inform potential petitioners that "the NRC will not delay its actions in completing the hearing or making the 52.103(g) finding. In other words,

members of the public who do not take advantage of the pre-clearance process would have to take the proceeding as they find it if they ultimately obtain access to SGI for contention formulation." 72 Fed. Reg. at 21,965. As the NRC Proposal emphasizes, this approach is "necessitated" by the language of the Atomic Energy Act directing the Commission to complete the ITAAC hearing to the maximum possible extent by the scheduled fuel load date. This provision should be strictly interpreted. The agency's approach on this matter also appears fully consistent with the existing SUNSI-SGI Access Procedures, which caution that potential parties should not expect additional flexibility in the strict timelines for submittal of contentions and rulings on those contentions if the individuals decide not to exercise the pre-clearance option.

2. The SUNSI-SGI Access Order

NRC proposes to include Template B (SUNSI-SGI Access Order) with the notice of intended operation. 79 Fed. Reg. at 21,967-68. This is generally consistent with NRC's policy in other types of adjudicatory proceedings, although NRC proposes several minor procedural modifications intended to expedite the proceeding. *Id.*, at 21,967. NEI agrees with the suggested modifications.

In particular, NEI supports NRC's Proposal to require individuals to file their requests for SUNSI or SGI access electronically by email. However, NRC should reconsider the proposal to allow individuals to defeat this requirement simply by alleging that the use of email is "impractical." Valuable NRC time could be lost wrangling over whether it is "impractical" for a given individual to use electronic mail. Alternatively, we suggest that NRC require SUNCI and SGI access requests to be made via email or by overnight mail. The third option proposed for transmitting such access requests, "delivery by hand," is impractical for everyone involved, particularly given the ongoing process of irradiating all paper documents received by the agency, and in any event is simply unnecessary.

NEI supports requiring such requests to be filed within 10 days of publication of the Federal Register notice of intended operation.

After SUNSI or SGI access is granted, NRC staff should be required to process documents and file protective orders and non-disclosure agreements within 10 (not 20) days. While useful, NRC's proposal to simply require a "showing of good cause" for the late filing does not appear sufficiently stringent to discourage late submittals by individuals intent on delaying the hearing.

3. Presiding Officer for Review of SUNSI-SGI Access Determinations

The NRC seeks comments on which body should be the presiding officer for rulings on requests for review of NRC Staff access determinations under the SUNSI-SGI Access Order (see 79 Fed. Reg. at 21,969; Draft Template A at 33-34, 45-47; Draft Template B at 18 n.13) and which body should receive motions for Protective Orders or draft Non-Disclosure Affidavits or Agreements for SUNSI/SGI. (Draft Template A at 44).

The presiding officer for rulings on requests for review of NRC staff access determinations should be the presiding officer responsible for the proceeding at the time of the request for review. This point should be clarified in the final ITAAC hearing procedures. Because the Commission would be the presiding officer with respect to ruling on hearing requests, it also should be the presiding officer for rulings on requests for review of access determinations. After a hearing request is granted, and until the Initial Decision is issued, the presiding officer for

requests for review should be the presiding officer responsible for any hearing. Having the same presiding officer for requests for review will result in efficiencies because that presiding officer will be the most familiar with the current status of the proceeding.

This same designation of responsibility should apply for motions for Protective Orders or draft Non-Disclosure Affidavits or Agreements for SUNSI/SGI.

4. Interlocutory Appeals of Decisions on Access to Sensitive Information

The NRC proposes the use of a case-specific provision providing a right to appeal to the Commission a licensing board order ruling on a request for access to SUNSI or SGI information. As envisioned by the NRC Proposal, the appeal would have to be filed within 10 days of the order, with any briefs in opposition due within 10 days of the appeal. 79 Fed. Reg. at 21,969.

As a preliminary matter, it is not clear that ITAAC hearing procedures must provide a right to file an interlocutory appeal of an agency decision denying an individual's request for access to SUNSI or SGI information. NEI would therefore recommend that this interlocutory appeal provision not be available in ITAAC hearings.

If this type of interlocutory appeal is allowed at all, the filing deadline should be shortened *from 10 to 5 days* following the ruling in question. In turn, responsive pleadings should be due within *five (5) days following the filing of the appeal.* This would result in a time savings of ten (10) days, which is appropriate given the expedited nature of the entire ITAAC hearing. In proposing this time reduction, we have considered the limited nature of the issue being appealed (whether the request for SUNSI/SGI access should have been granted). Additionally, if the access request is denied, the requestor should only be permitted to appeal whether the request should have been granted. If the access request is granted, the other parties should be permitted an appeal only on the issue of whether the access request should have been denied in whole or in part. See 79 Fed. Reg. at 21,969.

D. Procedures for ITAAC Hearings Not Involving Testimony (Legal Contentions--Draft Template C)

The NRC Proposal (79 Fed. Reg. at 21,973; Draft Template C) states that the procedures for hearings on legal issues would be resolved based on written legal briefs. We recommend that the final ITAAC procedures include additional, specific guidance as to how the NRC defines a contention on a legal issue. Currently, the discussion provides only that legal contentions are "contentions that raise only legal issues." (79 Fed. Reg. at 21,964). That definition of legal contention might be broadened to include any contention that does not involve a dispute of fact.

The Commission also should avoid admitting legal contentions where it is possible to resolve the underlying legal issues as part of the Commission's contention admissibility order. To facilitate this, the final ITAAC procedures should direct parties to fully brief legal issues in their contention admissibility filings. This approach should preclude or minimize the need for associated briefs, oral argument, and the use of additional procedures in Draft Template C. Although the NRC Proposal cites CLI-09-14 as support for its procedures dealing with legal contentions, the cited NRC high-level waste proceeding is far more complex and far broader in scope than the ITAAC hearings.

E. Procedures for Resolving Claims of Incompleteness (Draft Template D)

The NRC Proposal allows petitioners to submit a "claim of incompleteness" (79 Fed. Reg. at 21,966; Draft Template A at 9-10; Draft Template D) based on the part of 10 CFR 2.309(f)(1)(vii) that states: "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." To be clear, a claim of incompleteness is not equivalent to a contention, and the Commission's agreement with a petitioner's claim of incompleteness does not constitute admission of a contention for hearing.

Claims of incompleteness could present a substantial risk of delay in completion of the hearing. As proposed, the NRC procedures would apparently result in a delay whenever any claim of incompleteness is granted, because they would delay submission of the proposed contention until after the initial deadline. 79 Fed. Reg. at 21,973. To prevent or mitigate such delay, we recommend that the final hearing procedures require claims of incompleteness to be submitted shortly after the Notice of Intended Operation, and that claimants propose a mechanism for resolution. For example, the Commission should require claimants to file claims of incompleteness within 30 days after the notice of intended operation in conjunction with their notice of intended participation. (*See* Section II.G, above.)

In discussing claims of incompleteness, NRC describes 10 CFR 2.309 requirements for claiming that the licensee's 10 CFR 52.99(c) notification is "incomplete" and that "this incompleteness prevents the petitioner from making the necessary *prima facie* showing." We believe additional clarification regarding the intended definition of "incomplete"—or when a Section 52.99(c) notice is "complete"—is needed. Notably, the petitioner is required to identify the specific portion of the licensee's 10 CFR 52.99(c) notification that is incomplete, and explain why this deficiency prevents the petitioner from making the necessary *prima facie* showing. 79 Fed. Reg. at 21,966. Additional instruction on this key definition would be useful, given that the Commission will be attempting to adjudicate claims of incompleteness on an extremely tight timeframe without the benefit of precedent interpreting the standard. Such clarification would benefit all of the parties, and could speed decision-making.

On a similar point, Section 2.309(f)(1)(vii) of NRC regulations requires that a claim of incompleteness point to a specific portion of the Section 52.99(c) notice. In order to meet the Section 2.309(f)(1)(vii) requirement, the claim of incompleteness should explain what information is not included, why it should be included under Section 52.99, and explain how the absence of that information prevents the petitioner from making the *prima facie* showing necessary for a contention.

Additionally, if a claim of incompleteness is found valid, the licensee should be required to provide documents that are relevant to the specific portion of the Section 52.99(c) notification cited.

Given that the purpose of curing any incompleteness is to potentially allow for a *prima facie* showing, the petitioner should be required to show that (a) due to the deficiency, he cannot make *prima facie* showing and (b) the notice, after the inclusion of the missing information, will likely be materially different than the notice as-submitted. Claims of incompleteness requesting more detail on objective test results should be rejected because the report including the

additional information will likely not be materially different than the report as-submitted (for example, the notice says "all results between 1.2% and 1.7%"; a claim that each individual result should be listed should be rejected). Claims of incompleteness that attack the veracity of the report/compliance of the licensee without support also should be rejected.

Although the rules set forth the information that must be included in a claim of incompleteness, there are no explicit criteria by which to judge the sufficiency of those claims. NEI strongly suggests that the NRC's final ITAAC hearing procedures adopt specific standards for determining the validity of a claim of incompleteness. In particular, the NRC should rely on NEI-08-01, "Industry Guideline for the ITAAC Closure Process Under 10 CFR Part 52," Rev. 5 (July 2013), which sets forth guidance (and templates) describing the sufficiency of ICNs and UINs. The NRC has endorsed previous versions of NEI-08-01 (see Regulatory Guide 1.215, "Guidance for ITAAC Closure under 10 CFR Part 52") and may endorse the current version of the industry guidance in the near future. The NRC staff, nuclear industry, and members of the public have participated in multiple meetings on the ITAAC closure process in the past several years, in part resulting in NEI-08-01. This extensive effort should not be disregarded, and should be applied when assessing the validity of claims of incompleteness.

Therefore, NEI encourages the Commission to adopt the NRC-endorsed industry guidance as the standard by which claims of incompleteness are adjudicated. If the Commission finds that an ICN or UIN satisfies NEI-08-01, the claim of incompleteness should be denied outright.[17] Finding otherwise would effectively render meaningless the agreed-upon standards in NEI-08-01. Articulating at the outset these criteria for evaluating claims of incompleteness is important to ensuring that these claims are quickly resolved and that ITAAC hearings are conducted efficiently.

Lastly, the Commission should make it clear that a claim of incompleteness does not toll a petitioner's obligation to make a timely *prima facie* showing. In other words, if a claim of incompleteness is rejected, the petitioner will be given no additional time to challenge the ITAAC.

F. Findings of Fact and Conclusions of Law

The NRC requests comments on two options related to proposed findings of fact and conclusions of law. NRC recognizes that proposed findings of fact and conclusions of law "may assist the presiding officer in reaching its decision in certain cases or on certain issues," but that there may be cases or issues for which proposed findings and legal conclusions "are unnecessary and may cause delay." 79 Fed. Reg. at 21,972. Option 1 would allow 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 proposed findings of fact and conclusions of law for some or all of the hearing issues." Option 2 would not permit proposed findings of fact and conclusions of law "unless the presiding officer determines that they are necessary." Under Option 2, the presiding officer may limit the scope of proposed findings of fact and conclusions of law to certain specified issues. *See* 79 Fed. Reg. at 21,972; Draft Template B at 36.

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[17] The Commission's initial case-specific order in each proceeding should incorporate and endorse NEI-08-01, which would then establish binding standards governing claims of incompleteness. *See, e.g., La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-3, 59 NRC 10, 21-24 (2004) (establishing applicable substantive requirements in an order providing the public with an opportunity to intervene).

We recommend that the NRC choose Option 1. Proposed findings of fact and conclusions of law may aid the presiding officer by summarizing the participants' positions on the issues at hearing. Proposed findings could also help minimize the risk of delay in completing the ITAAC hearing because the presiding officer could adopt the prevailing party's proposed findings to the extent appropriate, rather than drafting an entirely new decision. Given the compressed hearing schedule and the objective nature of the ITAAC issues, the Commission should encourage this "adoption" approach as an efficient means of reaching a timely decision.

Moreover, the proposed findings should not have a significant impact on the schedule given that the procedures tie the Initial Decision to the hearing date, not to the date of the proposed findings. We also note that selection of Option 1 also would allow the presiding officer to dispense with the proposed findings if the factual circumstances show that they are unnecessary.

ATTACHMENT

ITAAC Hearing Tracks*

	Track 1 NRC Proposed		Track 1 NEI Proposed		Track 2 NRC Proposed		Track 2 NEI Proposed		Track 3 (modified Subpart N) NEI Proposed	
	Target Date	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**	**Target Date**	**Days Before Fuel Load**
Notice of Intended Operation/Opportunity for Hearing		210		210		210		210		210
Hearing Requests	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150	Within 60 days of Notice of Intended Operation	150
Answers to Hearing Request	Within 25 days of hearing request	125	Within 20 days of hearing request	130	Within 25 days of hearing request	125	Within 20 days of hearing request	130	Within 20 days of hearing request	130
Decision on Hearing Request	30 days after answers to hearing request	95	21 days after answers to hearing request	109	45 days after answers to hearing request	80	21 days after answers to hearing request	109	21 days after answers to hearing request	109
Prehearing Conference	Within 7 days of grant of hearing request	88	Within 7 days of grant of hearing request	102	Within 7 days of grant of hearing request	73	Within 7 days of grant of hearing request	102	Within 7 days of grant of hearing request	102
Scheduling Order	Within 3 days of prehearing conference	85	Within 3 days of prehearing conference	99	Within 3 days of prehearing conference	70	Within 3 days of prehearing conference	99	Within 3 days of prehearing conference, if needed	99
Document Disclosures	15 days after grant of hearing request	80	15 days after grant of hearing request	94	15 days after grant of hearing request	65	15 days after grant of hearing request	94	15 days after grant of hearing request	94
Pre-filed initial testimony	35 days after grant of hearing request	60	25 days after grant of hearing request	84	35 days after grant of hearing request	45	25 days after grant of hearing request	84	N/A	--
Pre-filed rebuttal testimony	15 days after initial testimony	45	7 days after initial testimony	77	No rebuttal	--	No rebuttal	--	N/A	--
Proposed Questions; Motions for Cross-Examination	7 days after rebuttal testimony	38	7 days after rebuttal testimony	70	7 days after initial testimony	38	7 days after initial testimony	77	N/A	--
Answers to Motions for Cross-Examination	5 days after motion for cross-examination	33	3 days after motion for cross-examination	67	5 days after motion for cross-examination	33	3 days after motion for cross-examination	74	N/A	--
Oral Hearing	15 days after rebuttal testimony	30	10 days after rebuttal testimony	67	15 days after initial testimony	30	10 days after initial testimony	74	25 days after grant of hearing request	74
Transcript Corrections	7 days after hearing	23	7 days after hearing	60	7 days after hearing	23	7 days after hearing	67	7 days after hearing	67
Findings (if needed)	15 days after hearing	15	15 days after hearing	45	15 days after hearing	15	15 days after hearing	59	N/A	--
Initial Decision	30 days after hearing	**0**	30 days after hearing	**37**	30 days after hearing	**0**	30 days after hearing	**44**	30 days after hearing	**54**

*These timeframes are not intended to apply to new or amended contentions filed after the original deadline.