Enclosure 6

Comment Summary Report

Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met

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U.S. Nuclear Regulatory Commission

hearing schedule, they can obtain up to 75 days of such additional margin through early submission of the uncompleted ITAAC notifications. In addition, as explained in response to the previous set of comments, the presiding officer can make minor adjustments to Commission-established milestones in the hearing schedule to avoid minor delays from a deadline falling on a weekend or holiday.

The NRC recognizes that the Track 1 schedule might not accommodate issuance of the initial decision by scheduled fuel load in all cases, e.g., if new contentions filed after the deadline are admitted. However, even in such cases, the NRC believes that the benefits of written rebuttal would generally outweigh the minor potential time savings from its elimination. Also, while Track 2 is nominally shorter than Track 1, the time saved from eliminating written rebuttal might ultimately be lost during the hearing and post-hearing phases if the presiding officer has an incomplete understanding of the parties' positions prior to the oral hearing.

Having weighed the pros and cons, the NRC has decided to make Track 1 the default evidentiary hearing track. Given the advantages of written rebuttal described above, written rebuttal will be included in most cases. Selecting Track 1 as the default hearing track will simplify the process for designating hearing procedures in each proceeding. Nonetheless, the Commission has the authority to eliminate written rebuttal in individual proceedings. The Commission might make such a change, for example, if the contested issues are narrow and simple and the parties' positions in the hearing request and answers thereto are sufficiently established to allow a full response in the parties' initial testimony and statements of position.[1] To enhance the Commission's ability to make such a change in a timely manner, the final evidentiary hearing template indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

In summary, the procedures have been modified as follows:

(1) Given the advantages of written rebuttal, the Track 1 procedures will be the default evidentiary hearing track.
(2) Notwithstanding this, the Commission has the authority to eliminate written rebuttal in individual proceedings.
(3) The final evidentiary hearing template indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

E. Additional Evidentiary Hearing Tracks

NEI: To provide additional schedule margin, NEI suggests that the ITAAC hearing procedures provide the option of an additional hearing track of shorter duration based on a modified Subpart N approach. NEI believes that the proposed procedures' reliance on a Subpart L-type approach may not represent the most efficient approach for completing all ITAAC hearings. As support for the use of Subpart N-type procedures, NEI cites the statement of considerations (SOC) of the 2007 Part 52 Rule (72 FR at 49451), in which the Commission stated that ITAAC hearings would ordinarily be conducted under Subpart L, but that the Commission could direct the use of less formal procedures on a case-specific basis, and that any ITAAC hearing will use informal procedures to the maximum extent practical and permissible under law.

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[1] Contrary to SCE&G's assertion, the Commission believes that it is capable of making such judgments based on an assessment of the admitted contention and the information from the parties' initial filings.

NEI understands the NRC's preference to use familiar and long-established adjudicatory procedures, but NEI asserts that the proposed procedures do not make a compelling case for this choice to the exclusion of other approaches. NEI states that 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 is narrowly focused on whether technical acceptance criteria are satisfied. NEI also asserts that given the objective, scientific and/or fact-based nature of the issues in dispute, formal hearing procedures appear unnecessary and perhaps even counter-productive. Under NEI's proposed alternative, pre-filed testimony would not be permitted, but oral presentations at the oral hearing would be allowed. NEI states that 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 thereto, and that 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.

NEI further asserts that the NRC's stated rationale for rejecting a Subpart N approach was cursory and did not seem to justify the NRC's decision. NEI claims that the use of a Subpart N-like approach might be appropriate for some ITAAC hearings if the contested issues fall within the ambit of those situations for which Subpart N was intended. Specifically, NEI cites the Commission's explanation that Subpart N was intended to be a fast-track process for quickly resolving issues in cases were contentions are few and not particularly complex, and that Subpart N was 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 the oral hearing. However, NEI proposes not to use the model milestones for a Subpart N hearing found in 10 CFR Part 2, Appendix D, Section IV, but instead proposes a more truncated hearing schedule.

NEI's proposed schedule for this additional hearing track is similar in many respects to NEI's proposed modifications to the Track 1 schedule except that certain filings and procedures would be eliminated. Specifically, NEI proposes the following schedule:

- The hearing request would be due 60 days after the notice of intended operation.
- Answers to the hearing request would be due 20 days after the hearing request.
- The Commission's decision on the hearing request would be due 21 days after the answers.
- The prehearing conference would be held within 7 days of the grant of the hearing request.
- The initial scheduling order would be issued within 3 days of the prehearing conference.
- Document disclosures would be due 15 days after the grant of the hearing request.
- Pre-filed testimony, proposed questions, and motions for cross-examination would not be permitted.
- The oral hearing would be held 25 days after the grant of the hearing request.
- Joint transcript corrections would be due within 7 days of the oral hearing.
- Proposed findings of fact and conclusions of law would not be permitted.
- The initial decision would be due 30 days after the oral hearing.

Because the hearing would held 25 days after the decision on the hearing request and the initial decision would be due 30 days thereafter, the schedule contemplates an initial decision 55 days after the decision on the hearing request assuming one day for the hearing.

NEI also suggests that if the NRC deems it infeasible at this time to incorporate an additional expedited hearing track in the final ITAAC hearing procedures, the NRC could, similar to its approach with the first COL uncontested hearings, reassess the usefulness of the procedures after conducting several hearings. At that time, the NRC could possibly offer a modified Subpart N approach as an additional alternative hearing format in appropriate cases going forward.

Westinghouse: Westinghouse encourages NRC to consider NEI's recommendations regarding the use of hearing approaches other than those based on Subpart L, such as a legislative hearing.

SCE&G: To mitigate the potential for delay, SCE&G recommends using a shorter hearing track with Subpart N-type procedures in certain circumstances. Under SCE&G's suggested approach, pre-filed testimony would not be permitted and the parties would directly proceed to the oral hearing. SCE&G asserts that some contentions may be so straightforward that it will be apparent that the use of Subpart N-type procedures would be beneficial and that a Subpart N-type approach could save a month or more on the hearing schedule. SCE&G suggests that the use of the Subpart N-type track (or any other hearing track) should be decided on a contention-by-contention basis. SCE&G further recommends that the procedures should require the parties in their initial filings to address which hearing tracks should be used for hearings on the proposed contentions. SCE&G asserts that, contrary to the position taken in the proposed procedures, 10 CFR 2.309(g) does not prohibit parties from addressing the selection of hearing procedures. Instead, SCE&G understands 10 CFR 2.309(g) to mean that the parties would not address the selection of hearing procedures already in 10 CFR Part 2 because 10 CFR 2.310(j) states that the Commission will designate the procedures to be used.

NRC Response: While the NRC agrees with NEI that the NRC should reassess the ITAAC hearing procedures after they have been used in several hearings, the NRC does not adopt the commenters' suggestions to add other evidentiary hearing tracks. As an initial matter, the proposed procedures provided a number of reasons for choosing a Subpart L approach (and in turn rejecting a Subpart N approach):

- *Subpart L is the most widely used approach in NRC hearings and has demonstrated its effectiveness since implementation in its current form in 2004.*
- *Written testimony and statements of position allow the parties to provide their views with a greater level of clarity and precision, which is important for hearings on technical matters.*
- *With the parties' positions established, oral questions and responses can be used to quickly and efficiently probe the positions of the parties.*
- *The submission of testimony prior to the oral hearing increases the quality of the oral hearing because it allows more time for the presiding officer to thoughtfully assess the testimony and carefully craft questions that will best elucidate those matters crucial to the presiding officer's decision.*
- *In Subpart L proceedings, pre-filed written testimony and exhibits are often admitted en masse at the beginning of the oral hearing, and the presiding officer's questioning can be completed in a relatively short amount of time.*
- *In the absence of pre-filed written testimony, however, an oral hearing will consume more time because the entirety of the evidentiary record will need to be established sequentially and orally, and the admission of exhibits would be subject to a more cumbersome and time-consuming admission process.*

Proposed ITAAC Hearing Procedures, 79 FR at 21964. ~~In addition, with respect to Subpart N, the proposed procedures stated that the NRC does not have sufficient experience to conclude that the issues to be resolved in an ITAAC hearing will be simple enough to profitably employ the procedures of Subpart N and forego the advantages accruing from a Subpart L approach.~~ Id. ~~at 21965. The proposed procedures also stated that a Subpart N approach did not appear to provide a schedule advantage over a Subpart L approach because the model milestones in 10 CFR Part 2, Appendix B, Section IV for an enforcement hearing under Subpart N contemplate that the time between the granting of the hearing request and an initial decision is 90 days plus the time taken by the oral hearing and the closing of the record.~~ Id. ~~As modified in these final procedures, Track 1 and Track 2 would take less time.~~[2]

However, NEI and SCE&G respond to this rationale by stating that there may be situations where the contested issues are simple enough to employ a Subpart N-type approach and that a Subpart N-type approach can be modified to take as little as 55 days, thereby providing a schedule advantage over the Track 1 and Track 2 procedures. Given this possibility, NEI and SCE&G believe that a Subpart N approach should at least be one of the available options.

While NEI and SCE&G's position seems attractive at first blush, it does not appear to the NRC that the specific modifications NEI proposes to Subpart N would result in a workable process, as explained below. In addition, to make a Subpart N approach workable would require lengthening the hearing schedule to the point that there would be no schedule advantage over a Subpart L-type approach. For the reasons stated above ~~and in the proposed procedures~~, the NRC prefers the advantages of a Subpart L-type approach for evidentiary hearings and chooses to employ this approach in the absence of a workable alternative that takes less time. ~~The NRC's view is strengthened upon consideration of the fact that Subpart N has never before been employed. The stability and predictability of an ITAAC hearing—itself a first-of-a-kind endeavor—would not be promoted by using a never-before-employed hearing format.~~

NEI's proposed modifications do not appear to be workable because they would remove aspects of the Subpart N process that make it possible for the presiding officer to effectively conduct the questioning of the witnesses. Specifically, 10 CFR 2.1404 provides that before an oral hearing under Subpart N, the parties are required to provide a "written summary of the oral and written testimony of each proposed witness" and to propose questions (or question areas) for the witnesses. However, NEI's proposal includes neither of these provisions. Instead, under NEI's proposed approach, the presiding officer would not have access to information regarding the parties' testimony and evidence until the oral hearing. This would not allow the presiding officer a sufficient opportunity to consider the parties' evidence and positions so as to ask all of the questions the presiding officer would need to issue the initial decision. While NEI's proposal could be modified to add back provisions on written summaries of the testimony and proposed questions (or question areas), the time needed for the parties to prepare this information and for the presiding officer to consider it before the hearing would seem to warrant lengthening the hearing schedule. However, lengthening NEI's proposed 55-day hearing schedule by even a minor amount would mean that a Subpart N-type approach would no longer provide a schedule

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[2] ~~Although the NRC has decided to make Track 1 the default evidentiary hearing track, the Track 2 schedule is relevant to this discussion because the Commission has the authority to select Track 2 in individual proceedings. NEI and SCE&G have suggested using a Subpart N approach in straightforward cases, and any case for which the Commission could justify eliminating pre-filed testimony in its entirety would be a case for which the Commission could justify using the Track 2 procedures.~~

advantage over a Subpart L-type approach because the Track 2 hearing schedule can take as few as 70 days.[3] In addition, the NRC believes it is more efficient for the parties to directly provide written testimony that can be entered into evidence rather than a written summary of future oral and written testimony. Therefore, the NRC declines to adopt the commenters' suggestion that the ITAAC hearing procedures establish a Subpart N-type hearing track.

The NRC also does not agree with Westinghouse's suggestion to include a legislative hearing track in the ITAAC hearing procedures. Westinghouse did not provide any supporting rationale for use of legislative hearing procedures. In addition, the NRC has stated that while legislative hearings are "suited to the development of 'legislative facts,' viz., general facts which help a decisionmaker decide questions of policy and discretion," legislative hearings:

> *are not well suited to resolving disputes of fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, or where the motive or intent of the party or eyewitness is at issue. Nor does the legislative hearing model appear to offer any real advantages over other informal or formal hearing procedures in resolving matters of law. Moreover, the Commission has little experience in using legislative hearing procedures in contested proceedings, making it difficult to determine what practical problems would arise if contested proceedings were conducted under a legislative hearing model.*

Changes to Adjudicatory Process, 69 FR 2182, 2192 (Jan. 14, 2004) (final rule). Under 10 CFR Part 52, all issues of policy and discretion are decided by the time the COL is issued, and compliance with the ITAAC is purely a matter of meeting narrow, technical acceptance criteria. Because an ITAAC hearing will involve a focused inquiry regarding detailed technical questions, the NRC does not believe that the legislative hearing format is tailored to resolve these questions.

Finally, the NRC disagrees with SCE&G's position that 10 CFR 2.309(g) does not prohibit hearing requests and answers from addressing the selection of hearing procedures. SCE&G states that it understands 10 CFR 2.309(g) only to prohibit parties from addressing the selection of hearing procedures that already exist in 10 CFR Part 2, because 10 CFR 2.310(j) states that the Commission would designate the procedures to be used. However, 10 CFR 2.309(g) does not use qualified language. Instead, it states: "A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310." This 52.103 exclusion was added to the NRC's regulations as part of the 2007 Part 52 Rule. In discussing this provision, the SOCs also use clear, unqualified language: "Under the revised paragraph (g), a request for hearing under § 52.103 shall not address the hearing procedures to be utilized." 2007 Part 52 Rule, 72 FR at 49414. Because answers to hearing requests are intended to address matters raised in the hearing request, this prohibition applies by extension to the answers. Given this, NEI and SCE&G's recommendation regarding the parties providing input to the selection of hearing tracks in an ITAAC hearing does not comply with 10 CFR 2.309(g). Aside from this, the NRC believes that the Commission will be able to select appropriate procedures without specific

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[3] Also, NEI's proposed 55-day schedule assumes that the oral hearing will take only one day even though all testimony will need to be delivered orally and all exhibits will need to be introduced at the oral hearing. As explained above, a Subpart L approach will result in a shorter oral hearing, all other things being equal, and thereby make it more likely that the oral hearing will take only one day.

input from the parties on this matter, and the NRC has considered stakeholder input during the finalization of these general procedures for ITAAC hearings. However, the prohibition in 10 CFR 2.309(g) does not apply to hearing requests from the licensee because such hearing requests are not subject to 10 CFR 2.309 and because the generic procedures did not address the procedures for hearings requested by the licensee.

No changes were made to the procedures in response to these comments, except that some of the rationale for hearing format selection that is discussed above has been added to the final procedures. The procedures have also been clarified to provide that the prohibition in 10 CFR 2.309(g) does not apply to hearing requests from the licensee because such hearing requests are not subject to 10 CFR 2.309 and because the generic procedures did not address the procedures for hearings requested by the licensee.

F. APA Section 554 Provision on Eliminating the Need for a Hearing

NEI: NEI recommends that the final ITAAC hearing procedures address the application of the Administrative Procedure Act (APA) provision at Title 5 of the United States Code (5 U.S.C.) § 554(a)(3) to eliminate the need for an ITAAC hearing where the agency decision on the contention rests "solely on inspections, tests, or elections." NEI points out that potential reliance on this provision was included in the 1989 rule originally promulgating 10 CFR Part 52[4] and that the Commission has consistently stated since 1989 that it is legally possible to apply this provision to avoid a § 52.103 hearing on whether a specific ITAAC (or portion of an ITAAC) has been satisfied.

NEI acknowledges that in the 1989 Part 52 Rule the Commission stated (54 FR at 15381):

> However, not every finding the Commission must make before operation begins under a combined license will necessarily always be based on wholly self-implementing 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. . . . The final rule does not attempt to say in advance what issues might fall under that exception.

NEI also cites a comment response from the Commission documented in the 2007 Part 52 Rule in which the NRC said that there are many possible approaches that might be used to determine whether an ITAAC falls within the APA exception. 2007 Part 52 Rule Comment Summary Report at 75. However, the Commission declined to include a specific process for invoking the exception in the 2007 rulemaking because (1) the NRC had no experience with ITAAC hearings, (2) no specific process was described in the proposed rules, and (3) the need for such a process was not imminent. *Id.*

[4] Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 FR 15372 (Apr. 18, 1989) (final rule) (1989 Part 52 Rule).

NEI recommends that the ITAAC hearing procedures explicitly recognize the APA exception and provide guidance on how it should be applied because invoking this exception could save time and resources. NEI suggests that the procedures allow the licensee or NRC staff to request the use of this APA exception in their answers to hearing requests. Such a request would need to provide a basis for concluding that the particular ITAAC involves detailed objective criteria entailing little judgment and discretion in their application, and does not involve questions of credibility, conflicts, and sufficiency. NEI also recommends that the other parties be allowed to file a prompt response. As an alternative approach, NEI says all hearing participants, including petitioners, could be required to affirmatively address in their initial filings the application of this exception. Further responses would only be allowed if authorized by the Commission. NEI also suggests that the Commission could raise the APA exception sua sponte.

Westinghouse: Westinghouse endorses NEI's recommendations on use of the APA Section 554 exception.

SCE&G: SCE&G's perspective on the legality and desirability of using the APA Section 554 exception mirrors the position of NEI. In agreement with NEI, SCE&G also recommends that the ITAAC hearing procedures explicitly acknowledge the APA exception and provide guidance on its use. Without outlining a specific process, SCE&G recommends that the hearing procedures allow the participants to argue that the APA exception does or does not apply to a particular ITAAC, with the Commission ruling on the question as part of its decision on the hearing request. In agreement with NEI, SCE&G suggests that those advocating the application of APA Section 554 to an ITAAC provide the basis for concluding that the ITAAC involves highly detailed objective criteria entailing little judgment and discretion in their application (i.e., wholly self-implementing acceptance criteria), and does not involve questions of credibility, conflicts, and sufficiency.

NRC Response: The NRC declines to adopt the suggestion made in the comments. The NRC has never formally examined the ITAAC to determine whether any ITAAC would satisfy the case law requirements for invoking the APA exception in 5 U.S.C. § 554(a)(3) to avoid holding a hearing where the "decision[] rest[s] solely on inspections, tests, or elections." The NRC has also never determined that there are any ITAAC that are subject to this exception. While it may be legally possible in the abstract to apply the APA Section 554 exception to some ITAAC in an ITAAC hearing (depending on the wording of the ITAAC and other relevant circumstances), the commenters' suggested approach for applying the exception is not practical, as explained below. Also, the NRC has not identified at this time a practical alternative to the commenters' suggested approach for applying the APA exception.

The comments suggest applying a standard for invoking the APA Section 554 exception that is derived from Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) (hereinafter "UCS"). In UCS, the court concluded that the exception did not apply to evaluating the results of emergency planning exercises just prior to reactor operation. Id. at 1450. In discussing the basis for its conclusion, the court in UCS stated that "[t]here is no indication [the APA Section 554 exception] was meant to apply to decisions that are made by weighing evidence tendered by third parties." Id. at 1449-50. The court further stated that where "questions of credibility, conflicts, and sufficiency surface[,] . . . the ordinary reasons for requiring a hearing come into the picture." Id. at 1450. The court also approvingly cited legislative history stating that the exception is intended to obviate the holding of a hearing that "'is not desired or utilized . . . because it gives no added protection.'" Id. at 1449 n.23 (quoting Attorney General's Committee

on Administrative Procedure, Final Report to the President and to the Congress 37 (1941), reprinted in United States Dep't of Justice, Attorney General's Manual on the APA 45 (1947)). As the Commission stated in the 1989 Part 52 Rule (54 FR at 15381), the APA exception is appropriate for "cut-and-dried" affairs.

Given the case law standard for applying the APA exception, it would not be practical to adopt the commenters' suggestion and make the decision on the APA exception as part of the NRC's decision on the hearing request. If the hearing request is not granted, there is no need to determine whether the APA exception applies. On the other hand, if the Commission determines that the hearing request requirements have been met, then the Commission will have determined that the petitioner made the prima facie showing. In this circumstance, the petitioner will have, at the very least, raised "questions of . . . sufficiency" (and possibly "questions of credibility[and] conflicts"), which the UCS court said ordinarily require a hearing. UCS, 735 F.2d at 1450. Thus, it would be difficult for the Commission to determine (1) that the ultimate determination on the contested acceptance criteria is a "cut-and-dried" affair (in the words the Commission used in the 1989 Part 52 Rule) not requiring a hearing, and (2) that the contested acceptance criteria are, in fact, met, notwithstanding the petitioner's prima facie showing and notwithstanding the fact that the petitioner was not given an opportunity to address the apparent deficiencies in the petitioner's prima facie showing that the NRC must have later perceived in order to determine that the petitioner was incorrect. ~~The NRC does acknowledge that it might be legally possible for the Commission to conclude that the acceptance criteria are not met in light of an overwhelming showing in the petitioner's hearing request and then to invoke the APA exception to avoid a hearing. This possibility is remote, however, and the NRC believes that a licensee should generally have an opportunity to contest the petitioner's claims in a hearing.~~[5]

Although not suggested by the commenters, the NRC also considered the possibility of applying the APA exception prior to the hearing by individually considering all of the ITAAC (875 ITAAC for the Vogtle Unit 3 license) and all of the possible challenges that might be made to the completion of the ITAAC and then determine the particular ITAAC that would fall within the exception. However, the NRC does not believe that it would be fruitful to engage in such an exercise at this time given the massive resources required, the way most ITAAC are currently written, and the NRC's lack of experience with ITAAC hearings.

The NRC is not stating that there are no ITAAC (or situations) for which the APA exception could be invoked, but for the above reasons, the NRC declines to adopt the suggestion made in the comments. The final procedures have been modified to reflect this decision.

~~[5] Of course, if the licensee were to concede the petitioner's claims in its answer to the hearing request, then there would be no reason to hold a hearing. However, in that case, the decision not to hold a hearing would be based on an uncontested decision entering judgment in favor of the petitioner instead of being based on the APA Section 554 exception.~~