UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

April 1, 2016

COMMISSION VOTING RECORD

DECISION ITEM: SECY-15-0010

TITLE: FINAL PROCEDURES FOR HEARINGS ON CONFORMANCE WITH THE ACCEPTANCE CRITERIA IN COMBINED LICENSES

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of April 1, 2016.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Burns
Commissioner Svinicki
Commissioner Ostendorff
Commissioner Baran
OGC
EDO
PDR

VOTING SUMMARY – SECY-15-0010

RECORDED VOTES

	APPROVED	DISAPPROVED	ABSTAIN	NOT PARTICIPATING	COMMENTS	DATE
Chrm. Burns	X				X	02/12/16
Cmr. Svinicki	X	X			X	12/23/15
Cmr. Ostendorff	X	X			X	04/30/15
Cmr. Baran	X				X	05/28/15

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Burns

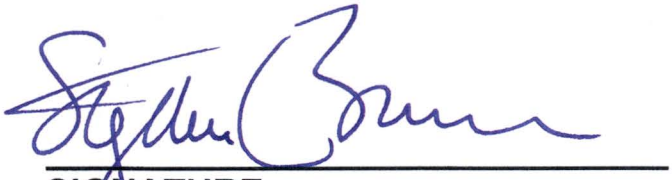
SUBJECT: SECY-15-0010: FINAL PROCEDURES FOR HEARING ON CONFORMANCE WITH THE ACCEPTANCE CRITERIA IN COMBINED LICENSES

Approved XX **Disapproved** _____ **Abstain** _____

Not Participating _____

COMMENTS: **Below** XX **Attached** XX **None** _____

Please see the attached comments.



SIGNATURE

12 February 2016

DATE

Entered in "STARS" **Yes** XX **No** _____

Chairman Burns's Comments on SECY-15-0010
"Final Procedures for Hearings on Conformance with the Acceptance Criteria in Combined Licenses"

I appreciate the thoughtful work and cooperative effort applied by the staff to the development of the procedures to guide the conduct of hearings on inspections, tests, analyses, and acceptance criteria (ITAAC) related to operation under a combined licenses under 10 C.F.R. part 52. Overall, the procedures will aid the NRC staff, our licensees, and the public by ensuring that the Commission has a reliable process in place to manage ITAAC hearings. Although I endorse in most respects the proposed procedural framework recommended by the staff in SECY-15-0010, I suggest some modifications to the text of the final rulemaking notice and also agree with Commissioners Svinicki and Ostendorff with respect to certain changes to the procedures as proposed.

1. Although I agree that we should employ the procedures in 10 C.F.R. part 2, subpart L, as the "default" procedures for the ITAAC hearing, we should leave open the possibility that other procedures, such as those available in Subpart N to 10 C.F.R. part 2, might be applied. (I agree that the legislative hearing procedures in Subpart O would not be applicable). Thus, the staff should revise the draft *Federal Register* notice (FRN), the comment summary report, and the proposed templates to indicate that the hearing procedures in subpart L will be the presumed default procedures for ITAAC hearings, but that the Commission may, consistent with 10 C.F.R. § 2.310(j), direct that the ITAAC hearing be conducted in accordance with other procedures designated by the Commission.

2. With respect to the exception to the Administrative Procedure Act (APA) in 5 U.S.C. § 554(a)(3) that eliminates the need for a hearing where a decision rests "***solely*** on inspections, test, or elections," I agree that there is no benefit to trying to pre-screen all of the ITAAC in the COL to determine whether particular ITAAC fall within the exception. However, if an ITAAC test shows that an objective criterion has been met (e.g., a pressure test must fall within the range of 50 and 55 psi), no challenge would lie against that fact absent some *prima facie* showing of fraud or mis-performance of the test. An inquiry into whether the ITAAC was an appropriate measure (in effect a *post hoc* challenge to the original license) or further inquiry into its significance would not lie. It may well be that this circumstance is not a true application of the APA exception but rather represents an adequate rebuttal against contention admission because a *prima facie* showing has not been made, but the point is not clearly made in the draft FRN. Accordingly, the staff should revise the draft FRN and the comment summary report as indicated in the attached edits.

3. One area on which there was significant comment involved the connection between the findings required to be made under 10 C.F.R. § 52.103(c) and those required to be made under 10 C.F.R. § 52.103(g). As a purely legal matter, I believe it is legally permissible for the Commission to make a § 52.103(c) finding prior to the staff making a finding under § 52.103(g). But I also agree with the staff's interpretation that the § 52.103(c) findings are limited in scope to those ITAAC for which hearing requests have been granted, i.e., to contested ITAAC. The proposed ITAAC procedures take the most sensible approach by requiring that the § 52.103(c) and § 52.103(g) findings be made before a facility is allowed to operate either on an interim basis. I would clarify though that, notwithstanding the need for both of these finding to be made before interim operation is authorized, similar to Commissioners

Svinicki and Ostendorff, I also believe that the Commission has the flexibility and discretion to make the 10 C.F.R. § 52.103(c) finding at a time of its choosing.

4. I agree with Commissioners Svinicki and Ostendorff with respect to applying the existing rule on reopening found in 10 C.F.R. § 2.326(a).

As part of its implementation of these procedures, the staff proposes to develop internal implementation processes and additional templates within 6 months after the ITAAC hearing procedures are finalized. Once the staff has finalized its internal procedures the staff should develop a Commissioners' Assistants Note transmitting the finalized staff procedures for the Commission's information at least 15 days prior to issuance.

Stephen G. Burns
12 February 2016

SGB Edits

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

[NRC-2014-0077]

Final Procedures for Conducting Hearings on Conformance with the Acceptance Criteria in Combined Licenses

AGENCY: Nuclear Regulatory Commission.

ACTION: Final ITAAC hearing procedures.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has finalized generic procedures for conducting hearings on whether acceptance criteria in combined licenses are met. These acceptance criteria are part of the inspections, tests, analyses, and acceptance criteria (ITAAC) included in the combined license for a nuclear reactor. Reactor operation may commence only if and after the NRC finds that these acceptance criteria are met. The Commission will use the final generic ITAAC hearing procedures (with appropriate modifications) in case-specific orders to govern hearings on conformance with the acceptance criteria. ~~The final procedures were determined after consideration of public comments on the proposed procedures, which were published in the *Federal Register* on April 18, 2014 (79 FR 21958).~~

DATES: These final procedures are effective **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

ADDRESSES: Please refer to Docket ID NRC-2014-0077 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2014-0077. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415~~287~~-34633~~422~~; email: Carol.Gallagher@nrc.gov. For technical questions, contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at http://www.nrc.gov/reading-rm/adams.html. To begin the search, select "ADAMS Public Documents" and then select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. For the convenience of the reader, the ADAMS accession numbers are provided in a table in the "Availability of Documents" section of this document.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Michael A. Spencer, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301-415-4073, email: Michael.Spencer@nrc.gov.

SUPPLEMENTARY INFORMATION:

IV. Previously Established Law, Regulation, and Policy Governing ITAAC Hearings.

A. Hearing Request.

B. Interim Operation.

C. Initial Decision.

V. General Approach to ITAAC Hearing Procedure Development.

A. Use of Existing Part 2 Procedures.

B. Choice of Presiding Officer to Conduct an Evidentiary Hearing.

C. Schedule.

D. Hearing Formats.

VI. Final General ITAAC Hearing Procedures.

A. Notice of Intended Operation.

1. Prima Facie Showing.

2. Claims of Incompleteness.

3. Interim Operation.

4. Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness After the Original Deadline.

5. SUNSI-SGI Access Order.

6. Filing of Documents and Time Computation.

7. Motions.

8. Notifications Regarding Relevant New Developments in the Proceeding.

9. Stays.

10. Interlocutory Review.

11. Licensee Hearing Requests.

B. Procedures for Hearings Involving Testimony.

1. Schedule and Format for Hearings Involving Witness Testimony.

2. Mandatory Disclosures/Role of the NRC Staff.

3. Certified Questions/Referred Rulings.

C. Procedures for Hearings Not Involving Testimony (Legal Contentions).

I. Introduction.

The NRC promulgated Part 52 of Title 10 of the *Code of Federal Regulations* (CFR) on April 18, 1989 (54 FR 153~~72~~86) to reform the licensing process for future nuclear power plant applicants. The rule added alternative licensing processes in 10 CFR Part 52 for early site permits (ESPs), standard design certifications, and combined licenses (COLs). These were alternatives~~additions~~ to the two-step licensing process that already existed in 10 CFR Part 50. The processes in 10 CFR Part 52 are intended to facilitate early resolution of safety and environmental issues and to enhance the safety and reliability of nuclear power plants through standardization. The centerpiece of 10 CFR Part 52 is the COL, which resolves the safety and environmental issues associated with construction and operation before construction begins. Applicants for a COL are able to reference other NRC approvals (e.g., ESPs and design certifications) that resolve a number of safety and environmental issues that would otherwise need to be resolved in the COL proceeding.

After the promulgation of 10 CFR Part 52 in 1989, the Energy Policy Act of 1992 (EPAct), Public Law Number 102-486, added several provisions to the Atomic Energy Act of 1954, as amended (AEA), regarding the COL process, including provisions on ITAAC. The inclusion of ITAAC in the COL is governed by Section 185b. of the AEA, and hearings on conformance with the acceptance criteria in the ITAAC are governed by Section 189a.(1)(B) of the AEA. On December 23, 1992 (57 FR 60975), the Commission revised 10 CFR Part 52 to conform to the EPAct. Further additions and revisions to the regulations governing hearings on conformance with the acceptance criteria were made in the final rule entitled "Licenses,

Certifications, and Approvals for Nuclear Power Plants" (2007 Part 52 Rule) (72 FR 49352; August 28, 2007), and in the final rule entitled "Requirements for Maintenance of Inspections, Tests, Analyses, and Acceptance Criteria" (ITAAC Maintenance Rule) (77 FR 51880; August 28, 2012).

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.[1]

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. The NRC inspectors will inspect a sample of the ITAAC to ensure that the ITAAC are successfully completed.[2] This sample is chosen using a comprehensive selection process to provide confidence that both the ITAAC that have been

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[1] *See, e.g.*, Vogtle Unit 3 Combined License, Appendix C (ADAMS Accession No. ML112991102). There are 875 ITAAC in the Vogtle Unit 3 COL.

[2] In addition to ITAAC for SSCs, there are ITAAC related to the emergency preparedness program and physical security hardware. The NRC will inspect the performance of all emergency preparedness program and physical security hardware ITAAC.

directly inspected and the ITAAC that have not been directly inspected are successfully completed.

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 on 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). Specifically, 10 CFR 52.99(c)(3) requires the licensee to provide sufficient information, including the specific procedures and analytical methods to be used in performing the ITAAC, to demonstrate that the uncompleted inspections, tests, and analyses will be performed and the corresponding acceptance criteria will be met. 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 at 51887), the notifications required by 10 CFR 52.99(c)(1) and (2) 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. WSpecifically with respect to uncompleted ITAAC, the Commission stated in the 2007 Part 52 Rule (72 FR at 49367) that it "expects that any contentions submitted by prospective parties regarding uncompleted ITAAC would focus on any inadequacies of the specific procedures and analytical methods described by the licensee" in its uncompleted ITAAC notification.

The NRC regulations that directly relate to the ITAAC hearing process are in 10 CFR 2.105, 2.309, 2.310, 2.340, 2.341, 51.108, and 52.103. Because 10 CFR 52.103 establishes the most important requirements regarding operation under a combined license, including basic aspects of the associated hearing process, NRC regulations often refer to the ITAAC hearing process as a "proceeding under 10 CFR 52.103." Additional regulations governing the ITAAC hearing process are in the design certification rules, which are included as appendices to 10 CFR Part 52, for example, "Design Certification Rule for the AP1000 Design," 10 CFR Part 52, Appendix D, Paragraphs VI, VIII.B.5.g, and VIII.C.5. In addition, the Commission announced several policy decisions regarding the conduct of ITAAC hearings in its final policy statement entitled "Conduct of New Reactor Licensing Proceedings" (2008 Policy Statement) (73 FR 20963; April 17, 2008).

While NRC regulations address certain aspects of the ITAAC hearing process, they do not provide detailed procedures for the conduct of an ITAAC hearing. As provided by 10 CFR 2.310(j), proceedings on a Commission finding under 10 CFR 52.103(c) and (g) shall be conducted in accordance with the procedures designated by the Commission in each proceeding. The use of case-specific orders to impose case-specific hearing procedures reflects the flexibility afforded to the NRC by Section 189a.(1)(B)(iv) of the AEA, which provides the NRC with the discretion to determine the appropriate procedures for an ITAAC hearing,

whether formal or informal.[3] A case-specific approach has the advantage of allowing the NRC to conduct the proceeding more efficiently by tailoring the procedures to the specific matters in controversy. In addition, the NRC can more swiftly implement lessons learned from the first ITAAC hearings to future proceedings. This approach is particularly beneficial given that this is a first-of-a-kind hearing process.

The NRC recognized, however, that the predictability and efficiency of the ITAAC hearing process would be greatly enhanced by the development, to the extent possible, of generalized procedures that can be quickly and easily adapted to the specific features of individual proceedings. Thus, the Commission, in its July 19, 2013 staff requirements memorandum (SRM) on SECY-13-0033, "Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103," (ADAMS Accession Nos. ML13200A115 and ML12289A928) directed the NRC staff, the Office of the General Counsel (OGC), and the Office of Commission Appellate Adjudication (OCAA) (collectively, "the Staff") to develop options for ITAAC hearing formats for Commission review and approval. ~~To ensure that the generic ITAAC hearing procedures were finalized sufficiently in advance of upcoming ITAAC hearings to allow potential participants to prepare for them, the Commission further directed that the ITAAC hearing procedures "be developed, deliberated, and resolved within the next 12 to 18 months."~~ The Commission-approved procedures described in this notice represent the culmination of these efforts. While the ITAAC hearing procedures for a particular proceeding will be established through case-specific orders, the generic procedures described in this notice will form the basis for these case-specific orders.

[3] Thus, ITAAC hearings are not required to comply with the Administrative Procedure Act (APA) procedures for formal "on the record" hearings. *See* 5 U.S.C. § 554(a).

II. Public Comments and Public Meetings.

Pursuant to direction from the Commission in the SRM on SECY-13-0033, the Staff developed proposed generic ITAAC hearing procedures that the Staff published for comment in the *Federal Register* on April 18, 2014 (79 FR 21958). The 75-day comment period closed on July 2, 2014.

Early in the comment period (May 21, 2014), the Staff conducted a public meeting to allow for an exchange of information between the Staff and the public regarding the proposed procedures, the rationale therefor, and suggestions from the public on possible alternatives to the approaches taken in the proposed procedures. As stated in the meeting notice, statements made at the public meeting were not treated as formal comments on the proposed procedures because the NRC held the public meeting to help inform the public's written comments on the proposed procedures. The summary of the May 21, 2014 public meeting is available at ADAMS Accession No.~~umber~~ ML14153A433, and a transcript of the meeting is available at ADAMS Accession No.~~umber~~ ML14147A200.

Six comment letters from the following persons and entities were received on the proposed procedures:

- On behalf of the Nuclear Energy Institute (NEI), Ellen C. Ginsberg submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A012).
- On behalf of South Carolina Electric & Gas Company (SCE&G), April R. Rice submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A013).
- On behalf of Southern Nuclear Operating Company, Inc. (SNC), Brian H. Whitley submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A011).
- On behalf of Westinghouse Electric Company LLC (Westinghouse), Thomas C. Geer submitted comments dated July 1, 2014 (ADAMS Accession No. ML14190A010).

- On behalf of Florida Power and Light Company (FPL), William Maher submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A009).
- On his own behalf, Mr. Barton Z. Cowan submitted comments dated July 2, 2014 (ADAMS Accession No. ML14195A275).

Two of the commenters, NEI and SNC, requested an additional public meeting on the proposed procedures. While SNC did not identify any particular topic on which to hold a public meeting, NEI suggested holding a public meeting on issues associated with interim operation. In response to these requests and after preliminary consideration of the comments received, the NRC held an additional public meeting on September 22, 2014, to discuss seven issues associated with public comments on interim operation, claims of incompleteness, and early publication of the notice of intended operation. Mr. Marvin Lewis and representatives of NEI, SCE&G, SNC, and Westinghouse provided comments at the public meeting. The summary of the September 22, 2014, public meeting is available at ADAMS Accession No.~~umber~~ ML14276A154, and a transcript of the meeting is available at ADAMS Accession No.~~umber~~ ML14274A235. On September 23, 2014, Mr. Marvin Lewis submitted correspondence (ADAMS Accession No. ML14272A454) amplifying on a comment he made at the public meeting. On October 15, 2014, Ellen C. Ginsberg submitted correspondence (ADAMS Accession No. ML14289A494) on behalf of NEI, providing written comments on the issues that were discussed at the public meeting. In this letter, NEI stated that it closely coordinated with SNC, SCE&G, FPL, and Westinghouse representatives and that these companies authorized NEI to state that they concur in, and support, NEI's October 15, 2014 comments.

The ~~[MONTH] 2015~~ "Comment Summary Report – Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met" (Comment Summary Report) (ADAMS Accession No. ML14344A076) summarizes both the written comments and the oral comments made at the September 22, 2014 public meeting. The Comment Summary Report

also provides the NRC's responses to the public comments and describes how the proposed procedures were modified as a result of the comments.

III. Differences Between the Proposed Procedures and the Final Procedures.

The NRC has made a number of modifications to the proposed procedures, primarily in response to public comments. In addition, the proposed procedures included options for comment on several issues, and these options have been resolved in the final procedures. Furthermore, the NRC has clarified the procedures in some cases to resolve ambiguities or to better reflect the intent underlying a provision in the proposed procedures. Finally, the NRC has made editorial corrections and minor clarifying edits to the proposed procedures. With the exception of editorial corrections and minor clarifying edits, the changes to the proposed procedures are described as follows.

A. Early Publication of the Notice of Intended Operation.

In the proposed procedures (79 FR 21964), the NRC stated that it was exploring the possibility of publishing the notice of intended operation somewhat earlier than 210 days before scheduled fuel load based on a licensee's voluntary early submission of uncompleted ITAAC notifications. As explained in the proposed procedures, the uncompleted ITAAC notifications must be submitted before the notice of intended operation is published to provide sufficient information to petitioners[4] to enable them to file contentions on uncompleted ITAAC with their hearing request. However, 10 CFR 52.99(c)(3) allows licensees to submit the uncompleted ITAAC notifications up to 225 days before scheduled fuel load. Given the time needed by the NRC staff to administratively process the uncompleted ITAAC notifications, publication of the

[4] As used in this notice, the word "petitioner" refers to any person who (1) is contemplating the filing of a hearing request, (2) has filed a hearing request but is not an admitted party, or (3) has had a hearing request granted.

notice of intended operation earlier than 210 days before scheduled fuel load requires submission of the uncompleted ITAAC notifications earlier than 225 days before scheduled fuel load.

The NRC requested comment on the pros and cons of early publication and on how early the NRC might reasonably issue the notice of intended operation. As discussed in Section 5.B of the Comment Summary Report, the NRC has decided to publish the notice of intended operation up to 75 days earlier than 210 days before scheduled fuel load (i.e., 285 days before scheduled fuel load) based on the licensee's voluntary early submission of the uncompleted ITAAC notifications. With early publication, all dates in the hearing schedule would be moved up accordingly. Thus, moving up the notice of intended operation would build margin into the schedule to account for a variety of possible delays, and the licensees currently constructing the Vogtle and V.C. Summer reactors have said in their written comments that it is feasible to submit uncompleted ITAAC notifications several months earlier than required. The NRC places great weight on the schedule advantages accruing from early publication because of the statutory directive in AEA § 189a.(1)(B)(v) to issue the hearing decision before scheduled fuel load "to the maximum possible extent." However, the NRC has decided to publish the notice of intended operation no earlier than 285 days before scheduled fuel load to limit the additional burden on participants from having a greater number of uncompleted ITAAC at the time the notice of intended operation is published.[5] Other aspects of early publication of the notice of intended operation are discussed in Section V.C of this notice.

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[5] As explained in the Comment Summary Report, petitioners are not prejudiced by the requirement to file contentions on uncompleted ITAAC because the uncompleted ITAAC notifications are intended to provide sufficient information to petitioners on which to file their contentions. However, if there are a greater number of uncompleted ITAAC notifications when the notice of intended operation is published, there will correspondingly be a greater number of subsequent ITAAC closure notifications for a petitioner to examine to determine whether a new or amended contention is warranted. In addition, publishing the notice of intended operation earlier marginally increases the probability of new or amended contentions being filed based on the possibility of differences between the uncompleted ITAAC notifications and the later ITAAC closure notifications. The NRC's decision not to publish the notice of intended operation any earlier than 285 days before scheduled fuel load limits additional resource (continued . . .)

B. Licensee Hearing Requests.

As discussed in Section 4.N of the Comment Summary Report, the procedures have been clarified to explicitly state that a licensee hearing request need not satisfy the contention standards in 10 CFR 2.309(f) or the standing requirements of 10 CFR 2.309(d). In addition, the procedures now include deadlines for licensee hearing requests ~~after the deadline~~ (20 days from formal NRC staff correspondence stating that a particular ITAAC has not been successfully completed) and NRC staff answers to licensee hearing requests (10 days after service of the hearing request). Finally, the procedures now state that licensee hearing requests that are filed before publication of the notice of intended operation are outside the scope of the hearing procedures and will be handled on a case-specific basis.

C. Deadlines and Hearing Schedule for Hearing Requests, Intervention Petitions, New or Amended Contentions, and Claims of Incompleteness After the Deadline.

In the proposed procedures (79 FR 21967), the NRC included the following options for comment on the time given for filing hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness after the deadline, and the time given for filing answers to these filings: (1) The petitioner is given 30 days from the new information to make its filing and the other parties have 25 days to answer. (2) The petitioner is given 20 days from the new information to make its filing and the other parties have 15 days to answer. (3) The petitioner is given [some period between 20 and 30 days] from the new information to make its filing and the other parties have [some period between 15 and 25 days] to answer.

As discussed in Section 4.J of the Comment Summary Report, commenters suggested deadlines for these filings that were even shorter than the lower ends of the ranges provided for

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(. . . continued)
burdens that would be imposed on all parties by early publication. Also, the NRC is taking steps to minimize the additional burden to petitioners associated with a greater number of uncompleted ITAAC notifications, as described in Section 5.B of the Comment Summary Report.

comment in the proposed procedures. The NRC agrees with the commenters that deadlines need to be as short as reasonably possible to limit the potential for delay. However, for the reasons discussed in the Comment Summary Report, the NRC believes that the deadlines suggested by the commenters would not necessarily be feasible, in the ordinary case, given the issues that the participants would need to address in filings after the deadline and answers thereto.

Therefore, the NRC has decided that the deadline for hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed after the deadline will be 20 days after the event giving rise to the need for the filing.[6] In the context of claims of incompleteness, this 20-day period will be triggered by the date that the ITAAC notification (or a redacted version thereof) becomes available to the public. For answers to these filings after the deadline, the NRC has decided that a 14-day period is reasonable. Notwithstanding these deadlines, the NRC encourages participants to file as soon as possible before these deadlines if it is possible for them to do so.

As discussed in Section 4.K of the Comment Summary Report, the NRC has also clarified the discussion in the proposed procedures regarding the evidentiary hearing schedule for hearings on new and amended contentions filed after the deadline. First, if a new contention is admitted by the Commission (including a contention submitted with a hearing request or intervention petition after the deadline), then the Commission will set the hearing schedule for the new contention. Second, if an amended contention is admitted by the Commission, then the Commission may revise the existing hearing schedule as appropriate. Third, if the Commission

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[6] If a petitioner submitting a hearing request, intervention petition, or motion for leave to file new or amended contentions or claims of incompleteness after the deadline believes that some aspect of operation must be stayed until action is taken in the hearing process, then that petitioner has the burden of submitting its stay request simultaneously with the late-filed hearing request, intervention petition, or motion for leave to file new or amended contentions or claims of incompleteness. If the petitioner does not include a stay request with its late-filed pleading, the petitioner will have constructively waived its right request a stay at a later time.

delegates a ruling on an amended contention to an Atomic Safety and Licensing Board (ASLB) or single legal judge and the presiding officer admits the amended contention, then the strict deadline for the original contention remains the same because only the Commission can set the strict deadline and ~~because~~ an amendment to a contention will not necessarily require an extension of the strict deadline. In such cases, the presiding officer should strive to meet the strict deadline to the best of its ability, but if unavoidable and extreme circumstances require an extension of the strict deadline, then the presiding officer may extend that deadline in accordance with the procedures set forth in the case-specific order governing the proceeding.

D. Claims of Incompleteness.

As discussed in Section 4.E of the Comment Summary Report, the NRC has adopted SNC's suggestion to require a petitioner considering whether to file a claim of incompleteness to consult with the licensee regarding access to the purportedly missing information prior to the petitioner filing the claim. The NRC agrees with SNC that a consultation process, similar to the one for motions required by 10 CFR 2.323, may obviate the need for petitioners to file, or the Commission to rule on, claims of incompleteness. Consultation would, therefore, potentially shorten the hearing schedule and conserve participants' and the Commission's resources.

The NRC also agrees with SNC that consultation should be initiated 21 days after the notice of intended operation is published. Initiating consultation by this date is reasonable since the petitioner would not be required to prepare a filing satisfying regulatory requirements, but would only need to initiate discussions with the licensee on access to the allegedly missing information. In addition, a significant number of ITAAC notifications should be available well before the notice of intended operation is published, and the NRC expects petitioners to examine such notifications before the notice of intended operation is published as part of their preparations for the ITAAC hearing process. Further, initiating consultation 21 days after publication of the notice of intended operation is early enough such that, if the petitioner and licensee reach agreement in a reasonable period of time, the petitioner should be able to file

any subsequent contention with the initial hearing request or shortly thereafter. To ensure effective consultation, the NRC is also requiring that the petitioner and the licensee engage in timely, sincere, and meaningful consultations. If agreement is not reached before the hearing request is due, then the NRC agrees with SNC that the claim of incompleteness must be filed with the hearing request because the consultation process should not extend the deadline for filing, consistent with NRC motions practice. In determining whether a claim of incompleteness is valid, the Commission will consider all of the information available to the petitioner, including any information provided to the petitioner by the licensee. The Commission will also consider whether the participants have discharged their consultation obligations in good faith.

While SNC's proposal addressed ITAAC notifications that are available when the notice of intended operation is published, it did not address ITAAC notifications that become available thereafter. This issue was discussed in the September 22, 2014 public meeting. After the consideration of comments and as discussed in Section 4.E of the Comment Summary Report, the NRC has decided that if the ITAAC notification (or a redacted version thereof) becomes publicly available after the notice of intended operation is published, then the petitioner must initiate consultation with the licensee regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public, except that consultation need not be commenced earlier than 21 days after publication of the notice of intended operation. A 7-day period is reasonable because the volume of new ITAAC notifications to be examined by the petitioner after the notice of intended operation is published will be substantially less than the volume of ITAAC notifications covered by the initial hearing request, and the 7-day deadline is only for the initiation of consultation, not the filing of a formal request. In addition, a 7-day deadline is appropriate to allow sufficient time to complete consultation before the deadline for filing claims of incompleteness.

The comment by SNC also did not address scenarios in which a petitioner seeks sensitive unclassified non-safeguards information (SUNSI) or safeguards information (SGI) from

the licensee.[7] This issue was also a subject of the September 22, 2014 public meeting. As discussed in Section 4.I of the Comment Summary Report, within one day of the licensee discovering that consultation on a claim of incompleteness involves SUNSI or SGI, the licensee must inform the petitioner of this fact. Within one day of the licensee discovering that security-related SUNSI or SGI is involved, the licensee must also inform the NRC staff with a brief explanation of the situation. Notifying the NRC staff is necessary because of the NRC's duty to ensure that security-related SUNSI is only provided to those individuals with a need for the information and that SGI is only provided to those individuals who have a need to know the SGI, who have been determined to be trustworthy and reliable after a background check, and who will provide sufficient security measures for any SGI in their possession. For this reason, if consultation on a claim of incompleteness involves security-related SUNSI or SGI, then the licensee shall not provide the security-related SUNSI or SGI unless and until the NRC has determined that such access is appropriate. In addition, if SGI is involved and the petitioner would like to continue to seek access, then to expedite the proceeding, the petitioner must complete and submit to the NRC the forms and fee necessary for the performance of a background check within 5 days of notice from the licensee that SGI is involved. Petitioners are expected to have forms completed prior to this date to allow for expeditious submission of the required forms and fee.

As discussed in Section 4.I of the Comment Summary Report, if a claim of incompleteness seeking access to SUNSI or SGI is ultimately filed with the NRC, then the claim of incompleteness, and the licensee's answer thereto, must specifically identify the extent to which the petitioner or the licensee believes that any of the requested information might be SUNSI or SGI. Also, a claim of incompleteness seeking access to SUNSI or SGI must show the

[7] Westinghouse, however, did request the NRC ~~to~~ include procedures for access to SUNSI and SGI in the context of claims of incompleteness, as discussed in Section 4.I of the Comment Summary Report.

need for the information (for SUNSI) and the need to know the information (for SGI). A claim of incompleteness involving SGI must further state that the required forms and fee for the background check have been submitted to the NRC. As discussed in Section 4.I of the Comment Summary Report, the final procedures state that petitioners are required to take advantage of the available processes for seeking access to SUNSI or SGI and that their failure to do so will be taken into account by the NRC. Other provisions regarding access to SUNSI or SGI in the context of claims of incompleteness have been included in the final procedures based on relevant provisions in the SUNSI-SGI Access Order.

Finally, as discussed in Section 4.E of the Comment Summary Report, the final procedures provide that a contention based on additional information provided to the petitioner by the licensee through consultation on a claim of incompleteness will be due within 20 days of the petitioner's access to the additional information, unless more than 20 days remains between access to the additional information and the deadline for the hearing request, in which case the contention will be due by the later hearing request deadline. This 20-day period is consistent with the time period for filing new or amended contentions after the deadline.

Apart from the consultation process for claims of incompleteness, the final procedures include a number of other modifications and clarifications to the process for claims of incompleteness. First, as discussed in Section 4.F of the Comment Summary Report, the procedures have been clarified to explicitly state that a claim of incompleteness does not toll a petitioner's obligation to make a timely *prima facie* showing. If the petitioner is unsure whether to file a contention or a claim of incompleteness on an ITAAC notification, the petitioner may submit both a contention and a claim of incompleteness at the same time, arguing in the alternative that if the contention is not admissible, then the claim of incompleteness is valid.

Second, as stated in Section 4.G of the Comment Summary Report, the procedures have been clarified to state that claims of incompleteness must include a demonstration that the allegedly missing information is reasonably calculated to support a *prima facie* showing. This

requirement is implied by 10 CFR 2.309(f)(1)(vii), but making it explicit should help petitioners understand the showing that NRC regulations require for claims of incompleteness. In addition, the procedures now state that the petitioner must provide an adequately supported showing that the 10 CFR 52.99(c) report fails to include information required by 10 CFR 52.99(c).

Third, as stated in Section 4.H of the Comment Summary Report, the procedures have been clarified to state that a valid claim of incompleteness will only result in the licensee providing information relevant to the specific portions of the 10 CFR 52.99(c) notification that were the subject of the claim of incompleteness. This result is implied by 10 CFR 2.309(f)(1)(vii), which expressly ties the claim of incompleteness to a showing that the licensee's 10 CFR 52.99(c) ITAAC notifications do not contain information required by that regulation.

Fourth, the template for resolving valid claims of incompleteness has been revised so that the additional procedures included in the Commission order will not be taken primarily from the evidentiary hearing template but will be taken primarily from the Additional Procedures Order in the template for the notice of intended operation. The Commission is making this change because fewer modifications are required to adapt the Additional Procedures Order to resolve~~ing~~ valid claims of incompleteness.

E. Legal Contentions and Briefing of Legal Issues.

As discussed in Section 4.M of the Comment Summary Report, the NRC has clarified the procedures to define a legal contention as any contention that does not involve a dispute of fact. Also, in order to expedite the proceeding and ensure sound decision making by the presiding officer, the final procedures provide that participants must fully brief all relevant legal issues in their filings. This includes, but is not limited to, (1) hearing requests filed by the original deadline; (2) hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the original deadline; and (3) answers to these filings. By requiring participants to fully brief legal issues in their filings, the

presiding officer may be able to resolve all legal questions quickly~~, which might obviate the need to admit a legal contention~~.

In addition, the NRC has modified the template for the legal contention track to more specifically describe how the evidentiary hearing procedures apply to a hearing on a legal contention. In summary, the evidentiary hearing procedures apply with the exception of those that involve testimony (or associated filings) and those that involve discovery, the purpose of which is to support the preparation of testimony. Also, the final legal contention track template eliminates the statement in the proposed template that procedures dealing with interactions between the Commission and administrative judges would be omitted if the Commission designates itself as the presiding officer for resolving the legal contention. The NRC made this change because, even if the Commission is the presiding officer for the legal contention, a licensing board or single legal judge might rule on amended contentions or disputes over access to SUNSI or SGI.

F. Motions for Extension of Time.

In the proposed procedures (79 FR at 21968), the NRC included the following proposal for motions for extension of time:

> Motions for extension of time will be allowed, but good cause must be shown for the requested extension of time based on an event occurring before the deadline. To meet the statutory mandate for the timely completion of the hearing, deadlines must be adhered to strictly and only exceptional circumstances should give rise to delay. Therefore, in determining whether there is good cause for an extension, the factors in 10 CFR 2.334 will be considered, but "good cause" will be interpreted strictly, and a showing of "unavoidable and extreme circumstances" will be required for more than very minor extensions.
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> . . .
>
> Motions for extension of time shall be filed as soon as possible, and, absent exceptional circumstances, motions for extension of time will not be entertained if they are filed more than two business days after the moving party discovers the event that gives rise to the motion. The Staff selected 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.

(footnote omitted). However, the NRC specifically requested comment 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. The NRC also requested comment on whether a deadline-based trigger (e.g., "motions for extension of time shall be filed as soon as possible, but no later than 3 days before the deadline") should be used in lieu of, or in combination with, an event-based trigger.

As discussed in Section 3.B of the Comment Summary Report, the NRC has decided to eliminate the "very minor extensions" language because the NRC agrees with commenters that (1) the ITAAC hearing schedule does not allow for any delay unless such delay is absolutely necessary, (2) employing one standard instead of two makes application simpler and avoids litigation over which standard should apply, and (3) it is possible for participants to meet the unavoidable and extreme circumstances standard for very minor extension requests (e.g., a one-day extension request based on an unforeseen, sudden event occurring on the filing due date that prevents the participant from meeting the deadline). Therefore, the NRC has decided to apply the unavoidable and extreme circumstances standard to all extension requests, no matter how minor.

The NRC has also decided to employ a combination of a deadline-based and an event-based trigger for motions for extension of time. The NRC agrees with SNC's comment that a meritorious motion for extension of time will generally be triggered by a sudden, unforeseen event, probably at the last minute. However, the NRC also agrees with NEI and SCE&G that the event giving rise to an extension request might occur over time, making it difficult to identify the specific date that would trigger the obligation to file an extension request. Given these considerations, the NRC has decided to employ a deadline-based trigger for extension requests, but to allow for the later filing of an extension request if unavoidable and extreme circumstances prevent the filing of the extension request by the deadline-based trigger. Specifically, the final procedures provide that motions for extension of time shall be filed as soon

as possible, but no later than 3 days before the deadline, with one limited exception. If the petitioner is unable to file an extension request by 3 days before the deadline, then the petitioner must (1) file its request as soon as possible thereafter, (2) demonstrate that unavoidable and extreme circumstances prevented the petitioner from filing its extension request by 3 days before the deadline, and (3) demonstrate that the petitioner filed its extension request as soon as possible thereafter.

G. Presiding Officer for the Hearing.

As discussed in Section 6.A of the Comment Summary Report, the NRC has decided that for evidentiary hearings (i.e., hearings involving testimony), an ASLB or a single legal judge (assisted as appropriate by technical advisors) will preside over the hearing. An ASLB or a single legal judge can efficiently conduct evidentiary hearings, and this choice promotes an appropriate division of responsibilities between the Commission and administrative judges because the Commission has tasked itself with (1) issuing decisions on initial hearing requests and on hearing requests, intervention petitions, new contentions, and claims of incompleteness filed after the deadline, (2) designating hearing procedures, and (3) making the adequate protection determination for interim operation. This choice also provides the flexibility to employ multiple presiding officers in cases where a large number of contentions are admitted.

The case-specific choice on whether to employ an ASLB or a single legal judge for an evidentiary hearing will ordinarily be made by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel after the Commission grants the hearing request. To ensure that the selected presiding officer can immediately engage the proceeding in a meaningful manner, the Chief Administrative Judge will be expected to identify, within a reasonable period of time prior to the Commission's decision on the hearing request, administrative judges who might be selected to serve as the presiding officer. The Commission expects the selected judges to familiarize themselves with the ITAAC hearing procedures and the parties' pleadings

before a decision on the hearing request so that they can perform meaningful work immediately after a decision on the hearing request.

For hearings on legal contentions, the choice of presiding officer will generally depend on case-specific factors. The procedures retain the Commission's discretion to serve as the presiding officer or to delegate that function. However, the Commission has concluded, as a general matter, that a single legal judge should be the presiding officer for hearings on legal contentions when the Commission chooses not to be the presiding officer. When only legal issues are involved, the considerations in favor of employing a panel are less weighty given that most ASLBs in other proceedings include only one legal judge, with the other two judges being technical experts on factual matters. Also, a single judge may be able to reach and issue a decision more quickly than a panel of judges. Therefore, the final procedures provide that if the Commission chooses not to be the presiding officer for a hearing on a legal contention, the presiding officer will be a single legal judge, assisted as appropriate by technical advisors.

H. Evidentiary Hearing Schedule.

As discussed in Section 5.C of the Comment Summary Report, the NRC has made some modifications to the general evidentiary hearing track schedules. First, the NRC has changed the milestone for initial testimony from 35 days after the granting of the hearing request to 30 days after the granting of the hearing request. The NRC has also added a provision explicitly providing that the Commission may in a particular proceeding add up to 5 days to, or subtract up to 5 days from, this 30-day milestone. These changes to the initial testimony milestones are intended to provide more flexibility in the hearing schedule based on the number and complexity of contested issues. While 30 days is the default period, a 25-day period might be appropriate when there are only one or two simple issues in dispute, while a 35-day period might be needed if the hearing involves numerous admitted contentions with complex issues. Second, the NRC has reduced the time period for rebuttal in the Track 1 procedures to 14 days

from 15 days. A 14-day period day should avoid delays resulting from a deadline falling on a weekend while giving parties sufficient time to prepare their rebuttal filings.

Third, the final procedures explicitly acknowledge the possibility that the oral hearing might last longer than one day, and explicitly allow for changes to the overall schedule in light of this possibility to ensure that the initial decision is issued by the strict deadline. The NRC expects the presiding officer to consider and discuss such adjustments during the prehearing conference. Fourth, and finally, the final procedures add, as an example of the presiding officer's authority to make minor modifications to Commission-established milestones, the ability of the presiding officer to make a minor adjustment to a milestone to avoid delay that would occur if the milestone falls on a weekend or holiday (e.g., reducing the due date for initial testimony from 30 days to 29 days because the 30th day falls on a Saturday). The final procedures also state that the Commission expects the presiding officer to make such adjustments, as necessary, to avoid delay.

I. Criteria for Deciding Between the Track 1 and Track 2 Procedures.

In the proposed procedures (79 FR at 21970), the NRC requested comment on factors for the Commission to consider when choosing between Track 1 procedures (which include both written initial and rebuttal testimony) and Track 2 procedures (which include written initial testimony but not written rebuttal testimony) in an individual proceeding. The proposed procedures explained that while Track 2 has a schedule advantage in that it is shorter than Track 1, the Track 1 procedures enjoy the advantages that come from written rebuttal, including greater assurance that the contested issues will be fully fleshed out in writing before the hearing.

As discussed in Section 5.D of the Comment Summary Report, the NRC has made the Track 1 procedures the default evidentiary hearing track. Written rebuttal should ensure that the parties have a complete opportunity to respond to new, unexpected issues raised in the other parties' initial testimony. Also, written rebuttal should help to clarify the evidentiary record and

the contested issues prior to the oral hearing, which ought to make the oral hearing shorter and more efficient. Further, written rebuttal should help the presiding officer reach its decision more expeditiously by increasing the likelihood that the topics raised in initial testimony will have been fully addressed before the hearing. Given these advantages, written rebuttal will be included in most cases. Setting Track 1 as the default hearing track will simplify the process for designating hearing procedures in each proceeding.

The Track 1 schedule should generally accommodate a timely hearing decision for contentions submitted with the initial hearing request. In cases where the Track 1 schedule might not accommodate issuance of the initial decision by scheduled fuel load, e.g., where new contentions after the deadline are admitted, the NRC believes that the benefits of written rebuttal will nevertheless generally outweigh the minor potential time savings from its elimination. Also, even though 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.

In any event, the Commission retains the authority to eliminate written rebuttal in individual proceedings. For example, the Commission might eliminate written rebuttal if the contested issues are narrow and simple and the parties' positions in the hearing request and answers are sufficiently established to allow a full response in the parties' initial testimony and statements of position. To enhance the Commission's ability to make such a change in a timely manner, the evidentiary hearing template indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

J. Additional Evidentiary Hearing Tracks.

As discussed in Section 5.E of the Comment Summary Report, several commenters recommended the use of hearing tracks in addition to those described in the proposed procedures. Specifically, NEI and SCE&G recommended the use of a purely oral Subpart N-

type hearing track in some cases to complete the hearing more quickly, while Westinghouse recommended the possible use of a legislative hearing track. As explained in the Comment Summary Report, the NRC declines to adopt these suggestions, but is supplementing its discussion of the rationale for the selected hearing tracks in Section V.D of this notice.

The procedures have also been clarified with respect to the prohibition in 10 CFR 2.309(g) that participants may not address the selection of hearing procedures in their initial filings. The final procedures state that this prohibition 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 do not address the procedures for hearings requested by the licensee.

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

As discussed in Section 5.F of the Comment Summary Report, several commenters recommended that the NRC set up a process for invoking the Administrative Procedure Act (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 commenters suggested that the Commission determine the exception's applicability in its decision on the hearing request. While the NRC has previously stated in the abstract that it may be legally possible to apply the APA exception to some ITAAC in an ITAAC hearing (depending on the wording of the ITAAC and other relevant circumstances), the NRC does not believe that the commenters' suggestion is practical.

If the petitioner does not satisfy the hearing request requirements, then invoking the APA exception would be unnecessary. However, if the petitioner meets the hearing request~~se~~ requirements, including the *prima facie* showing, then the petitioner will have raised questions of sufficiency, ~~and possibly questions of~~ credibility, or conflict~~s~~, i.e., that the licensees manner or method of complying with the ITAAC is flawed, that would warrant the grant of a hearing~~, that the relevant case law states normally require a hearing~~. ~~The NRC acknowledges that it might be 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.~~

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 and all of the possible challenges to ITAAC completion and then selecting the ITAAC that could fall under the APA 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.

For the reasons described above and in Section 5.F of the Comment Summary Report, the NRC has modified the procedures to state that the NRC has not identified at this time a practical approach for invoking the APA exception in an ITAAC hearing.

L. Contraction of Fuel Load Schedule.

As discussed in Section 5.G of the Comment Summary Report, the NRC has modified the procedures to clarify a statement in the proposed procedures regarding the licensee's ability to accelerate its fuel load schedule once the notice of intended operation is published. The NRC did not intend to prevent a licensee from operating if all of the requirements for operation are met. However, for the purposes of meeting the directive in AEA § 189a.(1)(B)(v) for the NRC to timely complete the hearing, the "anticipated date for initial loading of fuel into the reactor" referenced in AEA § 189a.(1)(B)(v) is established prior to publication of the notice of intended operation and cannot thereafter be moved up by the licensee. This is because the hearing process will be triggered, and the schedule will in part be determined, by publication of the notice of intended operation, the timing of which is based on the fuel load schedule that the licensee provides to the NRC before the notice of intended operation. If the "anticipated date for initial loading of fuel into the reactor" could be moved up after the notice of intended operation, then the NRC could be put in the untenable position of having a constantly moving target for completing the hearing. The NRC does not believe that Congress intended this, or that trying to

meet such a constantly moving target would be consistent with a fair and orderly hearing process. Nonetheless, the licensee can, consistent with 10 CFR 52.103(a), move up its scheduled fuel load date after the notice of intended operation is published. Such a contraction in the licensee's fuel load schedule would have no effect on the hearing schedule, but as a practical matter, the NRC would consider such a contraction in the licensee's schedule as part of its process for making the 10 CFR 52.103(g) finding and the adequate protection determination for interim operation.

M. Pre-Clearance Process for Access to SGI.

As discussed in Section 6.B of the Comment Summary Report, the NRC has decided to publish the plant-specific *Federal Register* notice on the pre-clearance SGI background check process 420 days before scheduled fuel load rather than 390 days before scheduled fuel load. For these purposes, the NRC will base the projected date of fuel load on the licensee's estimated schedule. This change accounts not only for the fact that the notice of intended operation might be published up to 75 days earlier, but also for the fact that SGI background checks now take less time than they previously did. The NRC has also decided that this "pre-clearance" notice will state that the required background check forms and fee should be submitted within 20 days of the pre-clearance notice to allow enough time for the completion of the background check prior to the publication of the notice of intended operation. Finally, the NRC has made some clarifications to the discussion in the proposed procedures regarding delays due to the processing of SGI background checks.

N. Development of Protective Order Templates for Access to SUNSI and SGI.

As discussed in Section 6.B of the Comment Summary Report, the NRC will develop generic protective order templates for SUNSI and SGI to help expedite proceedings involving a petitioner's access to SUNSI or SGI. The NRC intends to develop these templates in a public

process allowing stakeholder feedback, separate from the issuance of these final ITAAC hearing procedures. However, the final procedures reflect the use of the generic protective order templates that will be developed by the NRC.

O. Presiding Officer for Review of SUNSI-SGI Access Determinations and Related Matters.

In the proposed procedures, the NRC requested comment on whether the Commission or an ASLB (or single legal judge) should be the presiding officer for review of SUNSI-SGI access determinations and for protective orders and other related matters under the SUNSI-SGI Access Order. *See* Draft Template A, at 44 nn. 23-24, 45-46 (ADAMS Accession No. ML14097A460). For an admitted party seeking access to SUNSI or SGI relevant to the admitted contentions, the proposed procedures provided that the 10 CFR 2.336 disclosures process would be used in lieu of the SUNSI-SGI Access Order, and that any disputes among the parties over access to SUNSI would be resolved by the presiding officer, while any disputes over access to SGI would be resolved in accordance with 10 CFR 2.336(f). *See* Draft Template B, at 17 (ADAMS Accession No. ML14097A468).

As discussed in Section 6.F of the Comment Summary Report, the NRC has determined that challenges to NRC staff access determinations under the SUNSI-SGI Access Order are to be filed with the Chief Administrative Judge, who will assign a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge. The Commission believes that administrative judges are particularly suited to expeditiously resolveing questions of this kind, and a single legal judge may be able to issue a decision on a more expedited basis. If the challenge relates to an adverse determination by the NRC's Office of Administration on trustworthiness and reliability for access to SGI, then consistent with 10 CFR 2.336(f)(1)(iv),

neither the single legal judge chosen to rule on such challenges nor any technical advisors supporting a ruling on the challenge can serve as the presiding officer for the proceeding.[8]

Consistent with the proposed procedures, a motion to compel access to SUNSI made as part of the mandatory disclosures process shall be heard by the presiding officer of the proceeding, and a motion to compel access to SGI made as part of the mandatory disclosures shall be resolved in accordance with 10 CFR 2.336(f). Consistent with 10 CFR 2.336(f), the presiding officer for the hearing would hear challenges to NRC staff determinations on access to SGI except for challenges to adverse Office of Administration determinations on trustworthiness and reliability. For adverse determinations on trustworthiness and reliability, a separate single legal judge (assisted as appropriate by technical advisors) would rule on the challenge.

For the sake of efficiency, in cases where there is a dispute over access to SUNSI or SGI that was resolved by a presiding officer, the presiding officer for the issuance of protective orders and other related matters will be the same as the presiding officer that heard the dispute over access. In cases where there is no access dispute but a presiding officer is needed for protective orders or other related matters, (1) the presiding officer for the admitted contention will be the presiding officer for such matters when the SUNSI or SGI is being provided as part of mandatory disclosures, and (2) the Chief Administrative Judge will appoint a presiding officer for such matters when the SUNSI or SGI is being provided under the SUNSI-SGI Access Order.

P. Mandatory Disclosures.

As discussed in Section 6.G of the Comment Summary Report, the NRC has made the following modifications to the mandatory disclosure requirements to make them more flexible and efficient:

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[8] This restriction is intended to prevent the possible appearance that a presiding officer's ruling on the merits of a contention, for example, might have been improperly influenced by access to personal information about a person requesting access to SGI. *See* Protection of Safeguards Information, 73 FR 63546, 63550 (October 24, 2008) (final rule).

- Parties may agree to exclude certain classes of documents (such as drafts) from the mandatory disclosures. The NRC has no objection to such exclusions if agreed to by the parties, and such exclusions should be discussed at the prehearing conference.

- As a default matter, a party is not required to include a document in a privilege log if (1) the document satisfies the withholding criteria of 10 CFR 2.390(a), and (2) the document is not being withheld on the basis that it is SGI, security-related SUNSI, or proprietary information. The NRC is making this change because SGI, security-related SUNSI, and proprietary information could have some bearing on contested issues and access might be appropriate in some circumstances pursuant to a protective order. However, other types of privileged information are much less likely to have a bearing on contested issues, particularly given the narrow technical nature of ITAAC. Nonetheless, the presiding officer may change the scope of the privilege log requirement for a case-specific reason, and the parties may jointly agree to change the scope of the privilege log requirement.

- Privilege logs will be viewed as sufficient if they specifically identify each document being withheld (including the date, title, and a brief description of the document) and the basis for withholding (e.g., "contains SGI").

Q. Notifications of Relevant New Developments in the Proceeding.

As discussed in Section 6.H of the Comment Summary Report, the procedures have been revised to state that if an ITAAC closure notification or ITAAC post-closure notification is submitted on a contested ITAAC, then notification to the ASLB and the participants of this fact will be due within one day, rather than on the same day. The NRC agrees with commenters that same-day notification may be impractical in some instances.

R. Proposed Findings of Fact and Conclusions of Law.

In the proposed procedures (79 FR at 21972), the NRC requested comment on the following two options regarding proposed findings of fact and conclusions of law:

(1) Proposed findings of fact and conclusions of law would be allowed 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.

(2) Proposed findings of fact and conclusions of law would not be permitted unless the presiding officer determines that they are necessary. Under this option, the presiding officer may limit the scope of proposed findings of fact and conclusions of law to certain specified issues.

As discussed in Section 6.J of the Comment Summary Report, the NRC is adopting the option whereby proposed findings of fact and conclusions of law will be allowed unless the presiding officer dispenses with them for some or all of the hearing issues. The NRC is allowing proposed findings of fact and conclusions of law as a default matter because they may aid the presiding officer by summarizing the parties' positions on the issues at hearing and citing to the hearing record. Allowing proposed findings of fact and conclusions of law also should not significantly affect the hearing schedule because the initial decision date is tied to the oral hearing date. Further, the parties should have available resources to prepare the filing since all other hearing activities will have concluded. Finally, the presiding officer may adopt a party's proposed findings of fact and conclusions of law if the presiding officer deems it appropriate to do so, which could save time in some cases.

S. Motions and Petitions for Reconsideration and Motions for Clarification.

In the proposed procedures (79 FR at 21968-69, 21970), the NRC requested comment on the following three options regarding requests for reconsideration:

(1) Except for more abbreviated filing deadlines, motions and petitions for reconsideration would be allowed in accordance with 10 CFR 2.323(e) and 10 CFR 2.345, respectively.

(2) Motions and petitions for reconsideration would only be allowed for the initial decision and Commission decisions on appeal of the initial decision.

(3) Motions and petitions for reconsideration would not be permitted.

In addition, for Options 2 and 3, the proposed procedures included two limitations on motions for clarification to prevent them from becoming de facto motions for reconsideration. Specifically, a motion for clarification could only be based on an ambiguity in a presiding officer order and could not advocate for a particular interpretation of the presiding officer order.

As discussed in Section 6.L of the Comment Summary Report, the NRC has adopted Option 2, which allows reconsideration only for initial decisions and Commission decisions on appeal of initial decisions. The NRC has also included the limitations on motions for clarification that are described above with the exception of the prohibition on advocacy, which the NRC considers unnecessary. The NRC adopted Option 2 to avoid diversion of presiding officer and party resources prior to the initial decision given the extremely abbreviated ITAAC hearing schedule and given that appeal rights will quickly accrue. However, after the initial decision, the parties' resources will no longer be consumed by the hearing itself, so the parties should have the resources to file and respond to requests for reconsideration. In addition, a request for reconsideration of either the initial decision or of a Commission decision on appeal of the initial decision will not prevent these decisions from taking effect. Furthermore, initial decisions and Commission decisions on appeal of initial decisions are the most important decisions in the proceeding, so allowing reconsideration of these decisions is prudent.

Notwithstanding this, the NRC acknowledges that given the first-of-a-kind nature of ITAAC hearings, there may be a need to correct misunderstandings or errors in a presiding officer's decision. The potential for such errors and misunderstandings may be compounded by the very tight timeline on which decisions must be issued. Thus, to the extent that a presiding officer decision is based on a simple misunderstanding or a clear and material error (e.g., a conflict between the scheduling order and the Commission's order imposing procedures for the hearing), the parties could attempt to more informally raise the issue with the presiding officer by

requesting a conference call on the matter.[9] For this reason, the final procedures allow such requests, which should be made by email to the presiding officer's law clerk with the other parties' representatives copied on it. If the presiding officer decides that no conference call is necessary, then the parties' and the presiding officer's resources will not have been expended. If a conference call is held, the resource expenditure should be minimal and any error or misunderstanding could be more quickly rectified than through a formal request for reconsideration.

T. Interlocutory Review.

In the proposed procedures (79 FR at 21970), the NRC requested comment on the following two options regarding interlocutory review:

(1) Interlocutory review would be available only for presiding officer determinations on access to SUNSI or SGI.

(2) Interlocutory review would be available for presiding officer determinations on access to SUNSI or SGI. For other presiding officer decisions, the interlocutory review provisions of 10 CFR 2.341(f) would be retained without modification. However, interlocutory review would be disfavored, except for decisions on access to SUNSI or SGI, because of the expedited nature of an ITAAC hearing.

As discussed in Section 6.M of the Comment Summary Report, the NRC has limited interlocutory review to decisions on access to SUNSI or SGI because interlocutory review of other decisions would be unnecessary and unproductive given the expedited nature of the

[9] This possibility is not available in cases where the Commission, itself, is serving as the presiding officer because such an informal process would be impractical since Commission action is subject to formal processes (some of which are required by law). In addition, the potential need for such an informal process is less likely to arise in the portions of the ITAAC hearing process over which the Commission will preside.

proceeding. Because of the abbreviated ITAAC hearing schedule, appeal rights will quickly accrue, and before the initial decision, the parties' resources should be dedicated to completing the hearing. The NRC is allowing interlocutory review for decisions granting access to SUNSI or SGI because a post-hearing appeal opportunity will not cure the harm from a pre-hearing grant of access to sensitive information. The NRC is also providing a right to interlocutory review for decisions denying access to SUNSI or SGI because the NRC believes that those seeking access to SUNSI or SGI should have a reciprocal appeal opportunity and because it is important to quickly resolve disputes over access to such information given the potential effect that an erroneous denial of access might have on the schedule of the proceeding. However, because a denial of access to information does not represent irreparable harm, the Commission expects that presiding officers will not delay any aspect of the proceeding because an interlocutory appeal is filed seeking to overturn a denial of access to SUNSI or SGI.

The NRC has also decided that, because of the limited nature of the dispute, a 7-day period is appropriate for filing and answering interlocutory appeals of decisions on access to SUNSI or SGI. The NRC has also made corresponding changes to the deadlines in 10 CFR 2.336(f)(1)(iii)(B) and (f)(1)(iv) for challenges to adverse NRC's Office of Administration determinations on trustworthiness and reliability for access to SGI.

U. Reopening the Record.

The proposed procedures (Draft Template B, page 35) provided a procedural mechanism for reopening the record, and provided for comment the following two options on how the reopening standards were to be applied:

(1) The NRC's existing rule in 10 CFR 2.326 would apply to any motion to reopen the record.

(2) Motions to reopen the record would be entertained only with respect to the submission of new information related to a previously admitted contention, and 10 CFR 2.326 would apply to any such motion. A motion to reopen would not be required for a hearing

request, intervention petition, or motion for leave to file a new or amended contention filed after the original deadline.

As stated in the *Federal Register* notice for the proposed procedures (79 FR at 21967), the intended difference between the two options was whether hearing requests, intervention petitions, and new or amended contentions after the original deadline should be exempted from the requirements in 10 CFR 2.326. The proposed procedures stated that a possible rationale for not applying the reopening standards to these filings after the deadline is that the purposes served by the reopening provisions—to ensure an orderly and timely disposition of the hearing—would be addressed by the requirements applying to hearing requests, intervention petitions, and new or amended contentions filed after the deadline. Specifically, the proposed procedures stated that one could argue that any timeliness concerns are addressed by the good cause requirement in 10 CFR 2.309(c) and that concerns regarding newly raised issues being significant and substantiated are addressed by the *prima facie* showing requirement in 10 CFR 2.309(f)(1)(vii).

As discussed in Section 6.O of the Comment Summary Report, the NRC has decided that the 10 CFR 2.326 reopening requirements will apply to all efforts to reopen the record, with the exception of hearing requests, intervention petitions, and new or amended contentions filed after the deadline. The exception from having to meet the 10 CFR 2.326 reopening standards is limited to hearing requests, intervention petitions, and new or amended contentions filed after the deadline because the good cause and *prima facie* showings that are required for these filings are substantially similar to the 10 CFR 2.326 reopening standards, as explained in the proposed procedures. Thus, the exception does not constitute a relaxation of the reopening standards; rather, the exception simply eliminates unnecessary duplication of effort. As a consequence, the exception does not apply to other efforts to reopen the record, e.g., efforts to

introduce evidence on existing contentions after the record has closed or the filing of claims of incompleteness after the record has closed.[10]

V. Interim Operation.

In response to comments, the NRC has decided to expand on and clarify the discussion of interim operation in the proposed procedures. Specifically, as explained in Section 7.B of the Comment Summary Report, the NRC is supplementing its discussion of the basis for its conclusion that the Commission's determination on adequate protection during interim operation is not intended to be a merits determination on the petitioner's *prima facie* showing. Also, as discussed in Section 7.D of the Comment Summary Report, the NRC is expanding on and clarifying the procedures' discussion of how interim operation applies in various contexts. The additional discussion on these two points appears later in this notice. Finally, as discussed in Section 7.F of the Comment Summary Report, the NRC has modified the procedural order templates to state, consistent with the *Federal Register* notice for the proposed and final procedures, that 10 CFR 2.340(j) does not apply in cases where interim operation has been allowed.

W. Submission, Filing, and Service of Documents.

As discussed in Section 3.A of the Comment Summary Report, the NRC has decided to eliminate hand delivery as a means of submitting, filing, or serving documents. Hand delivery to the NRC is impractical because it would require a contact being available to receive the document at the time it is delivered, which would impose undue burdens on the recipients,

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[10] As presented in the draft procedural order templates, the option eliminating the 10 CFR 2.326 requirements for hearing requests, intervention petitions, and new or amended contentions filed after the deadline would have limited the application of 10 CFR 2.326 to the submission of new information related to a previously admitted contention. While the submission of new information related to a previously admitted contention is the most likely situation in which a petitioner might move to reopen the record under 10 CFR 2.326, it is possible that a petitioner might move to reopen the record in other circumstances, e.g., claims of incompleteness. Therefore, the final procedures broadly state that 10 CFR 2.326 applies to any effort to reopen the record, with the exception of hearing requests, intervention petitions, and new or amended contentions filed after the deadline.

especially if the document were delivered later in the evening. For the same reason, hand delivery could be impractical for other organizations. ~~Further, hand delivery is, in any event, unlikely to be an option selected by a hearing participant.~~

On a different matter, the final procedures now specify that SGI background check forms and fees that are submitted to the NRC pursuant to the SUNSI-SGI Access Order must be submitted by overnight mail. No method of delivery was specified in the proposed procedures, but the NRC has decided to require the use of overnight mail to avoid delay and to be consistent with the filing and transmission methods used for paper documents in other ITAAC hearing-related contexts.

X. Initial Decision Becoming Final Action of the Commission.

The proposed procedures included a change to 10 CFR 2.1210 regarding the time at which the initial decision becomes final action of the Commission. This change had the purpose of making 10 CFR 2.1210 conform to 10 CFR 2.341. However, after the proposed procedures were published, the NRC issued a rule entitled "Miscellaneous Corrections" (79 FR 66598; November 10, 2014) modifying 10 CFR 2.1210 to be consistent with 10 CFR 2.341. Therefore, the change to 10 CFR 2.1210 that was in the proposed ITAAC hearing procedures is no longer necessary and has been eliminated.

IV. Previously Established Law, Regulation, and Policy Governing ITAAC Hearings.

In developing ITAAC hearing procedures, the NRC has implemented previously established law, regulation, and policy governing ITAAC hearings. In particular, the procedures were developed with an eye toward the overarching statutory requirement for the expeditious completion of an ITAAC hearing found in AEA § 189a.(1)(B)(v). This section provides that the Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice of intended operation or the

anticipated date for initial loading of fuel into the reactor, whichever is later. Other provisions of previously established law, regulation, and policy, the discussion of which directly follows, may be grouped into three categories: (1) provisions relating to hearing requests, (2) provisions relating to interim operation, and (3) provisions relating to the initial decision of the presiding officer on contested issues after a hearing.

A. Hearing Request.

Section 189a.(1)(B)(i) of the AEA and 10 CFR 52.103(a) provide that not less than 180 days before the date scheduled for initial loading of fuel into the reactor, the NRC will publish in the *Federal Register* a notice of intended operation, which will 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. The contents of the notice of intended operation are governed by 10 CFR 2.105. With respect to the timing of this notice, the Commission's previously stated goal was to publish the notice of intended operation 210 days before scheduled fuel load (72 FR at 49367). This is still the goal if uncompleted ITAAC notifications are not submitted earlier than required. However, as explained later in this notice, the NRC has decided that it will publish the notice of intended operation up to 75 days earlier, i.e., 285 days before scheduled fuel load, if the uncompleted ITAAC notifications are submitted earlier than required and certain other requirements are met.

Hearing requests are governed by 10 CFR 2.309. In accordance with 10 CFR 2.309(a), a hearing request in a proceeding under 10 CFR 52.103 must include a demonstration of standing and contention admissibility, and 10 CFR 2.309(a) does not provide a discretionary intervention exception for ITAAC hearings as it provides for other proceedings. Thus, discretionary intervention pursuant to § 2.309(e) does not apply to ITAAC hearings as it does to other proceedings. As reflected in 10 CFR 2.309(f)(1)(i), the issue of law or fact to be raised in an ITAAC hearing request must be directed at demonstrating 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.[11]

In addition to the normal requirements for hearing requests, ITAAC hearing requests must, as required by AEA § 189a.(1)(B)(ii), show, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and must show, *prima facie*, the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This required "*prima facie*" showing is implemented in 10 CFR 2.309(f)(1)(vii). Section 2.309(f)(1)(vii) also provides a process for petitioners to claim that a licensee's 10 CFR 52.99(c) report is incomplete and that this incompleteness prevents the petitioner from making the necessary *prima facie* showing. To employ this process, which this notice terms a "claim of incompleteness," the petitioner must identify the specific portion of the licensee's 10 CFR 52.99(c) report that is incomplete and explain why this deficiency prevents the petitioner from making the necessary *prima facie* showing.

Also, as provided by 10 CFR 51.108, the NRC is not making any environmental finding in connection with its finding under 10 CFR 52.103(g) that the acceptance criteria are met, and the Commission will not admit any contentions on environmental issues in an ITAAC hearing. Instead, the 10 CFR 52.103(g) finding is a categorical exclusion as provided in 10 CFR 51.22(c)(23). As the Commission explained (72 FR at 49428) when promulgating 10 CFR 51.108 and 10 CFR 51.22(c)(23): (1) The major federal action with respect to facility operation is issuing the COL because the COL authorizes operation subject to successful completion of

[11] Because the ITAAC were previously approved by the NRC and were subject to challenge as part of the COL proceeding, a challenge to the ITAAC themselves will not give rise to an admissible contention, but the ITAAC could be challenged in a petition to modify the terms and conditions of the COL that is filed under 10 CFR 52.103(f). *See* 2007 Part 52 Rule, 72 FR at 49367 n.3. Because 10 CFR 52.103(f) petitions are outside the scope of the ITAAC hearing process, the 10 CFR 52.103(f) process is outside the scope of this notice.

the ITAAC; (2) the environmental effects of operation are evaluated in the COL environmental impact statement; and (3) the 52.103(g) finding is constrained by the terms of the ITAAC, i.e., it involves only a finding on whether the predetermined acceptance criteria are met. Therefore, the environmental effects of operation were considered, and an opportunity for a hearing on these effects was provided, during the proceeding on issuance of the COL.

Design certification rules contain additional provisions regarding ITAAC hearing requests. Any proceeding for a reactor referencing a certified design would be subject to the design certification rule for that particular design. For example, any ITAAC hearing for a plant referencing the AP1000 Design Certification Rule would be subject to the requirements of 10 CFR Part 52, Appendix D. Paragraph VI of 10 CFR Part 52, Appendix D, establishes the issue finality provisions for the AP1000 design certification and specifically discusses the application of these provisions to ITAAC hearings. Paragraph VIII.B.5.g of 10 CFR Part 52, Appendix D, establishes a process for parties who believe that a licensee has not complied with Paragraph VIII.B.5 when departing from Tier 2 information to petition to admit such a contention into the proceeding.[12] Among other things, such a contention must bear on an asserted noncompliance with the ITAAC acceptance criteria and must also comply with the requirements of 10 CFR 2.309. Paragraph VIII.C.5 establishes a process whereby persons who believe that a change must be made to an operational requirement approved in the design control document or a technical specification (TS) derived from the generic TS may petition to admit such a contention into the proceeding if certain requirements, in addition to those set forth in 10 CFR 2.309, are met.

In accordance with 10 CFR 2.309(i), answers to hearing requests are due in 25 days and no replies to answers are permitted. As reflected in 10 CFR 2.309(j)(2), the Commission

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[12] Tier 2 information is a category of information in a design control document that is incorporated by reference into a design certification rule. The definition of Tier 2 for the AP1000 design certification can be found at 10 CFR Part 52, Appendix D, Paragraph II.E.

has decided that it will act as the presiding officer for determining whether to grant the hearing request. In accordance with AEA § 189a.(1)(B)(iii) and 10 CFR 2.309(j)(2), the Commission will expeditiously grant or deny the hearing request. As stated in 10 CFR 2.309(j)(2), this Commission decision may not be the subject of an appeal under 10 CFR 2.311. If a hearing request is granted, the Commission will designate the procedures that govern the hearing as provided by 10 CFR 2.310(j). In accordance with 10 CFR 2.309(g), hearing requests (and by extension answers to hearing requests) are not permitted to address the selection of hearing procedures under 10 CFR 2.310 for an ITAAC hearing.

B. Interim Operation.

The AEA provides for the possibility of interim operation, which is operation of the plant pending the completion of an ITAAC hearing. The potential for interim operation arises if the Commission grants a hearing request that satisfies the requirements of AEA § 189a.(1)(B)(ii). If the hearing request is granted, AEA § 189a.(1)(B)(iii) directs the Commission to allow interim operation if it determines, after considering the petitioners' *prima facie* showing and any answers thereto, that there will be reasonable assurance of adequate protection of the public health and safety during a period of interim operation. 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.[13] As provided by 10 CFR 52.103(c), the Commission will make the adequate protection determination for interim operation acting as the presiding officer. In accordance with 10 CFR 2.341(a), parties are prohibited from seeking further Commission review of a Commission decision allowing interim operation.

[13] The pertinent legislative history supports this view. 138 Cong. Rec. S1686 (February 19, 1992) (statement of Sen. Johnston); S. Rep. No. 102-72 at 296 (1991).

A number of issues concerning interim operation are discussed in SECY-13-0033 and the associated SRM, including the following points relevant to the development of ITAAC hearing procedures:

- Because AEA § 185b. requires the Commission~~NRC~~ to find that the acceptance criteria are met prior to operation, interim operation cannot be allowed until the Commission~~NRC~~ finds under 10 CFR 52.103(g) that all acceptance criteria are met, including those acceptance criteria that are the subject of an ITAAC hearing.

- The NRC staff proposed, and the Commission approved, that the 52.103(g) finding necessary for all phases of operation be delegated to the NRC staff. Among other things, this delegation means that the Commission will not make, in support of interim operation, a merits determination prior to the completion of the hearing on whether the acceptance criteria are met.

- For operational programs and requirements that are required to be implemented upon a 10 CFR 52.103(g) finding, these programs and requirements would also be implemented in the event that the Commission allows interim operation in accordance with 10 CFR 52.103(c), given that the 10 CFR 52.103(g) finding would be made in support of interim operation.

- As provided by 10 CFR 52.103(h), ITAAC no longer constitute regulatory requirements after the 10 CFR 52.103(g) finding is made. In addition, ITAAC post-closure notifications pursuant to 10 CFR 52.99(c)(2) are only required until the 10 CFR 52.103(g) finding is made. Therefore, ITAAC maintenance activities and associated ITAAC post-closure notifications would no longer be necessary or required after a 10 CFR 52.103(g) finding, including during any period of interim operation.

Another issue addressed in SECY-13-0033 was the subject of extensive comments on the proposed procedures. As stated in SECY-13-0033 and in the proposed procedures, the legislative history of the EPAct indicates that Congress did not intend the Commission to rule on the merits of the petitioner's *prima facie* showing when making the adequate protection

determination for interim operation. Instead, Congress intended interim operation for situations in which the petitioner's *prima facie* showing relates to an asserted adequate protection issue that will not present adequate protection concerns during the interim operation period, or in which mitigation measures can be taken to preclude potential adequate protection issues during the period of interim operation.

As discussed in detail in Section 7.B of the Comment Summary Report, some commenters argued that the Commission's adequate protection determination for interim operation could be based on a pre-hearing merits conclusion that the petitioner's *prima facie* showing is incorrect. The primary arguments in support of this position are as follows: (1) The position in SECY-13-0033 inappropriately constrains the Commission's determination on reasonable assurance of adequate protection and is contrary to longstanding interpretations of this broad concept. (2) Resort to the legislative history is inappropriate because the statutory language is clear. (3) Even if it were appropriate to consult the legislative history, the NRC misinterpreted it.

None of these arguments have altered the NRC's position on the proper interpretation of the statutory language. With respect to argument (1), the NRC's position is not based on an interpretation of "reasonable assurance of adequate protection" but on an interpretation of how the petitioner's *prima facie* showing and the answers thereto are to be "consider[ed]" when making the interim operation determination, as directed by AEA § 189a.(1)(B)(iii). Because the NRC's position is not based on an interpretation of "reasonable assurance of adequate protection," the NRC's position is not contrary to longstanding interpretations of this broad concept. Also, the NRC's position puts no constraints on the Commission's independent judgment in determining whether there is reasonable assurance of adequate protection during interim operation because the Commission will have already exercised its independent judgment on adequate protection matters when it determined that the petitioner made a *prima facie* showing that the operational consequences of not conforming with the acceptance criteria

would be contrary to reasonable assurance of adequate protection of the public health and safety. The Commission will consider a different question with regard to interim operation: whether there is reasonable assurance of adequate protection of the public health and safety during the period of interim operation (for example, because the issue will not arise during the period of extended operation or because the licensee proposed sufficient mitigation measures) notwithstanding the Commission's earlier finding of a *prima facie* showing.

With respect to argument (2), the NRC acknowledges the "plain meaning" canon of statutory interpretation, but does not find it applicable to this statutory provision. The "plain meaning" canon applies only when the words of a statute are "clear and unambiguous." 2A Sutherland Statutes and Statutory Construction, § 46:1 (7th ed. 2007). However, the statutory interim operation provision does not clearly and unambiguously instruct the NRC on how to consider the petitioner's *prima facie* showing when making the interim operation determination. Nothing in the statutory language directs the NRC to make a merits determination on the petitioner's *prima facie* showing. In addition, the statutory provision can be viewed as ambiguous because it can alternatively be interpreted as a specially crafted stay provision focused on the question of irreparable harm (i.e., will the petitioner's adequate protection concerns arise during a period of interim operation). Because the statutory language is not clear and unambiguous as discussed in this paragraph, the plain meaning canon does not apply and it is appropriate to consider the legislative history.

With respect to argument (3), the NRC does not agree that it misinterpreted the relevant legislative history. As discussed in the Comment Summary Report, the interim operation provision reached its final form as part of a Senate floor amendment. This amendment was sponsored, introduced, and explained by Senator Johnston, the floor manager of the bill and the Chairman of the Senate Committee that produced the bill, on the same day that the amendment was adopted by the Senate. Senator Johnston stated that interim operation was intended to be limited and that it was intended to apply where there was no question of safe operation of the

plant, such as where the alleged safety concern would not arise during the interim period or where mitigation measures could be taken to avoid the problem during the interim operation period. In an analogous situation, the U.S. Supreme Court treated as authoritative the remarks made by an amendment's sponsor when, as here, the final language resulted from a floor amendment, there was no subsequent Congressional report on the provision, and the amendment's sponsor explained the meaning of the provision on the same day that it was adopted. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). Consequently, it is appropriate for the NRC to give substantial weight to Senator Johnston's remarks on the meaning of the interim operation provision. Interpreting Senator Johnston's remarks in light of the statutory language he was discussing, it is clear that the "question about safe operation of the plant" refers to the petitioner's *prima facie* showing that operation is contrary to reasonable assurance of adequate protection of the public health and safety. Therefore, Senator Johnston's evident intent was that the Commission's adequate protection determination for interim operation would not be a merits determination that the petitioner's *prima facie* showing is, in fact, incorrect. In addition, the examples given by Senator Johnston of when interim operation would be appropriate contemplate that the Commission would make the adequate protection determination while accounting for the possibility that the petitioner's *prima facie* showing might be correct.

Also, as discussed in the Comment Summary Report, an earlier version of the legislation directed the NRC to make a preliminary merits determination as part of its interim operation decision, but this preliminary merits determination language was later removed from the bill by the Senate amendment just discussed. Consistent with U.S. Supreme Court precedent, this removal of the preliminary merits determination language should be regarded as a decision by Congress to take a different approach. *See INS v. Cardoza–Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in

favor of other language." (citations omitted)); *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.").

In its comments, NEI states that Congress might have removed the preliminary merits determination language to afford the Commission maximum flexibility in making the adequate protection determination for interim operation. However, NEI offers no evidence for its view, and NEI's claim is contradicted by the legislative history. Senator Johnston explained that the changes made to the bill by Senate Amendment Number 1575 were intended to address concerns that Senators had about the bill. 138 Cong. Rec. S1143 (Feb. 6, 1992). Senator Johnston went on to state that "[t]he authority to allow interim operation is limited" and that interim operation was intended to apply to situations "where there is no question about the safe operation of the plant." 138 Cong. Rec. S1143, S1173 (Feb. 6, 1992).

Thus, in light of the relevant legislative history, the NRC has determined that the adequate protection determination for interim operation is not intended to be a merits determination on the petitioner's *prima facie* showing. Nevertheless, the answers to the petitioner's hearing request are relevant to, and important for making, the adequate protection determination for interim operation. The answers filed by the licensee and the NRC staff could be considered in determining whether the *prima facie* showing has been made and to which aspects of operation the *prima facie* showing applies—such as whether the adequate protection concern is one of long-term safety or the concern only implicates adequate protection at certain operational levels (e.g., at greater than five percent power). The licensee's answer might also propose mitigation measures with an explanation of how reasonable assurance of adequate protection would be maintained during an interim period even if the petitioner's *prima facie* showing proves to be correct.

C. Initial Decision.

After the completion of an ITAAC hearing, the presiding officer will issue an initial decision pursuant to 10 CFR 2.340(c) on whether the acceptance criteria have been or will be met. As provided by 10 CFR 2.340(f), an initial decision finding that acceptance criteria in a COL have been met is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective. In accordance with 10 CFR 2.340(j), the Commission or its delegate (i.e., the NRC staff) will make the 10 CFR 52.103(g) finding within 10 days from the date of issuance of the initial decision, if:

(1) the Commission or its delegate can find that the acceptance criteria not within the scope of the initial decision are met,

(2) the presiding officer has issued a decision that the contested acceptance criteria have been met or will be met, and the Commission or its delegate can thereafter find that the contested acceptance criteria are met, and

(3) notwithstanding the pendency of a 10 CFR 2.345 petition for reconsideration, a 10 CFR 2.341 petition for review, a 10 CFR 2.342 stay motion, or a 10 CFR 2.206 petition.

Section 2.340(j) is intended to describe how the 52.103(g) finding may be made after an initial decision by the presiding officer that the acceptance criteria have been, or will be, met. However, in amending § 2.340(j) in the ITAAC Maintenance Rule, the Commission stated (77 FR at 51885-86) that § 2.340(j) was being amended to "clarify some of the possible paths" for making the 52.103(g) finding after the presiding officer's initial decision and that § 2.340(j) "is not intended to be an exhaustive 'roadmap' to a possible 10 CFR 52.103(g) finding that acceptance criteria are met." Thus, there may be situations in which the mechanism and circumstances described by 10 CFR 2.340(j) are not wholly applicable. For example, if interim operation is allowed, then the 52.103(g) finding will have been made prior to the initial decision. In such a case, there is no need for another 52.103(g) finding after an initial decision finding that the contested acceptance criteria have been met because the initial decision will have

confirmed the correctness of the 52.103(g) finding with respect to the contested acceptance criteria.[14]

V. General Approach to ITAAC Hearing Procedure Development.

With these procedures, the NRC has attempted to develop an efficient and feasible process that is consistent with previously established law, regulation, and policy and that will allow the presiding officer and the parties a fair opportunity to develop a sound record for decision. To achieve this objective, the NRC has used the following general approach.

A. Use of Existing Part 2 Procedures.

The procedures described in this notice are based on the NRC's rules of practice in 10 CFR Part 2, modified as necessary to conform to the expedited schedule and specialized nature of ITAAC hearings. The ITAAC hearing procedures have been modeled on the existing rules of practice because the existing rules have proven effective in promoting a fair and efficient process in adjudications and there is a body of precedent interpreting and applying these provisions. In addition, using the 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.

B. Choice of Presiding Officer to Conduct an Evidentiary Hearing.

As explained in Section III.G of this notice, the NRC has decided that for evidentiary hearings, an ASLB or a single legal judge (assisted as appropriate by technical advisors) will

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[14] Other scenarios not covered by 10 CFR 2.340(j) include those in which the presiding officer does not find that the acceptance criteria have been or will be met, a decision that might be made after a period of interim operation has been authorized. How a negative finding by the presiding officer would be resolved by a licensee, and the effect such a finding would have on interim operation, would depend on the facts of the case and the nature of the presiding officer's decision. Therefore, such eventualities are not further addressed in these generic procedures.

preside over the hearing. The case-specific choice on whether to employ an ASLB or a single legal judge for an evidentiary hearing will ordinarily be made by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel after the Commission grants the hearing request. However, the Commission retains the option of choosing who will conduct the evidentiary hearing in each proceeding. To ensure that the selected presiding officer can upon designation immediately commence work on evidentiary hearing activities, the Chief Administrative Judge will be expected to identify, within a reasonable period of time prior to the Commission's decision on the hearing request, administrative judges who might be selected to serve as the presiding officer. The Commission expects the selected judges to familiarize themselves with the ITAAC hearing procedures and the participants' pleadings before a decision on the hearing request.

C. Schedule.

As explained earlier, AEA § 189a.(1)(B)(v) provides that the Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice of intended operation or the anticipated date for initial loading of fuel into the reactor, whichever is later. While the AEA does not require that the hearing be completed by the later of these two dates in all cases, the procedures described in this notice have been developed with the intent of satisfying the statutory goal for timely completion of the hearing. However, there may be cases where the ITAAC hearing extends beyond scheduled initial fuel load because of unusual situations or because of circumstances beyond the control of the NRC.

Because the Commission intends to publish the notice of intended operation at least 210 days before scheduled initial fuel load, the later of the two dates identified in AEA § 189a.(1)(B)(v) will, in practice, be scheduled initial fuel load. If the notice of intended operation is issued 210 days before scheduled fuel load, 85 days will be consumed by the 60-day period for filing hearing requests and the 25-day period for filing answers to hearing

requests. Thus, meeting the statutory goal for completing the hearing will ordinarily require that the NRC be able to determine whether to grant the hearing request, hold a hearing on any admitted contentions, and render a decision after hearing within 125 days of the submission of answers to hearing requests.[15]

To meet the statutory objective for timely completion of the hearing, the NRC must complete the hearing process much faster than is usually achieved in NRC practice for other hearings. However, the ITAAC hearing process is different from other NRC hearings in that the contested issues will be narrowly constrained by the terms of the ITAAC and the required *prima facie* showing. In addition, the NRC anticipates that with the required *prima facie* showing and the answers thereto, the parties will have already substantially established their hearing positions and marshalled their supporting evidence. Furthermore, the parties' initial filings, in conjunction with other available information (including licensee ITAAC notifications describing the completion, or the plans for completing, each ITAAC), will provide the parties with at least a basic understanding of the other parties' positions from the beginning of the proceeding.

Given the differences between an ITAAC hearing and other NRC hearings, the NRC took several steps to expedite the ITAAC hearing process. The most important step is that the hearing preparation period will begin as soon as the hearing request is granted. In other NRC proceedings associated with license applications, hearing requests are due soon after the license application is accepted for NRC staff review, and the preparation of pre-filed written testimony and position statements does not begin until months or years later, after the NRC

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[15] A licensee is required by 10 CFR 52.103(a) to notify the NRC of its scheduled date for initial fuel load no later than 270 days before the scheduled date and to update its schedule every 30 days thereafter. While the licensee can, consistent with 10 CFR 52.103(a), move up its scheduled fuel load date after the notice of intended operation is published, such a contraction in the licensee's fuel load schedule would have no effect on the hearing schedule for the reasons given in Section 5.G of the Comment Summary Report. For the purpose of meeting the AEA § 189a.(1)(B)(iii) directive to expeditiously complete the hearing, the "anticipated date for initial loading of fuel" is set once the notice of intended operation is issued and cannot thereafter be moved up. However, as a practical matter, the NRC would consider such a contraction in the licensee's schedule as part of its process for making the 10 CFR 52.103(g) finding and the adequate protection determination for interim operation.

staff completes its review. However, the parties to an ITAAC hearing can begin preparing their testimony and position statements as soon as a hearing request is granted given the focused nature of an ITAAC hearing and given the information and evidence already available to, and established by, the parties at that point in the proceeding. Beginning the hearing preparation process upon the granting of a hearing request is expected to dramatically reduce the length of the hearing process, which should reduce overall resource burdens on participants in the hearing.

Another important step is to eliminate procedures from the hearing process that are time-consuming, resource-intensive, and unnecessary under the particular circumstances of an ITAAC proceeding. For example, because the hearing will be concluded within a few months of the granting of a hearing request, there is little purpose served by summary disposition motions and contested motions to dismiss.[16] In addition, by preparing ahead of time detailed procedures for the conduct of ITAAC hearings, the NRC is avoiding delays that might occur if ~~detailed procedures were not developed and~~ the presiding officer needed to make ad hoc decisions on how to address foreseeable issues that could have been considered earlier.

Even with the steps just described, meeting the statutory directive to expeditiously complete the ITAAC hearing will require the parties to exercise a high degree of diligence in satisfying their obligations as participants in the hearing. To instill discipline with respect to meeting the hearing schedule, the ITAAC hearing procedures provide that the Commission, when imposing procedures for the conduct of the hearing, will set a strict deadline for the issuance of a presiding officer's initial decision after the hearing. This strict deadline, which will be a calendar date, can only be extended upon a showing that "unavoidable and extreme

[16] However, to avoid holding a hearing unnecessarily, joint motions to dismiss that are agreed to by all parties will be entertained.

circumstances"[17] necessitate the delay. This strict deadline provision, which will be included whether the Commission, an ASLB, or a single legal judge is the presiding officer, will serve to prevent delays in the hearing decision, including delays in any intermediate step of the hearing process that might delay the hearing decision.

In addition, the ITAAC hearing procedures shorten a number of deadlines from those provided by current regulations. While this will require greater alertness and efficiency on the part of hearing participants, the deadlines in these procedures are feasible, and the burden on participants will be somewhat ameliorated by the focused nature of ITAAC hearings. Also, a shorter hearing period at the end of construction should lessen the overall resource burden on participants, which may be advantageous to participants with limited financial resources.[18]

The procedures in this notice have been developed on the assumption that the notice of intended operation will be issued 210 days before scheduled fuel load. There is a practical difficulty with issuing the notice of intended operation earlier than 210 days before scheduled fuel load: uncompleted ITAAC notifications are not required to be submitted until 225 days before scheduled fuel load. Until these uncompleted ITAAC notifications are received, members of the public will not have a basis on which to file contentions with respect to uncompleted ITAAC. Thus, the notice of intended operation cannot be issued until after the receipt and processing of all uncompleted ITAAC notifications. Nevertheless, if a licensee voluntarily submits all uncompleted ITAAC notifications somewhat earlier than 225 days before

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[17] This standard is taken from the Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998).

[18] For example, several litigation processes, such as summary disposition motions and written motions *in limine*, have been eliminated. Also, petitioners will not need to follow the substantial volume of licensee-NRC staff correspondence that would be expected over a several-year application period to determine whether to file new or amended contentions. Further, with a shorter hearing process at the end of construction, fewer events should occur that might give rise to new or amended contentions, and the parties' mandatory disclosures should consume fewer resources.

scheduled initial fuel load, then the notice of intended operation could be issued earlier. Early issuance of the notice of intended operation might facilitate the completion of the hearing by scheduled fuel load notwithstanding the occurrence of some event that would otherwise cause delay.

As discussed in Section 5.B of the Comment Summary Report, the licensees currently constructing the Vogtle and V.C. Summer reactors have stated in their written comments that it is feasible to submit uncompleted ITAAC notifications several months earlier than required. Given this statement, and given the schedule advantages accruing from early publication of the notice of intended operation, the NRC has decided to publish the notice of intended operation up to 75 days earlier than 210 days before scheduled fuel load (i.e., 285 days before scheduled fuel load) based on the licensee's voluntary early submission of the uncompleted ITAAC notifications. However, early publication of the notice of intended operation will only occur if the NRC has received either an uncompleted ITAAC notification or an ITAAC closure notification for every ITAAC. With early publication, all dates in the hearing schedule would be moved up accordingly.

The NRC will attempt to publish the notice of intended operation 15 days after it has received uncompleted ITAAC notifications covering all ITAAC that have not yet been completed. To make early publication of the notice of intended operation efficient and effective, some additional practical steps must be taken:

- In addition to meeting the requirements of 10 CFR 52.103(a), the licensee will need to informally apprise the NRC of the licensee's fuel load schedule well enough in advance to allow the NRC to prepare to issue the notice of intended operation on a more expedited basis.
- The NRC will not publish the notice of intended operation until the licensee has submitted a 10 CFR 52.103(a) fuel load schedule. Therefore, the licensee should submit this 10 CFR 52.103(a) schedule with its last uncompleted ITAAC notification if the licensee has not already done so.

- The uncompleted ITAAC notifications will need to specify the coverage period of the uncompleted ITAAC notifications (i.e., "intended to cover all ITAAC not completed by [X] days before scheduled fuel load."). If a coverage period is not specified, the NRC will assume that the coverage period begins 225 days before scheduled fuel load as specified by 10 CFR 52.99(c)(3).

- Any ITAAC completed before the specified coverage period will not be the subject of an uncompleted ITAAC notification but will be the subject of an ITAAC closure notification.

D. Hearing Formats.

The hearing format used to resolve admitted contentions depends, in the first instance, on whether testimony will be necessary to resolve the contested issues. While testimony is employed in most NRC hearings because contentions usually involve issues of fact, the NRC sometimes admits legal contentions, i.e., contentions that do not involve a dispute of fact but raise only legal issues. *See, e.g., U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588-591 (2009). The procedures for legal contentions, which are explained in more detail later in this notice, will involve the Commission setting a briefing schedule at the time it grants the hearing request, with the briefing schedule determined on a case-by-case basis.

Hearings involving testimony are necessarily more complex. A threshold question for such hearings is whether testimony should be delivered entirely orally, delivered entirely in written form, or as in the case of proceedings under Subpart L of 10 CFR Part 2, delivered primarily in written form with an oral hearing being used primarily to allow the presiding officer to gain a better understanding of the testimony and to clarify the record. For the following reasons, the NRC believes that the best choice is the Subpart L approach, which is the most widely used approach in NRC hearings and which has demonstrated its effectiveness since implementation in its current form in 2004.

The Subpart L approach has many benefits. 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 positions of the parties clearly established, oral questions and responses can be used to quickly and efficiently probe the positions of the parties. The use of oral questions and responses is more efficient than written questions and responses because oral questioning allows for back-and-forth communication between the presiding officer and the witnesses that can be completed more quickly than written questioning. In addition, 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. Finally, certain efficiencies can be gained by the use of written testimony that are not available with entirely oral testimony. 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 would consume more time because the entirety of the evidentiary record would need to be established sequentially and orally, and the admission of exhibits would be subject to the more cumbersome and time-consuming admission process typical of trials.

The NRC considered, but rejected, a hearing format based on the procedures in 10 CFR Part 2, Subpart N, "Expedited Proceedings with Oral Hearings." As the Commission explained in the final rule entitled "Changes to Adjudicatory Process" (69 FR 2182, 2214-15; January 14, 2004), Subpart N is intended to be 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." In addition, "the [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." At this time, before the first ITAAC hearing commences, 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 written testimony and statements of position.

~~In addition, Subpart N has never been tested in practice. Because an ITAAC hearing is a first-of-a-kind endeavor, the NRC does not believe that the stability and predictability of the process would be promoted by using a never-before-employed hearing format. Furthermore, an ITAAC hearing would not necessarily be completed more quickly with a Subpart N approach. The model milestones in 10 CFR Part 2, Appendix B, Paragraph 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. However, the two Subpart L-type hearing tracks described in this notice take less time than this. While Subpart N might be modified to take less time, such modifications would likely make Subpart N unworkable. As discussed in Section 5.E of the Comment Summary Report, NEI suggested specific modifications to make a Subpart N-type track shorter, but these modifications appear to make the hearing track unworkable because the presiding officer would be expected to conduct the questioning of witnesses without pre-hearing filings providing (or summarizing) the parties' positions and testimony. While additional processes could be added to remedy this defect, such additional processes would lengthen the hearing track such that it would not enjoy a schedule advantage over the Subpart L-type hearing tracks described in this notice.~~

The NRC also did not adopt a legislative hearing track because, as the NRC has previously determined and as described in Section 5.E of the Comment Summary Report, legislative hearings are well suited to the development of "legislative facts," i.e., general facts relating to questions of policy and discretion, and are not well suited to resolving either legal

issues or disputes of fact relating to the occurrence of a past event. 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. ~~The Commission also 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.~~

~~Finally, as discussed in Section III.K of this notice and in Section 5.F of the Comment Summary Report, the NRC has not identified at this time a practical approach for invoking the APA exception in 5 U.S.C. § 554(a)(3) to avoid holding an ITAAC hearing.~~ Nonetheless, the Commission will continue to look for ways to enhance the ITAAC hearing process going forward and will examine whether these, or other approaches, could result in an improved process after conducting the first ITAAC hearings.

VI. Final General ITAAC Hearing Procedures.

Employing the general approach described in the previous section, the NRC has developed four templates with procedures for the conduct of an ITAAC hearing. These templates were provided with the proposed procedures in draft form for comment, and have been revised to reflect changes to the proposed procedures that are described in Section III of this notice. The first template, Final Template A, "Notice of Intended Operation and Associated Orders" (ADAMS Accession No. ML14343A901), includes the notice of intended operation, which informs members of the public of their opportunity to file a hearing request, includes an order imposing procedures for requesting access to SUNSI and SGI for the purposes of

contention formulation (SUNSI-SGI Access Order),[19] and includes an order imposing additional procedures specifically pertaining to an ITAAC hearing.

The second, third, and fourth templates (Templates B, C, and D) are for Commission orders imposing procedures after the Commission has made a determination on the hearing request. Specifically, the second template, Final Template B "Procedures for Hearings Involving Testimony" (ADAMS Accession No. ML14343A905), includes procedures for the conduct of a hearing involving testimony. The third template, Final Template C "Procedures for Hearings Not Involving Testimony" (ADAMS Accession No. ML14343A910), includes procedures for resolving legal contentions. The fourth template, Final Template D "Procedures for Resolving Claims of Incompleteness" (ADAMS Accession No. ML14343A913), includes procedures for resolving valid claims of incompleteness.

One issue not addressed by the templates is the potential for delay caused by the need to undergo a background check (including a criminal history records check) for access to SGI. This background check can take several months, and delay could occur if the persons seeking access to SGI are not already cleared for access and do not seek clearance until the notice of intended operation is issued. However, the "Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information" (SUNSI-SGI Access Procedures) (February 29, 2008) (ADAMS Accession No. ML080380626) provide 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. Therefore, to avoid the potential for delays from background checks, the NRC contemplates that a

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[19] SUNSI-SGI Access Orders accompany hearing notices in cases where the NRC believes that a potential party may deem it necessary to obtain access to SUNSI or SGI for the purposes of meeting Commission requirements for intervention. *See* 10 CFR 2.307(c). Given the range of matters covered by the ITAAC, it is appropriate to issue a SUNSI-SGI Access Order with the notice of intended operation.

plant-specific *Federal Register* notice announcing a pre-clearance process would be published 420 days before scheduled fuel load, based on the licensee's estimate at the time, which would be at least 135 days prior to the expected publication of the notice of intended operation for that plant.

This pre-clearance notice will state that the required background check forms and fee should be submitted within 20 days of the notice to allow enough time for the completion of the background check prior to the publication of the notice of intended operation. This "pre-clearance notice" will also inform potential parties that the NRC will not delay its actions in completing the hearing or making the 52.103(g) finding because of delays from background checks for persons seeking access to SGI. In other words, members of the public will have to take the proceeding as they find it onceif they ultimately obtain access to SGI for contention formulation. This is necessitated by the plain language of the AEA, which directs the Commission to complete the hearing to the maximum possible extent by scheduled fuel load. The pre-clearance process is designed to prevent the SGI background-check process from becoming a barrier to timely public participation in the hearing process. As stated in Attachment 1 to the SUNSI–SGI Access Procedures (p. 11), "given the strict timelines for submission of and rulings on the admissibility of contentions (including security-related contentions) . . . potential parties should not expect additional flexibility in those established time periods if they decide not to exercise the pre-clearance option."

In the following subsections, this notice provides a broad overview of the procedures and addresses certain significant procedures described in the templates. Certain procedures of lesser significance, and the rationales therefor, are described solely in the templates.

A. Notice of Intended Operation.

The *Federal Register* notice of intended operation, the contents of which are governed by 10 CFR 2.105, will 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 in the COL. Among other things, the notice of intended operation (1) will specifically describe how the hearing request and answers thereto may be filed, (2) will identify the standing, contention admissibility, and other requirements applicable to the hearing request and answers thereto, and (3) will identify where information that is potentially relevant to a hearing request may be obtained. The notice of intended operation also will establish a milestone of 30 days after the answers for a Commission ruling on the hearing request. This milestone is consistent with the statutory directive that rulings on hearing requests be made expeditiously and is necessary to allow sufficient time for the hearing if the request is granted. In addition, the notice of intended operation will be accompanied by a SUNSI-SGI Access Order, and an order imposing additional procedures specifically pertaining to an ITAAC hearing (Additional Procedures Order). The following subsections describe the significant procedures included in the notice of intended operation template.

1. *Prima Facie Showing.*

To obtain a hearing on whether the facility as constructed complies, or upon completion will comply, with the acceptance criteria in the combined license, AEA § 189a.(1)(B)(ii) provides that a petitioner's request for hearing shall show, *prima facie*, 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. This requirement is implemented in 10 CFR 2.309(f)(1)(vii), which requires this *prima facie* showing as part of the contention admissibility standards. Without meeting this requirement, the contention cannot be admitted and the hearing request cannot be granted.

In making this *prima facie* showing, the Additional Procedures Order will state that any declaration of an eyewitness or expert witness offered in support of contention admissibility needs to be signed by the eyewitness or expert witness in accordance with 10 CFR 2.304(d). If

declarations are not signed, their content will be considered, but they will not be accorded the weight of an eyewitness or an expert witness, as applicable, with respect to satisfying the *prima facie* showing required by 10 CFR 2.309(f)(1)(vii). The purpose of this provision is to ensure that a position that is purportedly supported by an expert witness or an eyewitness is actually supported by that witness.

2. *Claims of Incompleteness.*

While a *prima facie* showing is required before a contention can be admitted and a hearing request granted, 10 CFR 2.309(f)(1)(vii) provides a process for petitioners to claim that the licensee's 10 CFR 52.99(c) report is incomplete and that this incompleteness prevents the petitioner from making the necessary *prima facie* showing. The petitioner must identify the specific portion of the licensee's 10 CFR 52.99(c) report that is incomplete and explain why this deficiency prevents the petitioner from making the necessary *prima facie* showing.[20] Final Template A includes more detail on the standards for claims of incompleteness. If the Commission determines that the claim of incompleteness is valid, then it will issue an order, described later in this notice, requiring the licensee to provide the additional information and providing a process for the petitioner to file a contention based on the additional information. If the petitioner files an admissible contention thereafter, and all other hearing request requirements have been met, then the hearing request will be granted.

Before filing a claim of incompleteness, the petitioner is required to consult with the licensee regarding access to the purportedly missing information. Consultation may obviate the need for petitioners to file, or the Commission to rule on, claims of incompleteness. Therefore, consultation could shorten the hearing schedule and conserve participants' and the

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[20] For claims of incompleteness, the "incompleteness" refers to a lack of required information in a licensee's ITAAC notification, not to whether the ITAAC has yet to be completed. Thus, a valid claim of incompleteness with respect to an uncompleted ITAAC notification must identify, among other things, an insufficient description in the notification of how the licensee will successfully complete the ITAAC.

Commission's resources. The NRC has also imposed procedures addressing the possibility that a petitioner will seek SUNSI or SGI from the licensee. Additional discussion of the consultation and the SUNSI-SGI access provisions is in Section III.D of this notice and Sections 4.E and 4.I of the Comment Summary Report.

3. *Interim Operation.*

As stated earlier, the AEA requires the Commission to determine, after considering the petitioner's *prima facie* showing and answers thereto, whether there is reasonable assurance of adequate protection of the public health and safety during a period of interim operation while the hearing is being completed. The Commission's adequate protection determination for interim operation is not to be based on a merits determination with respect to the petitioner's *prima facie* showing, including any 10 CFR 52.103(g) finding by the NRC staff. A statement to this effect will be included in any Commission adequate protection determination.

Because the adequate protection determination for interim operation is based on the participants' initial filings, the notice of intended operation will specifically request information from the petitioners, the licensee, and the NRC staff regarding the time period and modes of operation during which the adequate protection concern arises and any mitigation measures proposed by the licensee. The notice of intended operation will also inform the petitioners, the NRC staff, and the licensee that, ordinarily, their initial filings will be their only opportunity to address adequate protection during interim operation.

Because the Commission's interim operation determination is a technical finding, a proponent's views regarding adequate protection during interim operation must be supported with alleged facts or expert opinion, including references to the specific sources and documents on which the proponent relies. Any expert witness or eyewitness declarations, including a statement of the qualifications and experience of the expert, must be signed in accordance with 10 CFR 2.304(d). The probative value that the NRC accords to a proponent's position on

adequate protection during interim operation will depend on the level and specificity of support provided by the proponent, including the qualifications and experience of each expert.

If the Commission grants the hearing request, it may determine that additional briefing is necessary to support an adequate protection determination. If the Commission makes this determination, then it will issue a briefing order concurrently with the granting of the hearing request. In addition, if mitigation measures are proposed by the licensee in its answer to the hearing request, then the Commission will issue a briefing order allowing the NRC staff and the petitioners an opportunity to address adequate protection during interim operation in light of the mitigation measures proposed by the licensee in its answer.[21]

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. With respect to the relationship between the timing of the NRC staff's 52.103(g) finding and the Commission's adequate protection determination, the NRC believes that the adequate protection determination should precede the 52.103(g) finding because the 40-year terms of the already-issued COLs commence when the 52.103(g) finding is made and because certain regulatory and license requirements related to operation are triggered by the 52.103(g) finding. Concurrent with the 52.103(g) finding, the NRC staff could issue an order that would allow interim operation and include any terms and conditions on interim operation that are imposed by the Commission as part of its adequate protection determination. In addition, because the NRC staff intends to inform the Commission that the NRC staff is prepared to make the 52.103(g)

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[21] Because an interim operation determination is necessary only if contentions are admitted, it makes sense to have additional briefing on licensee-proposed mitigation measures only after a decision on the hearing request. However, as explained later, a different process applies to contentions submitted after the hearing request is granted because of the greater need for an expedited decision on interim operation.

finding prior to it actually making the finding, the Commission could make the adequate protection determination after this NRC staff notification but before the 52.103(g) finding.

If the Commission determines that there is adequate protection during the period of interim operation, a request to stay the effectiveness of this decision will not be entertained. The interim operation provision serves the purpose of a stay provision because it is the Congressionally-mandated process for determining whether the 52.103(g) finding that the acceptance criteria are met will be given immediate effect. The Commission's decision on interim operation becomes final agency action once the NRC staff makes the 52.103(g) finding and issues an order allowing interim operation.

To provide guidance on the relationship between the interim operation provision and the 10 CFR 52.103(g) finding, the Commission is describing when interim operation might be allowed and when the 10 CFR 52.103(g) finding might be made in the following scenarios. These scenarios all assume that the NRC staff has been able to determine by scheduled fuel load that all acceptance criteria are met and that any initial decision after hearing has found conformance with the acceptance criteria.

(1) If the initial decision after the hearing is issued before scheduled fuel load, then there will no interim operation by definition, i.e., interim operation is defined as operation pending the completion of the hearing. The making of the 10 CFR 52.103(g) finding after the initial decision will be governed by 10 CFR 2.340(j), as applicable.

(2) If the initial decision is not issued before scheduled fuel load, then interim operation will be allowed if the NRC staff has made the 10 CFR 52.103(g) finding and the Commission has made a positive adequate protection determination for interim operation for all admitted contentions. Interim operation will be allowed in this circumstance notwithstanding the pendency of any pleading, including a stay request.

(3) If the initial decision is not issued before scheduled fuel load, and the Commission has not made a positive adequate protection determination for interim operation for all admitted

contentions, then the NRC staff will wait to issue the 10 CFR 52.103(g) finding until the earlier of (1) the issuance of the initial decision after the hearing, or (2) the Commission's issuance of a positive adequate protection determination for interim operation on all admitted contentions. If the Commission has made a negative interim operation determination for one or more contentions, then the NRC staff will wait to issue the 10 CFR 52.103(g) until after the completion of the hearing on those contentions. There does not appear to be any benefit from making the 10 CFR 52.103(g) finding during the pendency of the hearing without a positive adequate protection determination for all admitted contentions because the 10 CFR 52.103(g) finding could not be given immediate effect with respect to allowing operation. In addition, a number of regulatory and license provisions pertaining to operation, including the 40-year term of the license and the implementation of technical specifications and other operational programs, are triggered by the 10 CFR 52.103(g) finding. Because the plant would not be able to operate in such a scenario, it would not make sense to trigger these other operation-related requirements.

(4) If there are no admitted contentions, the NRC staff can make the 10 CFR 52.103(g) finding notwithstanding the pendency of any pleading, including appeals, motions to reopen, stay requests, or proposed new or amended contentions filed after the deadline. As a general matter, the mere filing of a pleading does not serve to stay any action. In addition, the structure of the COL provisions in AEA §§ 185b. and 189a.(1)(B) indicates that operation is automatically stayed only if the Commission has granted a hearing request but the hearing on the contention has not been completed. An automatic stay in this circumstance makes sense because the Commission will have determined that the petitioner made the required *prima facie* showing, i.e., a robust showing of, among other things, a significant safety problem at some point during reactor operation. The interim operation provision allows operation during the pendency of the hearing if the Commission determines that this possible harm does not apply, or can be mitigated, during the period of interim operation that is contemplated. In this regard, the interim operation provision is a special type of stay provision specially crafted for ITAAC hearings and

focused on the issue of irreparable harm. However, in the absence of an admitted contention (i.e., in the absence of a Commission determination that the petitioner has made the required *prima facie* showing), there has been no Commission determination of a robust showing of possible harm during operation, and the interim operation provision does not come into effect.[22] Therefore, in the absence of an admitted contention and unless directed otherwise by the Commission, the 10 CFR 52.103(g) finding can be made and will be given effect.

~~Nevertheless, the Commission recognizes that since the interim operation provision does not apply, it makes sense for the general stay provisions in the ITAAC hearing procedures to apply, although the irreparable harm factor should focus on reasonable assurance of adequate protection during operation to be consistent with the intent underlying the interim operation provision. Thus, if there is no admitted contention and a petitioner believes that some aspect of operation must be stayed until some action is taken in the hearing process, then that petitioner can file a stay request with the Commission in accordance with the stay provisions set forth in the case-specific procedural order.~~

4. *Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness After the Original Deadline.*

The notice of intended operation includes procedures governing hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed after the original deadline because such filings might be made between the deadline for hearing requests and a Commission decision on hearing requests. Filings after the initial deadline must show good cause as defined by 10 CFR 2.309(c), which includes the § 2.309(c)(1)(iii) requirement that the filing has been submitted in a timely fashion based on the availability of new information. In other proceedings, licensing boards have typically found that § 2.309(c)(1)(iii) is satisfied if the filing is made within 30 days of the

[22] As is stated in the AEA, the interim operation provision only comes into force "[i]f the [hearing] request is granted." AEA § 189a.(1)(B)(iii).

availability of the information upon which the filing is based, and § 2.309(i)(1) allows 25 days to answer the filing. The NRC believes that timeliness expectations should be clearly stated in the notice of intended operation, but is shortening these time periods in the interest of expediting the proceeding.

As discussed in Section 4.J of the Comment Summary Report, the NRC has decided that the deadline for hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline will be 20 days after the event giving rise to the need for the filing. In the context of claims of incompleteness, this 20-day period will be triggered by the date that the ITAAC notification (or a redacted version thereof) becomes available to the public. Answers to these filings will be due 14 days thereafter. Notwithstanding these deadlines, the NRC encourages participants to file as soon as possible before these deadlines if it is possible for them to do so.

The Commission would also need to consider issues associated with interim operation with respect to any grant of a hearing request, intervention petition, or new or amended contention filed after the original deadline. Therefore, the interim operation provisions described previously will also apply to hearing requests, intervention petitions, or new or amended contentions filed after the original deadline. A claim of incompleteness, however, does not bear on interim operation because interim operation is intended to address whether operation shall be allowed notwithstanding the petitioner's *prima facie* showing, while a claim of incompleteness is premised on the petitioner's inability to make a *prima facie* showing. Interim operation would be addressed after any incompleteness was cured if the petitioner files a contention on that topic.

In its 2008 Policy Statement (73 FR at 20973), the Commission stated that to lend predictability to the ITAAC compliance process, it would be responsible for three decisions related to ITAAC hearings: (1) the decision on whether to grant the hearing request, (2) the adequate protection determination for interim operation, and (3) the designation of the ITAAC

hearing procedures. Accordingly, the NRC believes that it would be consistent with this policy choice for the Commission to rule on all hearing requests, intervention petitions, and motions for leave to file new contentions or claims of incompleteness that are filed after the original deadline. If the Commission grants the hearing request, intervention petition, or motion for leave to file new contentions, the Commission will designate the hearing procedures and schedule for the newly admitted contentions and would determine whether there will be adequate protection during the period of interim operation with respect to the newly admitted contentions. If the Commission determines that a new or amended claim of incompleteness demonstrates a need for additional information in accordance with 10 CFR 2.309(f)(1)(vii), the Commission would designate separate procedures for resolving the claim.

For motions for leave to file amended contentions, a Commission ruling may not be necessary to lend predictability to the hearing process because the Commission will have provided direction on the admissibility of the relevant issues when it ruled on the original contention. Thus, the Commission will retain the option of delegating rulings on amended contentions to an ASLB or a single legal judge (assisted as appropriate by technical advisors). If the Commission rules on the admissibility of the amended contention, the Commission may revise the existing hearing schedule as appropriate. If the Commission delegates a contention admissibility ruling and the presiding officer admits the amended contention, then the Commission will still make the adequate protection determination for interim operation. In addition, the Commission-imposed procedures governing the adjudication of the original contention will apply to the amended contention if admitted by the presiding officer. Furthermore, the deadline for an initial decision on the amended contention (which is a strict deadline) will remain the same as the deadline for an initial decision on the original contention.[23]

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[23] The presiding officer should strive to meet the strict deadline, but if unavoidable and extreme circumstances require an extension of the strict deadline, then the presiding officer may extend that deadline in accordance with the procedures set forth in the~~is~~ case-specific procedural order.

Because the Commission would be ruling on (or delegating a ruling on) all hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness that are filed after the original deadline, all such filings after the original deadline would be filed with the Commission. The Commission contemplates that a ruling would be issued within 30 days of the filing of answers.

Finally, the NRC will not apply the 10 CFR 2.326 reopening standards to hearing requests, intervention petitions, and motions for leave to file new or amended contentions after the original deadline. The purposes served by the reopening provisions—to ensure an orderly and timely disposition of the hearing—would be addressed by the existing requirements for hearing requests, intervention petitions, and motions for leave to file new or amended contentions after the original deadline. Specifically, timeliness concerns are addressed by the good cause requirement in 10 CFR 2.309(c) and concerns regarding newly raised issues being significant and substantiated are addressed by the *prima facie* showing requirement in 10 CFR 2.309(f)(1)(vii). This exception does not constitute a relaxation of the reopening standards; rather, the exception simply eliminates unnecessary duplication of effort. As a consequence, the exception does not apply to other efforts to reopen the record, e.g., motions to introduce evidence on existing contentions after the record has closed or the filing of claims of incompleteness after the record has closed.

5. *SUNSI-SGI Access Order.*

The SUNSI-SGI Access Order included with the notice of intended operation is based on the template for the SUNSI-SGI Access Order that is issued in other proceedings, with the following modifications:

- To expedite the proceeding, initial requests for access to SUNSI or SGI must be made electronically by email, unless use of email is impractical, in which case delivery of a paper document must be made by overnight mail. All other filings in the proceeding must be made through the E-filing system with certain exceptions described later in this notice.

- To expedite the proceeding, the expectation for NRC staff processing of documents and the filing of protective orders and non-disclosure agreements has been reduced from 20 days after a determination that access should be granted to 10 days.

- As with SUNSI-SGI Access Orders issued in other proceedings, requests for access to SUNSI or SGI must be submitted within 10 days of the publication of the *Federal Register* notice, and requests submitted later than this period will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier. For the purposes of the SUNSI-SGI Access Order issued with the notice of intended operation, the showing of good cause has been defined as follows: the requestor must demonstrate that its request for access to SUNSI or SGI has been filed by the later of (a) 10 days from the date that the existence of the SUNSI or SGI document becomes public information, or (b) 10 days from the availability of new information giving rise to the need for the SUNSI or SGI to formulate the contention.

- Consistent with the time period described previously for new or amended contentions after the deadline, the SUNSI-SGI Access Order provides that any contentions based on the requested SUNSI or SGI must be filed no later than 20 days after the requestor receives~~is granted~~ access to that information, except that such contentions may be filed with the initial hearing request if more than 20 days remain between ~~the granting of access to~~ the date access to the information was received and the deadline for the hearing request.

- The NRC has reduced the time period for challenges to NRC staff determinations on access to SGI (and responses to such challenges) to expedite the proceeding and to be consistent with the time period for interlocutory appeals on access to SUNSI and SGI.

- Challenges to NRC staff determinations on SUNSI-SGI access under the SUNSI-SGI Access Order are to be filed with the Chief Administrative Judge, who will assign a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge. The NRC has

decided that a single legal judge should preside over such challenges because an administrative judge is particularly suited to expeditiously resolving questions of this kind, and a single legal judge may be able to issue a decision on a more expedited basis. If the challenge relates to an adverse determination by the NRC's Office of Administration on trustworthiness and reliability for access to SGI, then consistent with 10 CFR 2.336(f)(1)(iv), neither the single legal judge chosen to rule on such challenges nor any technical advisors supporting a ruling on the challenge can serve as the presiding officer for the proceeding.

- In cases where there is a dispute over access to SUNSI or SGI that was resolved by a presiding officer, the presiding officer for the issuance of protective orders and other related matters will be the same as the presiding officer that heard the dispute over access. In cases where there is no access dispute but a presiding officer is needed for protective orders or other related matters, the Chief Administrative Judge will choose a presiding officer for such matters.

6. *Filing of Documents and Time Computation.*

To support the expedited nature of this proceeding, the provisions in 10 CFR 2.302 and 10 CFR 2.305 for the filing and service of documents are being modified such that, for requests to file documents other than through the E-Filing system, first-class mail will not be one of the allowed alternative filing methods. The possible alternatives will be limited to transmission either by fax, email, or overnight mail to ensure expedited delivery. Use of overnight mail will only be allowed if fax or email is impractical. In addition, for documents that are too large for the E-Filing system but could be filed through the E-Filing system if separated into smaller files, the filer must segment the document and file the segments separately. In a related modification, the time computation provisions in 10 CFR 2.306(b)(1) through 2.306(b)(4), which allow additional time for responses to filings made by mail delivery, do not apply. Because overnight delivery will result in only minimal delay, it is not necessary to extend the time for a response.

7. *Motions.*

To accommodate the expedited timeline for the hearing, the time period for filing and responding to motions must be shortened from the time periods set forth in 10 CFR Part 2, Subpart C. Therefore, all motions, except for motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline, shall 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.

Motions for extension of time will be allowed, but good cause must be shown for the requested extension of time based on an event occurring before the deadline. To meet the statutory mandate for the timely completion of the hearing, deadlines must be adhered to strictly and only exceptional circumstances should give rise to delay. Therefore, in determining whether there is good cause for an extension, the factors in 10 CFR 2.334 will be considered, but "good cause" will be interpreted strictly, and a showing of "unavoidable and extreme circumstances" will be required for any extension, no matter how minor.

Motions for extension of time shall be filed as soon as possible, but no later than 3 days before the deadline, with one limited exception. If the petitioner is unable to file an extension request by 3 days before the deadline, then the petitioner must (1) file its request as soon as possible thereafter, (2) demonstrate that unavoidable and extreme circumstances prevented the petitioner from filing its extension request by 3 days before the deadline, and (3) demonstrate that the petitioner filed its extension request as soon as possible thereafter.[24]

Motions for reconsideration will only be entertained for a presiding officer's initial decision and Commission decisions on appeal of a presiding officer's initial decision. These are

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[24] Consistent with practice under 10 CFR 2.307, a motion for extension of time might be filed shortly after a deadline has passed, e.g., an unanticipated event on the filing deadline prevented the participant from filing. *See* "Amendments to Adjudicatory Process Rules and Related Requirements" (77 FR 46562, 46571; August 3, 2012).

the most important decisions in the proceeding, and reconsideration of these decisions does not prevent them from taking effect. ~~Also, since the hearing will have been concluded, the parties should have the resources to file and respond to motions for reconsideration.~~ Reconsideration is not permitted~~prohibited~~ in other circumstances because (1) reconsideration is unlikely to be necessary for other decisions, which are interlocutory in nature, (2) the resources necessary to prepare, review, and rule on requests for reconsideration take time away from other hearing-related tasks, (3) interlocutory rulings that have a material effect on the ultimate outcome of the proceeding can be appealed after the hearing decision is issued, and (4) the appellate process will not cause undue delay given the expedited nature of the proceeding.

Nonetheless, the NRC acknowledges that given the first-of-a-kind nature of ITAAC hearings (and their tight timelines), there may be a need to correct misunderstandings or errors in a presiding officer's decision. To the extent that a presiding officer's decision (here, the ASLB or a single legal judge) is based on a simple misunderstanding or a clear and material error (e.g., a conflict between the scheduling order and the Commission's order imposing procedures for the hearing), the parties could attempt to more informally raise the issue with the presiding officer by requesting a conference call on the matter.[25] Such requests should be made by email to the presiding officer's law clerk with the other parties' representatives copied on it. If the presiding officer decides that no conference call is necessary, then the parties' and the presiding officer's resources will not have been expended. If a conference call is held, the resource expenditure should be minimal and any error or misunderstanding more quickly rectified than through a formal request for reconsideration.

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[25] This possibility is not available in cases where the Commission, itself, is serving as the presiding officer because such an informal process would be impractical since Commission action is subject to formal processes (some of which are required by law). In addition, the potential need for such an informal process is less likely to arise in the portions of the ITAAC hearing process over which the Commission will preside.

Finally, to prevent motions for clarification from becoming *de facto* motions for reconsideration, only motions for clarification based on an ambiguity in a presiding officer order will be permitted. In addition, a motion for clarification must explain the basis for the perceived ambiguity and may offer possible interpretations of the purportedly ambiguous language.

8. *Notifications Regarding Relevant New Developments in the Proceeding.*

Section 189a.(1)(B)(i)-(ii) of the AEA and 10 CFR 2.309(f)(1)(vii) and 2.340(c) require contentions to be submitted, and permit a hearing to go forward, on the predictive question of whether one or more of the acceptance criteria in the combined license *will* not be met. Additionally, a licensee might choose to re-perform an inspection, test, or analysis as part of ITAAC maintenance or to dispute a contention,[26] or events subsequent to the performance of an ITAAC might be relevant to the continued validity of the earlier ITAAC performance. As a consequence, it is possible for the factual predicate of a contention to change over the course of the proceeding, thus affecting the contention or the hearing schedule. Given this and as directed by the Commission in *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 470 (2006), the parties have a continuing obligation to notify the other parties and the presiding officer of relevant new developments in the proceeding. In addition, to ensure that the parties and the Commission stay fully informed of the status of challenged ITAAC as a hearing request is being considered, any answers to the hearing request from the NRC staff and the licensee must discuss any changes in the status of challenged ITAAC.

After answers are filed, the parties must notify the Commission and the other parties in a timely fashion as to any changes in the status of a challenged ITAAC up to the time that the presiding officer rules on the admissibility of the contention. Such a notification includes

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[26] The legislative history of the EPAct suggests that re-performing the ITAAC would be a simpler way to resolve disputes involving competing eyewitness testimony. 138 Cong. Rec. S1143-44 (February 6, 1992) (statement of Sen. Johnston). In addition, ITAAC re-performance might occur as part of the licensee's maintenance of the ITAAC, and might also result in an ITAAC post-closure notification.

information related to re-performance of an ITAAC that might bear on the proposed contentions. In addition, after answers are filed, the licensee must notify the Commission and the parties of the submission of any ITAAC closure notification or ITAAC post-closure notification for a challenged ITAAC. This notice must be filed within one day of the ITAAC closure notification or ITAAC post-closure notification being submitted to the NRC.

9. *Stays.*

The stay provisions of 10 CFR 2.342 and 2.1213 apply to this proceeding, but in the interests of expediting the proceeding, (1) the deadline in § 2.342 for filing either a stay application or an answer to a stay application is shortened to 7 days, and (2) the deadline in § 2.1213(c) to file an answer supporting or opposing a stay application is likewise reduced to 7 days. In addition, as explained previously, a request to stay the effectiveness of the Commission's decision on interim operation will not be entertained.

10. *Interlocutory Review.*

The NRC has limited interlocutory review to decisions on access to SUNSI or SGI because interlocutory review of other decisions would be unnecessary and unproductive given the expedited nature of the proceeding. Because of the abbreviated ITAAC hearing schedule, appeal rights will quickly accrue, and before the initial decision, the parties' resources should be dedicated to completing the hearing. The NRC is allowing interlocutory review for decisions granting access to SUNSI or SGI because a post-hearing appeal opportunity will not cure the harm from a pre-hearing grant of access to sensitive information. The NRC is also providing a right to interlocutory review for decisions denying access to SUNSI or SGI because the NRC believes that those seeking access to SUNSI or SGI should have a reciprocal appeal opportunity and because it is important to quickly resolve disputes over access to such information given the potential effect that an erroneous denial of access might have on the schedule of the proceeding. However, ~~because a denial of access to information does not represent irreparable harm,~~ the Commission does not expect~~s that presiding officers will not~~

~~delay any aspect of the proceeding because an interlocutory~~ appeals ~~is filed~~ seeking to overturn a denial of access to SUNSI or SGI to delay any aspect of the proceeding unless the requestor can show irreparable harm.

The interlocutory appeal provision in the procedures is modeled after the relevant provisions of 10 CFR 2.311, but to expedite the proceeding and given the limited nature of the disputes subject to interlocutory appeal, such an appeal must be filed within 7 days of the order being appealed, and any briefs in opposition will be due within 7 days of the appeal. Consistent with the relevant provisions of 10 CFR 2.311, a presiding officer order denying a request for access to SUNSI or SGI may be appealed by the requestor only on the question of whether the request should have been granted. A presiding officer order granting a request for access to SUNSI or SGI may be appealed only on the question of whether the request should have been denied in whole or in part. However, such a question with respect to SGI may be appealed only by the NRC staff, and such a question with respect to SUNSI may be appealed only by the NRC staff or by a party whose interest independent of the proceeding would be harmed by the release of the information.

11. *Licensee Hearing Requests.*

In accordance with 10 CFR 2.105(d)(1), a notice of proposed action must state that, within the time period provided under 10 CFR 2.309(b), the applicant may file a request for a hearing. While this provision literally refers to applicants as opposed to licensees, it makes sense and accords with the spirit of the rule to provide an equivalent opportunity to licensees seeking to operate their plants, which have legal rights associated with possessing a license that must be protected. The situation giving rise to such a hearing request would be a dispute between the licensee and the NRC staff on whether the ITAAC have been successfully completed. The hearing request must be filed within 60 days of publication of the notice of intended operation, except that the licensee may file a hearing request after this deadline if it is filed within 20 days of formal correspondence from the NRC staff communicating its position

that a particular ITAAC has not been successfully completed. If a hearing request is filed by the licensee, the NRC staff may file an answer within 10 days of service of the hearing request.

With respect to the contents of a licensee request for hearing, the *prima facie* showing requirement would not apply because the licensee would be asserting that the acceptance criteria are met rather than asserting that the acceptance criteria have not been, or will not be, met. Licensees requesting a hearing would be challenging an NRC staff determination that the ITAAC has not been successfully completed; this NRC staff determination would be analogous to a *prima facie* showing that the acceptance criteria have not been met. Given this, a licensee requesting a hearing is required to specifically identify the ITAAC whose successful completion is being disputed by the NRC staff, and to identify the specific issues that are being disputed. However, a hearing request by the licensee need not address the contention admissibility standards in 10 CFR 2.309(f). Also, a licensee's hearing request need not address 10 CFR 2.309(d) because the licensee's interest in the proceeding is established by the fact that its authority to operate the facility depends on its compliance with the ITAAC.

The NRC does not believe that separate hearing procedures need to be developed for a hearing requested by a licensee. Such hearing requests should be highly unusual because disputes between the NRC staff and the licensee are normally resolved through other mechanisms~~interactions outside the adjudicatory process~~. Also, many of the hearing procedures described in this notice could likely be adapted, with little change, to serve the purposes of a hearing requested by a licensee.

B. Procedures for Hearings Involving Testimony.

With the exception of procedures for licensee hearing requests, the procedures described previously for inclusion with the notice of intended operation will also be included in the order setting forth the procedures for hearings involving testimony, with the following modifications:

- In the procedures issued with the notice of intended operation, additional briefing on licensee-proposed mitigation measures would occur only after a decision on the hearing request. However, because of the greater need for an expedited decision on interim operation for contentions submitted after the hearing request is granted, a different process is necessary. Therefore, if the licensee's answer addresses proposed mitigation measures to assure adequate protection during interim operation, the NRC staff and the proponent of the hearing request, intervention petition, or motion for leave to file a new or amended contention filed after the original deadline may, within 20 days of the licensee's answer, file a response that addresses only the effect these proposed mitigation measures would have on adequate protection during the period of interim operation.

- The provisions described earlier for motions for reconsideration under 10 CFR 2.323(e) also apply to petitions for reconsideration under 10 CFR 2.345.

- Additional procedures are imposed regarding notifications of relevant new developments related to admitted contentions. Specifically, if the licensee notifies the presiding officer and the parties of an ITAAC closure notification, an ITAAC post-closure notification, or the re-performance of an ITAAC related to an admitted contention, then the notice shall state the effect that the notice has on the proceeding, including the effect of the notice on the evidentiary record, and whether the notice renders moot, or otherwise resolves, the admitted contention. This notice requirement applies as long as there is a contested proceeding in existence on the relevant ITAAC (including any period in which an appeal of an initial decision may be filed or during the consideration of an appeal if an appeal is filed). Within 7 days of the licensee's notice, the other parties shall file an answer providing their views on the effect that the licensee's notice has on the proceeding, including the effect of the notice on the evidentiary record, and whether the notice renders moot, or otherwise resolves, the admitted contention. However, the petitioner is not required in this 7-day time frame to address whether it intends to file a new or amended contention. In the interest of timeliness, the presiding officer may, in its

discretion, take action to determine the notice's effect on the proceeding (e.g., hold a prehearing conference, set an alternate briefing schedule) before the 7-day deadline for answers.

Additional significant procedures that specifically relate to hearings involving witness testimony are as follows.

1. *Schedule and Format for Hearings Involving Witness Testimony.*

As discussed earlier, the NRC is using a Subpart L-type approach for evidentiary hearings that features pre-filed written testimony, an oral hearing, and questioning by the presiding officer rather than by counsel for the parties.[27] Two alternative hearing tracks have been developed, Track 1 and Track 2, with the only difference between these two tracks being whether both pre-filed initial and rebuttal testimony are permitted (Track 1) or whether only pre-filed initial testimony is permitted (Track 2). While Track 2 does not allow written rebuttal, it does allow a form of oral rebuttal in that the parties can propose questions to be asked of their own witnesses to respond to the other parties' filings.

After considering comments on which hearing track to use and as discussed in Section 5.D of the Comment Summary Report, the NRC has made the Track 1 procedures the default evidentiary hearing track. Written rebuttal should ensure that the parties have a complete opportunity to respond to new, unexpected issues raised in the other parties' initial testimony. Also, written rebuttal should clarify the evidentiary record and clarify the contested issues prior to the oral hearing, which ought to make the oral hearing shorter and more efficient. Further, written rebuttal should help the presiding officer reach its decision more expeditiously by increasing the likelihood that the topics raised in initial testimony will have been fully addressed before the hearing. Given these advantages, written rebuttal will be included in most cases.

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[27] However, as explained later, there is an opportunity to file motions to conduct cross-examination.

Setting Track 1 as the default hearing track will simplify the process for designating hearing procedures in each proceeding.

The Track 1 schedule should generally accommodate a timely hearing decision for contentions submitted with the initial hearing request. In cases where the Track 1 schedule might not accommodate issuance of the initial decision by scheduled fuel load, e.g., where new contentions after the deadline are admitted, the NRC believes that the benefits of written rebuttal will nevertheless generally outweigh the minor potential time savings from its elimination. Also, even though 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. In any event, the Commission retains the authority to eliminate written rebuttal in individual proceedings. For example, the Commission might eliminate written rebuttal if the contested issues are narrow and simple and the parties' positions in the hearing request and answers are sufficiently established to allow a full response in the parties' initial testimony and statements of position. For this reason, the Track 2 procedures are being retained as an option in the final procedures.

To ensure the completion of the hearing by the statutorily-mandated goal, the Commission will establish a "strict deadline" for the issuance of the initial decision that can only be extended upon a showing that "unavoidable and extreme circumstances" necessitate a delay. The presiding officer has the authority to extend the strict deadline after notifying the Commission of the rationale for its decision, which the presiding officer is expected to make at the earliest practicable opportunity after determining that an extension is necessary. In addition to this strict deadline, the schedule includes two other types of target dates: default deadlines and milestones. "Default deadlines" are requirements to which the parties must conform, but they may be modified by the presiding officer for good cause. Default deadlines are used for the completion of certain tasks soon after the decision on the hearing request that the parties

must begin working toward as soon as the hearing request is granted. Target dates that have not been designated as a "strict deadline" or a "default deadline" are "milestones," which are not requirements, but the presiding officer is expected to adhere to milestones to the best of its ability in an effort to complete the hearing in a timely fashion. The presiding officer may revise the milestones in its discretion, with input from the parties, keeping in mind the strict deadline for the overall proceeding.

The Track 1 and Track 2 schedules are reproduced in Table 1.

Table 1 – Track 1 and Track 2 Schedules

Event	**Target Date**	**Target Date**	**Target Date Type**
	Track 1 (the default)	*Track 2*	
Prehearing Conference	Within 7 days of the grant of the hearing request	Within 7 days of the grant of the hearing request	Milestone
Scheduling Order	Within 3 days of the prehearing conference	Within 3 days of the prehearing conference	Milestone
Document Disclosures; Identification of Witnesses; and NRC Staff Informs the Presiding Officer and Parties of Whether the Staff Will Participate as a Party	15 days after the grant of the hearing request	15 days after the grant of the hearing request	Default Deadline
Pre-filed Initial Testimony	30 (+/- 5) days[28] after the grant of the hearing request	30 (+/- 5) days after the grant of the hearing request	Milestone
Pre-filed Rebuttal Testimony	14 days after initial testimony	No rebuttal	Milestone
Proposed Questions; Motions for Cross-Examination/ Cross-Examination Plans	7 days after rebuttal testimony	7 days after initial testimony	Milestone
Answers to Motions for Cross-Examination	5 days after the motion for cross-examination OR oral answer to motion presented just prior to the beginning of the hearing	5 days after the motion for cross-examination OR oral answer to motion presented just prior to the beginning of the hearing	Milestone
Oral Hearing	15 days after rebuttal testimony	15 days after initial testimony	Milestone
Joint Transcript Corrections	7 days after the hearing	7 days after the hearing	Milestone
Findings (if needed)	15 days after the hearing or such other time as the presiding officer directs	15 days after the hearing or such other time as the presiding officer directs	Milestone
Initial Decision	30 days after the hearing	30 days after the hearing	Strict Deadline

[28] The Commission may add or subtract up to 5 days depending on the number and complexity of contested issues.

The Track 1 schedule takes 89 (+/- 5) days (including one day for the oral hearing), and the Track 2 schedule takes 75 (+/- 5) days (including one day for the oral hearing). The Commission may add or subtract up to 5 days for initial testimony depending on the number and complexity of contested issues. As stated earlier, answers to a hearing request would be due 125 days before scheduled fuel load if the notice of intended operation is published 210 days before scheduled fuel load, and the milestone for rulings on hearing requests is 30 days from the filing of answers. Thus, using the default hearing track (Track 1) for a contention admitted with a hearing request filed by the original deadline, an initial decision can ordinarily be expected 6 (+/- 5) days before scheduled fuel load. The Commission retains the flexibility to modify these dates, as well as the other procedures set forth in this notice, on a case-specific basis.

Both the Track 1 and Track 2 hearing schedules are aggressive, but this is necessary to satisfy the statutorily-mandated goal for timely completion of the hearing. The NRC believes that these schedules are feasible and will allow the presiding officer and the parties a fair opportunity to develop a sound record for decision. However, all parties must schedule their resources such that they will be able to provide a high, sustained effort throughout the hearing process. The parties are obligated to ensure that their representatives and witnesses are available during this period to perform all of their hearing-related tasks on time. The competing obligations of the participants' representatives or witnesses will not be considered good cause for any delays in the schedule.

The specific provisions governing the evidentiary hearing tasks are set forth in detail in Final Template B. Except for the mandatory disclosure requirements, these provisions are drawn from 10 CFR Part 2, Subpart L, subject to the schedule set forth previously and the following significant modifications or additional features:

- The prehearing conference is expected to occur, and the scheduling order is expected to be issued, soon after the hearing request is granted. To meet this schedule, the NRC envisions

that those who might potentially serve as the presiding officer will be designated well before the decision on the hearing request so that these persons would be familiar with the ITAAC hearing procedures, the record, and the disputed issues and would be able to immediately commence work on evidentiary hearing activities once the hearing request is granted.

- Other than a joint motion to dismiss supported by all of the parties, motions to dismiss and motions for summary disposition are not permitted~~prohibited~~. The time frame for the hearing is already limited, and the resources necessary to prepare, review, and rule on a motion to dismiss or motion for summary disposition would take time away from preparing for the hearing and likely would not outweigh the potential for error should it later be decided on appeal that a hearing was warranted.

- Written statements of position may be filed in the form of proposed findings of fact and conclusions of law. Doing so would allow the parties to draft their post-hearing findings of fact and conclusions of law by updating their pre-hearing filings. Also, if the parties choose this option, the presiding officer should consider whether it might be appropriate to dispense with the filing of written findings of fact and conclusions of law after the hearing.

- Written motions *in limine* or motions to strike[29] will not be permitted because such motions would lead to delay without compensating benefit. The parties' evidentiary submissions are expected to be narrowly focused on the discrete technical issues that would be the subject of the admitted contentions, and the presiding officer is capable of judging the relevance and persuasiveness of the arguments, testimony, and evidence without excluding them from the record. In addition, the parties' rights will be protected because they will have an opportunity to address the relevance or admissibility of arguments, testimony, or evidence in their pre- and post-hearing filings, or at the hearing.

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[29] Collectively, written motions *in limine* and motions to strike are written motions to exclude another party's arguments, testimony, or evidence.

- Consistent with 10 CFR 2.1204(b)(3), cross-examination by the parties shall be allowed only if it is necessary to ensure the development of an adequate record for decision. Cross-examination directed at persons providing eyewitness testimony will be allowed upon request. The expectation is that the presiding officer will closely manage and control cross-examination. The presiding officer need not, and should not, allow cross-examination to continue beyond the point at which it is useful. Similarly, in the exercise of its discretion, the presiding officer need not ask all (or any) questions that the parties request the presiding officer to consider propounding to the witnesses.

- Written answers to motions for cross-examination would be due 5 days after the filing of the motion, or, alternatively, if travel arrangements for the hearing interfere with the ability of the parties and the presiding officer to file or receive documents, an answer may be delivered orally at the hearing location just prior to the start of the hearing.[30] At the prehearing conference, the presiding officer and the parties would address whether answers to motions for cross-examination will be in written form or be delivered orally.

- Proposed findings of fact and conclusions of law will be allowed unless the presiding officer dispenses with them for some or all of the hearing issues. Proposed findings of fact and conclusions may aid the presiding officer by summarizing the parties' positions on the issues at hearing and citing to the hearing record, but if proposed findings of fact and conclusions of law are unnecessary for some (or all) issues, the presiding officer may dispense with proposed findings of fact and conclusions of law on these issues to avoid delay.

2. *Mandatory Disclosures/Role of the NRC Staff.*

~~The NRC believes that d~~Discovery should be limited to the mandatory disclosures required by 10 CFR 2.336(a), with certain modifications. The required disclosures, pre-filed

[30] Because cross-examination plans are filed non-publicly, answers to cross-examination motions would only address the public motion, which would likely include less detail. This justifies the shorter deadline for answers and the reasonableness of having answers be delivered orally.

testimony and evidence, and the opportunity to submit proposed questions should provide a sufficient foundation for the parties' positions and the presiding officer's ruling, as they do in other informal NRC adjudications. Any information that might be gained by conducting formal discovery under 10 CFR Part 2, Subpart G, likely would not justify the time and resources necessary to gain that information, particularly considering the limited time frame in which an ITAAC hearing must be conducted. Accordingly, depositions, interrogatories, and other forms of discovery provided under 10 CFR Part 2, Subpart G, will not be permitted. Modifications to the mandatory disclosure requirements of 10 CFR 2.336 are as follows:

- For the sake of simplicity, NRC staff disclosures will be based on the provisions of 10 CFR 2.336(a), as modified for ITAAC hearings, rather than on § 2.336(b). The categories of documents covered by § 2.336(a) and § 2.336(b) are likely to be the same in the ITAAC hearing context, and it is reasonable in an ITAAC hearing to impose a witness identification requirement on the NRC staff with its initial disclosures since initial testimony is due soon after the initial disclosures.

- The witness identification requirement of 10 CFR 2.336(a) is clarified to explicitly include potential witnesses whose *knowledge* provides support for a party's claims or positions in addition to opinion witnesses.

- All parties will provide disclosures of documents relevant to the admitted contentions and the identification of fact and expert witnesses within 15 days of the granting of the hearing request. This short deadline is necessary to support the expedited ITAAC hearing schedule. In addition, it is expected that the parties will be able to produce document disclosures and identify witnesses within 15 days of the granting of the hearing request because of the focused nature of an ITAAC hearing and because the parties will have already compiled much of the information subject to disclosure in order to address the *prima facie* showing requirement for ITAAC hearing requests.

- Parties may agree to exclude certain classes of documents (such as drafts) from the mandatory disclosures. The NRC has no objection to such exclusions if agreed to by the parties, and such exclusions should be discussed at the prehearing conference.

- As a default matter, a party is not required to include a document in a privilege log if (1) the document satisfies the withholding criteria of 10 CFR 2.390(a), and (2) the document is not being withheld on the basis that it is SGI, security-related SUNSI, or proprietary information. SGI, security-related SUNSI, and proprietary information might have some bearing on contested issues and access might be appropriate in some circumstances pursuant to a protective order. However, other types of privileged information are much less likely to have a bearing on contested issues, particularly given the narrow technical nature of ITAAC. Nonetheless, the presiding officer may change the scope of the privilege log requirement for a case-specific reason, and the parties may jointly agree to change the scope of the privilege log requirement.

- Privilege logs will be viewed as sufficient if they specifically identify each document being withheld (including the date, title, and a brief description of the document) and the basis for withholding (e.g., "contains SGI").

- Disclosure updates will be due every 14 days (instead of monthly) to support the expedited ITAAC hearing schedule.

- The Subpart L provisions for NRC staff participation as a party are retained, but the procedures in this notice also provide that the Commission may direct the NRC staff to participate as a party in the Commission order imposing hearing procedures.

In addition to the disclosure provisions of 10 CFR 2.336(a), the provisions of the SUNSI-SGI Access Order will apply to all participants (including parties)[31] subject to the following modifications/clarifications:

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[31] In other proceedings, the provisions of the SUNSI-SGI Access Order apply to petitioners not yet admitted as parties, as explained in *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 461-62 (2010). However, an ITAAC hearing differs from most (continued . . .)

- For a party seeking access to SUNSI or SGI relevant to the *admitted* contentions, the 10 CFR 2.336(a) disclosures process will be used in lieu of the SUNSI-SGI Access Order. As part of the disclosures process, a party seeking SUNSI or SGI related to an admitted contention would first seek access from the party possessing the SUNSI or SGI. Any disputes among the parties over access to SUNSI would be resolved by the presiding officer, and any disputes over access to SGI would be resolved in accordance with 10 CFR 2.336(f), except that the time periods under § 2.336(f) governing challenges to NRC staff determinations on access to SGI have been reduced as explained earlier in this notice.

- In cases where there is a dispute over access to SUNSI or SGI, the presiding officer ruling on the dispute will also be the presiding officer responsible for the issuance of protective orders and other related matters. In cases where there is no access dispute but a presiding officer is needed for protective orders or other related matters, (1) the presiding officer for the admitted contention will be the presiding officer for such matters when the SUNSI or SGI is being provided as part of mandatory disclosures, and (2) the Chief Administrative Judge will choose a presiding officer for such matters when the SUNSI or SGI is being provided under the SUNSI-SGI Access Order.

- The timeliness standard for requests for access is the later of (a) 10 days from the date that the existence of the SUNSI or SGI document becomes public information, or (b) 10 days from the availability of new information giving rise to the need for the SUNSI or SGI to formulate the contention.

- Any contentions based on SUNSI or SGI must be filed within 20 days of access to the SUNSI or SGI.

(. . . continued)
NRC proceedings because there will be no hearing file. The hearing file provides information that may be used to support new contentions. Because the disclosures process in an ITAAC hearing does not allow parties to access SUNSI or SGI for the purpose of formulating contentions unrelated to admitted contentions, it makes sense to apply the provisions of the SUNSI-SGI Access Order to parties.

As for the 10 CFR 2.1203 hearing file that the NRC staff is obligated to produce in Subpart L proceedings, the NRC is not applying this requirement to ITAAC hearings because the more narrowly defined NRC disclosure provisions discussed previously are sufficient to disclose all relevant documents. The scope of an ITAAC hearing is narrowly focused on whether the acceptance criteria in the pre-approved ITAAC are met, unlike other NRC adjudications that involve the entire combined license application. And unlike other NRC adjudicatory proceedings that may involve numerous requests for additional information, responses to requests for additional information, and revisions to the application, an ITAAC hearing will focus on licensee ITAAC notifications and related NRC staff review documents that will be referenced in a centralized location on the NRC Web site. Consequently, it is unlikely in an ITAAC hearing that a member of the public would obtain useful documents through the hearing file required by 10 CFR 2.1203 that it would not obtain through other avenues.

3. *Certified Questions/Referred Rulings.*

The NRC recognizes that there may be unusual cases that merit a certified question or referred ruling from the presiding officer, notwithstanding the potential for delay. Therefore, the provisions regarding certified questions or referred rulings in 10 CFR 2.323(f) and 2.341(f)(1) apply to ITAAC hearings. However, the proceeding would not be stayed by the presiding officer's referred ruling or certified question. Where practicable, the presiding officer should first rule on the matter in question and then seek Commission input in the form of a referred ruling to minimize delays in the proceeding during the pendency of the Commission's review.

C. Procedures for Hearings Not Involving Testimony (Legal Contentions).

Admitted contentions that solely involve legal issues will be resolved based on written legal briefs. The briefing schedule will be determined by the Commission on a case-by-case basis. The procedures retain the Commission's discretion to serve as the presiding officer or to delegate that function. However, the Commission has concluded, as a general matter, that a single legal judge (assisted as appropriate by technical advisors) should be the presiding officer

for hearings on legal contentions when the Commission chooses not to be the presiding officer. When only legal issues are involved, the considerations in favor of employing a panel are less weighty given that most ASLBs in other proceedings include only one legal judge, with the other two judges being technical experts on factual matters. Also, a single judge may be able to reach and issue a decision more quickly than a panel of judges.

The Commission will impose a strict deadline for a decision on the briefs by the presiding officer. If a single legal judge is the presiding officer, then the presiding officer will have the discretion to hold a prehearing conference to discuss the briefing schedule and to discuss whether oral argument is needed, but a decision to hold oral argument will not change the strict deadline for the presiding officer's decision. The additional hearing procedures for legal contentions will be taken from Template B, with the exception of those that involve testimony (or associated filings) and those that involve discovery. Also, if the Commission designates itself as the presiding officer for resolving the legal contention, then the procedures taken from Template B will be revised to reflect this determination.

D. Procedures for Resolving Claims of Incompleteness.

If the Commission determines that the petitioner has submitted a valid claim of incompleteness, then it will issue an order that will require the licensee to provide the additional information within 10 days (or such other time as specified by the Commission) and provide a process for the petitioner to file a contention based on the additional information. This contention and any answers to it will be subject to the requirements for motions for leave to file new or amended contentions after the original deadline that are described earlier. If the petitioner files an admissible contention thereafter, and all other hearing request requirements have been met, then the hearing request will be granted and an order imposing procedures for resolving the admitted contention will be issued. If the petitioner submits another claim of incompleteness notwithstanding the additional information provided by the licensee, it shall file its request with the Commission. Any additional claims of incompleteness will be subject to the

timeliness requirements for motions for leave to file claims of incompleteness after the original deadline that are described previously. Finally, the Commission order imposing procedures for resolving claims of incompleteness will include additional procedures, primarily from the Additional Procedures Order in Template A, with changes to reflect the procedural posture for a valid claim of incompleteness.

VII. Availability of Documents.

The NRC is making the documents identified in the following table available to interested persons through the following methods as indicated.

Document	ADAMS Accession No.
Public comment from Ellen C. Ginsberg on behalf of the Nuclear Energy Institute (May 27, 2015)	ML15149A102
Final Template A "Notice of Intended Operation and Associated Orders"	ML14343A901
Final Template B "Procedures for Hearings Involving Testimony"	ML14343A905
Final Template C "Procedures for Hearings Not Involving Testimony"	ML14343A910
Final Template D "Procedures for Resolving Claims of Incompleteness"	ML14343A913
Comment Summary Report – Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met ([MONTH] 2015)	ML14344A076
Public comment from Ellen C. Ginsberg on behalf of the Nuclear Energy Institute (July 2, 2014)	ML14190A012
Public comment from April R. Rice on behalf of South Carolina Electric & Gas Company (July 2, 2014)	ML14190A013
Public comment from Brian H. Whitley on behalf of Southern Nuclear Operating Company, Inc. (July 2, 2014)	ML14190A011

Document	ADAMS Accession No.
Public comment from Thomas C. Geer on behalf of Westinghouse Electric Company LLC (July 1, 2014)	ML14190A010
Public comment from William Maher on behalf of Florida Power and Light Company (July 2, 2014)	ML14190A009
Public comment from Mr. Barton Z. Cowan (July 2, 2014)	ML14195A275
Summary of May 21, 2014 public meeting (June 2, 2014)	ML14153A433
Transcript of May 21, 2014 public meeting	ML14147A200
Summary of September 22, 2014 public meeting (October 2, 2014)	ML14276A154
Transcript of September 22, 2014 public meeting	ML14274A235
Public comment from Mr. Marvin Lewis (September 23, 2014)	ML14272A454
Public comment from Ellen C. Ginsburg on behalf of the Nuclear Energy Institute (October 15, 2014)	ML14289A494
Draft Template A "Notice of Intended Operation and Associated Orders" (April 10, 2014)	ML14097A460
Draft Template B "Procedures for Hearings Involving Testimony" (April 10, 2014)	ML14097A468
Draft Template C "Procedures for Hearings Not Involving Testimony" (April 10, 2014)	ML14097A471
Draft Template D "Procedures for Resolving Claims of Incompleteness" (April 10, 2014)	ML14097A476
Vogtle Unit 3 Combined License, Appendix C	ML112991102
SECY-13-0033, "Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103" (April 4, 2013)	ML12289A928
SRM on SECY-13-0033 (July 19, 2013)	ML13200A115
Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (February 29, 2008)	ML080380626

The NRC has posted documents related to this notice, including public comments, on the Federal rulemaking Web site at http://www.regulations.gov under Docket ID NRC-2014-0077. The Federal rulemaking Web site allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: 1) Navigate to the docket folder (NRC-2014-0077); 2) click the "Email Alert" link; and 3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

VIII. Plain Language Writing.

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, well-organized manner that also follows other best practices appropriate to the subject or field and the intended audience. The NRC has attempted to use plain language in developing these general procedures, consistent with the Federal Plain Writing Act guidelines.

Dated at Rockville, Maryland, this [YY] day of [Month] 2015.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

SGB Edits

Comment Summary Report

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

[Month] 2015

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.[14] *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

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[14] *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.*

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.

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.[15]*~~

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

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~~[15] *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.*~~

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 advantage over a Subpart L-type approach because the Track 2 hearing schedule can take as few as 70 days.[16] 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

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[16] 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.

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 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[17] 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.

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[17] 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 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.*

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.~~[18]

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.

~~[18] 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.~~