NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Ostendorff

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

Approved X Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____

WAO

SIGNATURE

4/30/15

DATE

Entered in STARS" Yes _____ No _____

Commissioner Ostendorff's Comments on SECY-15-0010, "Final Procedures for Hearings on Conformance with the Acceptance Criteria in Combined Licenses."

I would like to thank the Office of the General Counsel, the Office of Commission Appellate Adjudication, the Office of New Reactors, the Office of Nuclear Security and Incident Response, and Region II for working together to develop draft final procedures for hearings on inspections, tests, analyses, and acceptance criteria (ITAAC).[1] The staff succeeded in designing ITAAC hearing procedures that are a fair, efficient, and feasible process for developing a sound record for decision in a manner consistent with established law, regulations, and policy. The staff's efforts were aided by the thoughtful comments and feedback received from members of the public, the Atomic Safety and Licensing Board, and the industry during the public comment period and public meetings on the draft procedures.

The staff's general approach for designing the ITAAC hearing procedures focuses on (1) hearing format selection, (2) choice of presiding officer, (3) steps to streamline and expedite the proceeding, (4) early publication of the notice of intended operation to add schedule margin, and (5) interim operation during an ITAAC hearing. The draft final ITAAC procedures reflect a careful consideration and accounting for the comments received on these issues, as well as staff's thorough review of existing statutory and regulatory requirements, Commission policy, and case law. I applaud the staff's efforts on the Comment Summary Report, which provides a detailed summary of the public comments on the proposed procedures and the NRC responses to these comments, including any changes made to the proposed procedures as a result of the comments. Likewise, I applaud the staff for creating templates for documents that would be issued for a particular facility during an ITAAC hearing. These templates are examples of the NRC's Principles of Good Regulation in action. The templates inform the public about the opportunity to participate in the regulatory process, provide regulatory stability, and help ensure an expedited proceeding that minimizes the use of resources.

I approve the staff's approach on each of the above issues, except the staff's recommendation regarding the reopening standards under issue (3) and the timing of the interim operation determination under issue (5). In my view, the reopening requirements in 10 CFR 2.326(a) should apply to all efforts to reopen the record. These requirements have served to ensure the orderly and timely dispositions of hearings and I do not find a compelling rationale presented to depart from these established requirements for particular filings. Therefore, the reopening requirements should apply to hearing requests, intervention petitions, or new or amended contentions filed after the deadline.

With regard to issue (5), the staff suggested that the Commission's adequate protection determination follow the NRC staff's determination that all acceptance criteria are met in order to avoid the appearance of prejudicing the NRC staff's ITAAC closure findings. I appreciate the

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[1] This effort was in response to the Staff Requirements Memorandum (SRM) on SECY-13-0033, "Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103," (July 19, 2013).

basis for the staff's suggestion in this regard; however, I do not support additional process-related measures to address this issue. Instead, the Commission should retain the flexibility to make the adequate protection determination for interim operation as early as possible in the interest of regulatory stability. As the staff noted, this decision is not based on a merits determination that the contested acceptance criteria are met.

Therefore, I approve the publication of the draft final procedures for hearings on ITAAC subject to the reopening standards applying in all circumstances after the record has closed and subject to the Commission retaining the flexibility to make the adequate protection determination for interim operation as early as possible. Accordingly, I recommend that the Commission direct the staff to revise the *Federal Register* notice, templates, and Comment Summary Report to reflect the approaches outlined in my vote before publication.[2]

As the staff notes, some minor additional actions are required to implement these draft final procedures. The staff should develop internal implementation processes within 6 months after the ITAAC hearing procedures are finalized, and should work closely with the NRC's Personnel Security Branch of the Office of Administration and the Office of Personnel Management on the processing of SGI background checks in ITAAC hearings. Further, the staff should develop additional templates to regularize and expedite the ITAAC hearing process.

Thank you again to the staff for the considerable efforts that went into developing these procedures. These efforts have resulted in procedures that will provide clarity and predictability in the ITAAC hearings.

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[2] *See, e.g.*, Section 6.O of the Comment Summary Report, page 38 of Template B, and Section III.U. of the *Federal Register* Notice (discussing reopening the record). *See, e.g.*, Section 7.D of the Comment Summary Report, Template A and Section III.V. of the *Federal Register* Notice (discussing interim operation during an ITAAC hearing).

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Baran

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 _____ Attached XX None _____

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SIGNATURE

5/28/15
_____
DATE

Entered in STARS" Yes XX No _____

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

The Atomic Energy Act sets forth very aggressive timelines for NRC to complete the Inspections Tests Analysis and Acceptance Criteria (ITAAC) hearings for new reactor combined licenses. It is important for NRC to publish detailed ITAAC hearing procedures now to allow all potential participants adequate time to understand the process prior to the beginning of an ITAAC hearing. Overall, I find that the procedures proposed by the NRC staff strike a reasonable balance between the requirement to meet the timeframes established in the Atomic Energy Act and the obligation to provide all participants a fair hearing opportunity. I approve publication of the final ITAAC hearing procedures subject to the modifications discussed below and attached.[1]

The proposed procedures contemplate licensees submitting their uncompleted ITAAC notifications earlier than the required 225 days before scheduled fuel load.[2] This allows NRC to issue the notice of intended operation earlier than required in the regulations, thereby triggering the ITAAC hearing process earlier. This additional time should help alleviate the potential for delays. However, the staff notes that beginning the hearing process 300 days prior to scheduled fuel load would result in more uncompleted ITAAC as compared to beginning 225 days prior to scheduled fuel load. Given the high bar for admitting a contention on an ITAAC, the short time frames for all filings, and the anticipated large number of uncompleted ITAAC, it is vital that the staff keep the public well-informed of all changes to ITAAC status in order to ensure that interested members of the public have a fair opportunity for a hearing. I encourage the staff to keep the public website current and continue to explore ways to make it easier for interested members of the public to identify and access uncompleted ITAAC notifications, the related ITAAC closure notifications, and other important documents such as any ITAAC-related inspection findings or ITAAC post-closure notifications required by Section 52.99(c)(2).

I do not support the change in the draft final procedures that would require potential intervenors to consult with the licensee prior to filing claims of incompleteness. I support including consultation in the procedures as a recommended best practice that could save all parties, including a potential intervenor, time and effort if a licensee provides a potential intervenor with information that convinces the potential intervenor that it is not necessary to file a claim of incompleteness. However, I do not support making this consultation a requirement. Given the amount of effort already required for intervenors to participate in an ITAAC hearing, we should not create additional procedural hurdles. Therefore, with regard to claims of incompleteness, the final procedures should revert to the language of the proposed procedures, and the staff should revise the *Federal Register Notice*, templates, and Comment Summary Report to reflect this revision.

I support the staff's approach to answering the question of when the Commission should make an interim operations finding. I agree that the appropriate time for the Commission to

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[1] For the attached edits to the Federal Register Notice, the staff should make corresponding changes to the templates and Comment Summary Report, as necessary.

[2] An "uncompleted ITAAC notification" is a document that 10 C.F.R. 52.99(c)(3) requires a licensee to submit at least 225 days before scheduled fuel load. An uncompleted ITAAC notification must be filed for each ITAAC for which the licensee has not filed an ITAAC closure notification, and the uncompleted ITAAC notification must "provide sufficient information to demonstrate that the prescribed inspections, tests or analyses will be performed and the prescribed acceptance criteria for the uncompleted ITAAC will be met."

make an interim operations finding is at the end of the hearing process, if it appears that the hearing may not be complete prior to fuel load. The Commission should not rule on interim operations early in the proceeding because the ITAAC hearing procedures are set up in such a way that the hearing should be completed prior to fuel load and no interim operations finding will likely be necessary. The Commission has taken on several responsibilities in this process, such as ruling on the admissibility of contentions and claims of incompleteness, choosing the appropriate hearing format, and ruling on interim operations. In my view, the Commission should keep its focus on the ITAAC hearing rather than take on the additional task of making a ruling that probably will prove unnecessary. Of course, the Commission can change these default procedures if necessary. For example, if all admitted contentions were to raise potential adequate protection concerns that manifest themselves later in the operating life of the facility or at a higher power level, making the interim operations finding more straightforward, the Commission could always make a case-specific exception.

Moreover, I agree with the staff's responses to public comments regarding the requirement for the staff to make the 10 C.F.R. 52.103(g) finding prior to the Commission allowing interim operations, affirming the Commission position in the staff requirements memorandum to SECY-13-0033.[3] I was not persuaded by the public comments seeking to change this position. The staff's interpretation of the Atomic Energy Act is the better plain language reading of sections 185b. and 189a.(1)(B)(iii) as it gives full effect to both statutory provisions.

I appreciate the staff's thorough and well-written paper and draft final procedures for ITAAC hearings. I encourage the staff to continue its outreach efforts to make sure that all potential parties are aware of these procedures well in advance of the beginning of the ITAAC hearing process.

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[3] SECY-13-0033: "Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103" (April 4, 2013).

Enclosure 1: Draft *Federal Register* Notice

[7590-01-P]

JMB Comments

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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]**.

VII. Availability of Documents.

VIII. Plain Language Writing.

I. Introduction.

The NRC promulgated Part 52 of Title 10 of the *Code of Federal Regulations* (CFR) on April 18, 1989 (54 FR 15386) 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 ~~additions~~ alternatives 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;

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 resolving 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

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 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.[15] 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.

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

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 plant-specific *Federal Register* notice announcing a pre-clearance process would be published 420 days before scheduled fuel load, 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 if 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

- 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 ~~is granted~~receives 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~~ receiving the information and the deadline for the hearing request.

Comment [JCM1]: JMB: These changes make the text of the FRN match the text of the templates, which speak about receipt of the document by the requestor.

- 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

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 ~~prohibited~~ not permitted 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.[24] 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.

[24] 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.

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~~ denials 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 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 ~~prohibited~~not permitted. 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[28] 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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[28] 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.

Comment [JCM2]: JMB: It is unnecessary to provide this level of direction to the Licensing Board.

- 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.[29] 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 discovery should be limited to the mandatory disclosures required by 10 CFR 2.336(a), with certain modifications. The required disclosures, pre-filed

[29] 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.