



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

January 12, 2011

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0106

TITLE: PROPOSED RULE - 10 CFR PARTS 2, 51, AND 54  
AMENDMENTS TO ADJUDICATORY PROCESS RULES  
AND RELATED REQUIREMENTS (RIN 3150-AL43)

The Commission (with Commissioners Svinicki, Apostolakis and Magwood agreeing and Chairman Jaczko and Commissioner Ostendorff agreeing in part) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of January 12, 2011.

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

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-10-0106

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X	X			X	10/14/10
COMR. SVINICKI	X				X	12/6/10
COMR. APOSTOLAKIS	X				X	12/3/10
COMR. MAGWOOD	X				X	11/22/10
COMR. OSTENDORFF	X	X			X	11/12/10

COMMENT RESOLUTION

In their vote sheets, Commissioners Svinicki, Apostolakis and Magwood approved and Chairman Jaczko and Commissioner Ostendorff approved in part the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on January 12, 2011.

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-10-0106 – PROPOSED RULE – 10 CFR PARTS  
2, 51, AND 54 “AMENDMENTS TO ADJUDICATORY  
PROCESS RULES AND RELATED REQUIREMENTS”  
(RIN 3150-AI43)

Approved X (in part) Disapproved X (in part) Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached X None \_\_\_\_\_

  
\_\_\_\_\_  
SIGNATURE

12/14/10  
\_\_\_\_\_  
DATE

Entered on “STARS” Yes x No \_\_\_\_\_

**Chairman Jaczko's Comments on SECY-10-0106**  
**Proposed Rule – 10 CFR parts 2, 51, and 54 "Amendments to Adjudicatory Process**  
**Rules and Related Requirements"**

I approve of publication of the proposed rule, with some modifications. Our adjudicatory process is one of the primary means by which we encourage public participation. Keeping those rules current and modifying them as necessary is an essential part of our public confidence mandate and I appreciate the staff's efforts in this regard.

I appreciate OGC's thoughtful analysis of the variety of ways to approach appeals of contention admissibility determinations. I believe, however, that the appropriate approach is to allow for contentions to be appealed upon the Board's original ruling of admissibility rather than waiting until the end of the proceeding. In my time on this Commission I have seen a number of cases where all parties would have been better served to have the answers regarding contention admissibility handled up front rather than at the end of a proceeding. While I appreciate concerns about the Commission's work load, I also appreciate the negative impacts on our stakeholders of our current practice that does not allow them to raise contention admissibility issues to the Commission until after the close of the proceeding. Commission decisions at this late stage can require additional hearings, adding significantly to the length of time for the adjudication and consuming additional resources. While this approach could increase the number of appeals, this is mitigated by the fact that applicants are encouraged to appeal all contentions under the existing procedures. Therefore, I am not yet persuaded that this change would require a significant increase in resources. I do, however, understand there are a variety of views on this matter and I believe the proposed changes described in Enclosure 2 would provide ample opportunity to receive comments on this change and hear directly from our stakeholders on this issue. Thus, I support adding the proposed rule language and discussion to the proposed rule.

I do not support additional delegation of Commission authority at this time. I understand and appreciate the desire to free the Commission from having to formally affirm "minor matters", but I am not yet convinced that the Commission has not already delegated such authority. I believe we must first establish precisely what types of "minor matters" the Commission would be comfortable delegating, and then, if necessary, adjust the rule accordingly. It is possible that all of the items that we identify as "minor matters" are already captured by the "minor procedural matters" the Commission currently has delegated to the Secretary. Thus, I believe it would be helpful for OGC first to do an analysis of what "minor procedural matters" as currently captured by our regulations means; and then, explain what, if any specific types of actions they would recommend having the Commission delegate that are not already captured by that language. This information could then inform a later Part 2 rulemaking effort.

Finally, I believe this proposed rule provides the Commission with the opportunity to clean up the regulations relevant to the mandatory hearings as we anticipate the first Commission mandatory hearings in new reactor proceedings. This is an issue the Commission has been



**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER SVINICKI  
SUBJECT: SECY-10-0106 – PROPOSED RULE – 10 CFR PARTS  
2, 51, AND 54 “AMENDMENTS TO ADJUDICATORY  
PROCESS RULES AND RELATED REQUIREMENTS”  
(RIN 3150-AI43)

Approved XX Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below XX Attached XX None \_\_\_\_\_

I approve the proposed rule, subject to the comments and edits  
attached.

Original vote was on 12/6/10.

  
\_\_\_\_\_  
SIGNATURE

12-8-10  
\_\_\_\_\_  
DATE

Entered on “STARS” Yes  No \_\_\_\_\_

**Commissioner Svinicki's Comments on SECY-10-0106**  
**Proposed Rule – 10 CFR Parts, 2, 51, and 54 “Amendments to Adjudicatory Process**  
**Rules and Related Requirements” (RIN 3150-A143)**

I approve publication of the draft *Federal Register* notice for the proposed rule (Enclosure 1 to SECY-10-0106), subject to these comments and the attached edits. I believe that this proposed rule will add clarity to our processes, thereby improving the efficiency of NRC adjudicatory proceedings.

I agree with the Office of the General Counsel (OGC) that no change to the current interlocutory appeal rule is warranted at this time. Although I recognize that arguments that appear reasonable on their face can be made for alternative approaches to the current interlocutory appeal framework, in my view, the Commission is advised to tread carefully, as any substantive departure from longstanding practice – coming at a time of such brisk pace in our adjudicatory docket – has the potential to be destabilizing. Although it appears that a majority of the Commission feels differently, I register here my disapproval of the option to solicit comments on alternative approaches.

I do believe, however, that we should specifically solicit stakeholder input on proposed changes to 2.309(c) that would make good cause the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention, petition, or hearing request. Although good cause is the factor given the most weight under NRC precedent, I believe that it would be useful for the Statements of Consideration (SOC) to further explain the basis for eliminating the other factors that currently exist in our rules, and to seek public comment on the effect, if any, of eliminating the other “eight factors” from use in our adjudicatory process – which seems a significant departure from current practice.

Finally, I approve of the modification to 2.346(j) to expand the Secretary's authority to “procedural and other minor matters.” I note that, as explained in the SOC, the Secretary's authority would still be confined to non-substantive procedural matters. My support for this change is rooted in the Secretary's current practice of notifying the Commission – via a “negative-consent” process – before taking action under her authority. In that vein, I agree with Commissioner Magwood that the current practice should be enshrined in the Internal Commission Procedures. Although I am comfortable going forward with the proposed change now, I support receiving additional information from OGC regarding the past uses of the Secretary's authority, as well as potential future uses under the proposed rule.

  
Kristine L. Svinicki

12-8-10

12/06/10

You can access publicly available documents related to this document, including the following documents, using the following methods:

**NRC's Public Document Room (PDR):** The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

**NRC's Agencywide Documents Access and Management System (ADAMS):**

Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, or 301-415-4737, or by e-mail to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov).

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X

X

X

X

- E. Subpart H—Sections 2.800 through 2.819  
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#### **I. Background.**

In a final rulemaking published in the *Federal Register* on January 14, 2004, 69 FR 2181 (2004 Part 2 revisions), the NRC substantially modified its rules of practice governing agency adjudications—10 CFR Part 2. Portions of 10 CFR Parts 1, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76 and 110 were also amended at that time. On May 11, 2004 (69 FR 25997), the NRC corrected errors in 10 CFR Part 2, Appendix D.

Since the new rules of practice became effective, provisions requiring correction or clarification of ambiguities, and several areas where further improvements could be achieved have been identified. Therefore, the NRC is publishing this proposed rule to solicit public comments on proposed corrections of those errors and proposed improvements to the rules governing its adjudicatory proceedings. Participants in NRC adjudicatory proceedings who will use these rules should note that several revisions to 10 CFR Part 2 were also adopted in recent years:

- Licenses, Certifications, and Approvals for Nuclear Power Plants (72 FR 49351; August 28, 2007) (Part 52 Rule);
- Use of Electronic Submissions in Agency Hearings (72 FR 49139; August 28, 2007)

(E-Filing Rule);

- Limited Work Authorizations for Nuclear Power Plants (72 FR 57415; October 9, 2007);
- Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information (73 FR 10978; February 29, 2008);
- Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information (73 FR 12627; March 10, 2008); and
- Protection of Safeguards Information (73 FR 63545; October 24, 2008).

## II. The Decision to Issue a Proposed Rule.

The amendments in this proposed rulemaking are procedural rules exempt from the notice and comment requirements of the Administrative Procedures Act (APA) and NRC regulations. 5 USC 553(b)(3)(A) and 10 CFR 2.804(d)(1). Nonetheless, the NRC is issuing this rulemaking as a proposed rule for public comment in order to benefit from stakeholder input.

## III. Effectiveness of the Final Rule.

The new and amended requirements in the final rule would not be retroactively applied to presiding officer determinations and decisions issued prior to the effective date of the final rule (e.g., a presiding officer order in response to a petition or motion), nor would these requirements be retroactively imposed on parties, such that a party would have to compensate for past activities that were accomplished in conformance with the requirements in effect at the time, but would no longer meet the new or amended requirements in the final rule. Further, in ongoing adjudicatory proceedings if there is a dispute over an adjudicatory obligation or situation arising prior to the effective date of the new rule, such disputes would be governed by the former rule provisions. However, the new or amended requirements would be effective and govern all obligations and disputes that arise after the effective date of the final rule. For example, if a Board issues, prior to the effective date of the new rule, a scheduling order incorporating by reference § 2.336(d), which requires parties to update their disclosures every 14 days, that obligation would change to 30 days once the effective date of the rule is reached. Therefore,

its boundaries, the State, local governmental body or Federally-recognized Indian Tribe seeking party status need not further establish its standing. As revised, proposed §§ 2.309(h)(1) and (h)(2) would delete the word "affected" from the phrase "Federally-recognized Indian Tribe." The use of "affected" in this context is proper only in a high-level radioactive waste disposal proceeding. For the same reason, the NRC proposes to remove "affected" from § 2.315(c) (regarding interested government participation) and from the definition of "Participant" added to § 2.4 in the E-Filing Rule (August 28, 2007; 49139, 49149). Existing § 2.309(d)(2)(iii) would be redesignated as § 2.309(h)(3).

e. Section 2.309(h) moved to 2.309(i)—Answers to requests for hearing and petitions to intervene; Replies to answers.

The present § 2.309(h), governing the filing of answers and replies to hearing requests and petitions to intervene, would be redesignated as § 2.309(i) and would be further revised. The current § 2.309(h)(1) refers to "proffered contentions," the preamble of current § 2.309(h) limits paragraph (h) to filing deadlines for hearing requests and intervention petitions, and there is no clear reference to contentions submitted after the initial filing. The NRC believes that the same deadlines should apply to answers and replies for new or amended contentions as apply to intervention petitions and hearing requests filed after the deadlines in § 2.309(b). The NRC is therefore proposing to amend this section to include answers and replies to requests to admit new or amended contentions after the initial filing. Because this change would cover all filings after the deadlines in § 2.309(b), the reference to "proffered contentions" in paragraph (h)(1) (proposed paragraph (i)(1)) would no longer be necessary and would be removed. The reference in current paragraph (h)(1) to "paragraphs (a) through (g)" would be changed to "paragraphs (a) through (h)" due to the addition of proposed new paragraph (h).

f. Section 2.309(i) moved to new 2.309(j)—Decision on request/petition.

^ The current § 2.309(i) would be redesignated as § 2.309(j). The redesignated § 2.309(j)

that this change to § 2.336(d) would reduce the burden and increase the robustness of updated disclosures. The NRC also proposes to add a sentence to the end of § 2.336(d), stating that the duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the Presiding Officer issues a decision on that contention, or when otherwise specified by the Presiding Officer or the Commission.

10. Section 2.340—Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses.

Sections 2.340(a) and (b) currently imply that the presiding officer must reach a decision prior to the issuance of a license or license amendment. But this is not necessarily the case. For operating licenses associated with production and utilization facilities, both the Atomic Energy Act and the NRC's regulations allow for the issuance of a license amendment upon a determination of "no significant hazards consideration." See, e.g., 42 U.S.C. 2239, 10 CFR 50.91. Further, Part 2 Subparts L and N allow the staff to act on an application, including an application for an initial or renewed operating license or operating license amendment, and in proceedings for an initial license or license amendment not involving a production and utilization facility, prior to the completion of any contested hearing, assuming that all other relevant regulatory requirements are met. 10 CFR 2.1202(a), 2.1210(c)(3), and 2.1403(a). The NRC is proposing to revise § 2.340 to clarify that production and utilization facility applications—for an initial license, a renewed license, or a license amendment where the NRC has made a determination of no significant hazards consideration—could be acted upon prior to the completion of a contested hearing. The NRC would also make conforming amendments to paragraphs (d) and (e) of this section to clarify that in proceedings involving a manufacturing license under Part 52 Subpart C, and in proceedings not involving production and utilization facilities, the NRC staff—provided it is able to make all of the necessary findings associated with

answer to the petition from ten to 25 days. The NRC is also proposing to extend the time to file a reply to an answer from five to ten days.

The NRC does not expect the proposed change in appeal deadlines to result in any unnecessary delays in licensing. For one thing, higher-quality briefs should expedite appellate decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC Staff finishes its safety and environmental reviews and does not affect the timing of those reviews. Finally, even when a final presiding officer decision approving a license comes before the Commission on a petition for review, the license can be issued immediately, notwithstanding the pendency of a petition for review. See 10 CFR 2.340(f), 2.341(e).

b. Section 2.341(c)—Petitions for review <sup>acted upon</sup> not ~~action on~~ deemed denied.

As stated in the 2004 Part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786 (See 69 FR 2225; January 14, 2004). But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. Accordingly, the NRC proposes to add a new § 2.341(c)(1); existing § 2.341(c)(1) would be redesignated as § 2.341(c)(2), and existing § 2.341(c)(2) would be redesignated as § 2.341(c)(3). Proposed § 2.341(c)(1) would adopt the deemed denied provisions of the former § 2.786(c) with the exception of the 30-day time limit, which would be extended to allow 120 days for Commission review. As a practical matter, the 30-day time frame has necessitated extensions of time in most proceedings, as the prescribed briefing period comprehends 30 days. A 120-day Commission review period would allow for sufficient time to review the filings at the outset, without the unintended consequence of the frequent need for extensions. The NRC is therefore proposing to adopt the deemed denied provisions of former § 2.786 with a 120-day time limit as a new § 2.341(c)(1).

1. Section 2.704—Discovery—required disclosures.

Section 2.704(a) through (c) sets forth the required disclosures that parties other than the NRC staff must make in formal NRC adjudications. In conformance with the timing provisions of § 2.336(d) a change in § 2.704(a)(3) is being proposed. The proposed § 2.704(a)(3) would require that unless otherwise stipulated or directed by order of the presiding officer, a party's initial disclosures must be made within 30 days of the order granting a hearing and that parties must provide disclosure updates every 30 days. Each update would include documents subject to disclosure under this section that have not been disclosed in a prior update, and that are developed, obtained, or discovered during the period that runs from the last disclosure update to 5 business days before the filing of the update. Presently, § 2.704(a)(3) requires that the initial disclosures be made within 45 days after a prehearing conference order following the initial prehearing conference specified in § 2.329. And § 2.704(e) requires a party who has made a disclosure under § 2.704 to supplement their disclosures if the party learns that some of the disclosed material was incomplete or incorrect (provided the additional or new information wasn't made available to other parties in writing), and where testimony of an expert from whom a report is required (extending to the information contained in the report and provided through a deposition of the expert).

(confusing?)

2. Section 2.705—Discovery—additional methods

Section 2.705(b)(2) allows the presiding officer to "alter the limits in these rules on the number of depositions and interrogatories." But the rules do not limit the number of depositions or interrogatories. The NRC is therefore proposing to amend this section to allow the presiding officer to set reasonable limits on the number of interrogatories and depositions. This proposed change would remove the confusion in this section and improve the efficiency of NRC adjudicatory proceedings.

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Proposed § 2.709(a)(6)(i) would also require that if a claim of privilege or protected status is made by the NRC staff for any documents, a list of these documents must be provided with sufficient information for assessing the claim of privilege or protected status. Finally, proposed § 2.709(a)(6)(ii) would require the NRC staff to provide disclosure updates every 30 days. Each update would include documents subject to disclosure under this section that have not been disclosed in a prior update and that are developed, obtained, or discovered during the period that runs from 5 business days before the last disclosure update to 5 business days before the filing of the update, as would be required of other parties by proposed § 2.704(a)(3).

b. Section 2.709(a)(7)—Form and type of NRC staff disclosures.

Proposed § 2.709(a)(7) would specify the manner in which the NRC staff may disclose information in Subpart G proceedings. For publicly available documents, data compilations, or other tangible things, the NRC staff's duty to disclose such information to the other parties and the presiding officer would be met by identifying the location, the title, and a page reference to the subject information. If the publicly available documents, data compilations, or other tangible things can be accessed at either the NRC Web site, <http://www.nrc.gov>, or at the NRC Public Document Room, the staff would provide the parties and the presiding officer with any citations necessary to access this information. This addition parallels § 2.704(a)(2) for disclosures by parties other than the NRC Staff.

**D. Subpart L—Sections 2.1200 through 2.1213**

1. Subpart L—Title ⑥

Subpart L of 10 CFR Part 2 contains the adjudicatory procedures that the NRC uses to conduct most of its licensing proceedings. The procedures in Subpart L were substantially revised in 2004 (69 FR 2182; January 14, 2004), and are intended to be used with the generally applicable provisions in Subpart C of 10 CFR Part 2. Under the provisions of 10 CFR Part 2 as revised in 2004, a hearing conducted under Subpart L meets the APA requirements for an "on

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decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC Staff finishes its safety and environmental reviews and does not affect the timing of those reviews.

### **G. Other Changes.**

#### **1. Section 2.4—Definitions.**

The current definition of "Participant" applies to an "individual or organization," and does not explicitly apply to governmental entities that have petitioned to intervene in a proceeding. The NRC proposes to correct this definition by adding a parenthetical reference to "individual or organization" so that it reads: "individual or organization (including governmental entities)."

The current definition of "NRC personnel" in § 2.4 contains outdated references to §§ 2.336 and 2.1018. The proposed revision of "NRC personnel" would update this definition by removing references to §§ 2.336 and 2.1018, neither of which references the term "NRC personnel."

#### **2. Section 2.101—Filing of application.**

In 2005, § 2.101 was amended to remove paragraph (e) and redesignate (f) and (g) as paragraphs (e) and (f). (70 FR 61887; October 27, 2005) The internal references to paragraph (g) were not updated to reflect the new paragraph designations. References in this section to § 2.101(g) would be corrected to reference § 2.101(f). There are no references to former § 2.101(f) in this section.

#### **3. Section 2.105—Notice of proposed action.**

X Proposed § 2.105 would make <sup>three</sup> ~~four~~ changes to the current regulation: (1) The introductory text of paragraph (a) would be revised by inserting a reference to the NRC's web site; (2) The introductory text of paragraph (b) would be clarified by specifying that the referenced notice pertains to one published in the *Federal Register*, and, (3) The introductory text of paragraph (d) would be corrected to reference the time period stated in § 2.309(b).

4. Section 2.802—Petition for rulemaking.

The proposed § 2.802(d), in accordance with the proposed definition of "Participant" in § 2.4 and the proposed amendment to the procedures for challenging the NRC's regulations in § 2.335, would replace the word "party" with "participant."

5. Corrections of other outdated and incorrect references.

Section 51.102(c) contains an outdated reference to "Subpart G of Part 2." The reference would be corrected to refer generally to Part 2. Also, the reference to the former Atomic Safety and Licensing Appeal Board would be removed from § 51.102.

Sections 51.4, 51.34, 51.109(f), and 51.125 contain outdated references to the former Appeal Board, which would be removed from these sections.

6. Section 54.27—Hearings.

Section 54.27 (pertaining to license renewal hearings for nuclear power reactors) contains an outdated reference to a 30-day period to request a hearing. As discussed in the 2004 Part 2 revisions, except for license transfer and HLW proceedings, the time in which to request a hearing was extended to 60 days from the date a notice of opportunity for hearing is published (either in the *Federal Register* or on the NRC's web site). (January 4, 2004; 69 FR 2200). The proposed § 54.27 would be corrected to reflect the proper 60-day period to request a hearing, and a reference to 10 CFR 2.309 would be added. The proposed 10 CFR 54.27 would retain the provision that in the absence of any hearing requests, a renewed operating license may be issued without a hearing upon 30-day notice <sup>and publication</sup> published in the *Federal Register*.

**V. Additional Issue for Public Comment—Scope of Mandatory Disclosures.**

Section 2.336 contains the general procedures governing disclosure of information before a hearing in contested NRC adjudicatory proceedings. The NRC is soliciting public comment on whether it should revise the § 2.336 mandatory disclosures to focus the staff's disclosure obligations under § 2.336(b)(3) on documents related to the parties' admitted contentions.

claim of privilege or protected status of the documents.

## **VI. Section-by-Section Analysis.**

### **A. Introductory Provisions—Sections 2.1 through 2.8.**

#### **1. Section 2.4—Definitions.**

This section would modify the definition of *Participant* in § 2.4, which currently applies to individuals or organizations that petition to intervene or request a hearing, but are not yet parties. The new definition would clarify that any individual or organization—including States, local governments, and Federally-recognized Indian Tribes—that petitions to intervene or requests a hearing shall be considered a participant. Further, Federally-recognized Indian Tribes do not have to be “affected” Federally-recognized Indian Tribes to participate in NRC licensing actions. “Affected” is reserved for Federally-recognized Indian Tribes that seek to participate in the high-level waste proceeding; it does not apply to the NRC’s other licensing actions. The current definition also indicates that States, local governmental bodies, or affected Federally-recognized Indian Tribes that seek to participate under § 2.315(c) shall be considered participants. This section does not grant these governmental bodies § 2.315(c) participant status; this status is only obtained when the interested governmental body is afforded the opportunity to participate in the proceeding by the Presiding Officer. Governmental bodies that have requested § 2.315(c) participant status, but have not yet been granted or denied such status by the Presiding Officer, are only entitled to participate in a proceeding as a § 2.4 participant.

### **B. Subpart A—Sections 2.100 through 2.111.**

#### **1. Section 2.101—Filing of application<sup>6</sup>**

This section would be amended to correct references to § 2.101(g), which should reference § 2.101(f). These changes would not alter the meaning or intent of this regulation.

#### **2. Section 2.105—Notice of proposed action.**

to participate in the hearing, must take the proceeding as they find it. Consistent with NRC case-law, § 2.315(c) participants would not be able to raise issues related to contentions or issues that were resolved prior to their entry as § 2.315(c) participants in the proceeding—if a State, local governmental body, or Federally-recognized Indian Tribe chooses to participate in a proceeding late in the process, their participation is subject to any orders already issued and should not interfere with the schedule established for the proceeding.

6. Section 2.319—Power of the presiding officer.

Proposed § 2.319(r) would reincorporate former § 2.1014(h) without any changes to the original language or intent. This section would require that an admitted contention that constitutes pure issues of law, as determined by the Presiding Officer, must be decided on the basis of briefs or oral argument.

X 7. Section 2.323—Motions <sup>(e)</sup>

Proposed § 2.323(f) would allow the Presiding Officer to independently, or in response to a petition from a party, certify questions or refer rulings to the Commission if the issue satisfies one of the two § 2.323(f)(1) criteria. In each case, the Presiding Officer would make the initial determination as to whether the issue or petition raises significant and novel legal or policy issues, or if prompt decision by the Commission is necessary to materially advance the orderly disposition of the proceeding.

8. Section 2.335—Consideration of Commission rules and regulations in adjudicatory proceedings.

Section 2.335 limits the requests for waivers or exceptions from NRC regulations to parties to a proceeding. Proposed § 2.335 would clarify that participants to an adjudicatory proceeding, including petitioners, may seek a waiver or exception to the NRC's regulations for a particular proceeding. This change would adopt the NRC's practice of allowing petitions to intervene and requests for hearing to contain § 2.335 requests for waivers or exceptions from the NRC's

regulations.

9. Section 2.336—General Discovery 

This section, which currently requires an update within 14 days of obtaining or discovering disclosable material, would be amended to require the filing of a mandatory disclosure update every 30 days. These updates would include all disclosable documents and information developed during the period that runs from five business days before the last disclosure update to 5 business days before the filing of the update. Parties not disclosing any documents or information are expected to file an update informing the presiding officer and the other parties that no documents or information are being disclosed. The duty of mandatory disclosure with respect to new information or documents relevant to a contention would end when the Presiding Officer issues a decision on that contention, or as specified by the Presiding Officer or the Commission.

10. Section 2.340—Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses.

Proposed § 2.340 would clarify that in some circumstances the NRC may act on a license, a renewed license, or on a license amendment prior to the completion of any contested hearing.

Paragraphs (a) and (b) concern construction and operating licenses, renewed licenses, combined licenses, and amendments to these licenses. These paragraphs would be amended to clarify that, in the case of a license amendment involving a power reactor, the NRC may complete action on the amendment request without waiting for the presiding officer's initial decision once the NRC makes a determination that the amendment involves no significant hazards consideration. In initial power reactor licensing cases and in cases where the NRC has not made a determination of no significant hazards consideration, these paragraphs would be amended to clarify that the NRC may not act on the application until the presiding officer issues

an initial decision in the contested proceeding.

Paragraph (c), which deals with initial decisions under 10 CFR 52.103(g), would be amended to clarify that the presiding officer may make findings of fact and conclusions of law on the matters put into controversy by the parties, and any matter designated by the Commission to be decided by the presiding officer. Further, the amended paragraph would clarify that matters not put into controversy by the parties shall be referred to the Commission for its consideration. The Commission could, in its discretion, treat any of these referred matters as a request for action under § 2.206 and would process the matter in accordance with § 52.103(f).

Paragraphs (d) and (e), which concern manufacturing licenses under Part 52 and proceedings not involving production or utilization facilities, would be amended to clarify that the NRC will issue, deny, or condition any permit, license, or amendment in accordance with a presiding officer's initial decision. These paragraphs also would be amended to clarify that the NRC may issue a license amendment before a presiding officer's initial decision becomes effective.

This proposed revision would clarify that in all cases the presiding officer is limited to matters placed into controversy by the parties, and serious matters not put into controversy by the parties that concern safety, common defense and security, or the environment and that are referred to, and consideration of which is approved by, the Commission.

11. Section 2.341—Review of decisions and actions of a presiding officer.

a. Extension of time to file a petition for review, answer, and reply.

Proposed § 2.341(b) would extend the time to file a petition for review and an answer to a petition from 15 to 25 days, and the time to file a reply to an answer from five to ten days.

b. Petitions for Commission review not acted <sup>upon</sup> or deemed denied.

Section 2.341 would reincorporate the "deemed denied" provision of former § 2.786(c), with an additional 90 days for Commission review before petitions for review are deemed denied.

contentions on which they will participate in advance of any hearing held.

\* \* \* \* \*

11. In § 2.319, paragraph (l) is revised, paragraph (r) is redesignated as paragraph (s), and a new paragraph (r) is added to read as follows:

**§ 2.319 Power of the presiding officer.**

\* \* \* \* \*

(l) Refer rulings to the Commission under § 2.323(f)(1), or certify questions to the Commission for its determination, either in the presiding officer's discretion, or on petition of a party under § 2.323(f)(2), or on direction of the Commission.

\* \* \* \* \*

(r) Establish a schedule for briefs and oral arguments to decide any admitted contentions that, as determined by the Presiding Officer, constitute pure issues of law.

\* \* \* \* \*

12. In § 2.323, paragraph (f) is revised to read as follows:

**§ 2.323 Motions**

\* \* \* \* \*

**(f) Referral and certifications to the Commission**

(1) If, in the judgment of the presiding officer, the presiding officer's decision raises significant and novel legal or policy issues, or prompt decision by the Commission is necessary to materially advance the orderly disposition of the proceeding, then the presiding officer may promptly refer the ruling to the Commission. The presiding officer shall notify the parties of the referral either by announcement on-the-record or by written notice if the hearing is not in session.

(2) A party may petition the presiding officer to certify a question to the Commission for early

X

2.206.

(k) *Issuance of other licenses.*

The Commission or the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue a license, including a license under 10 CFR Part 72 to store spent fuel in either an independent spent fuel storage facility (ISFSI) located away from a reactor site or at a monitored retrievable storage installation (MRS), within 10 days from the date of issuance of the initial decision:

- (1) If the Commission or the appropriate Director has made all findings necessary for issuance of the license, not within the scope of the initial decision of the presiding officer; and
- (2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under §2.206.

16. In § 2.341, paragraphs (a), (b)(1) and (3), (c), and (f)(1) are revised to read as follows:  
**§ 2.341 Review of decisions and actions of a presiding officer.**

(a)(1) Review of decisions and actions of a presiding officer are treated under this section, provided, however, that no party may request a further Commission review of a Commission determination to allow a period of interim operation under 10 CFR 52.103(c). This section does not apply to review or appeals under § 2.311 and the high-level waste proceeding, which are governed by § 2.1015. X

(2) Within 120 days after the date of a decision or action by a presiding officer, or within 120 days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within 25 days after service of a full or partial initial decision by a presiding officer, and within 25 days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

\* \* \* \* \*

(3) Any other party to the proceeding may, within 25 days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than 25 pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within 10 days of service of any answer. This reply brief may not be longer than 5 pages.

\* \* \* \* \*

(c)(1) If within 120 days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition is deemed to be denied, unless the Commission, in its discretion, extends the time for its consideration of the petition and any answers to the petition.

X (2) If a petition for review is granted, the Commission <sup>may</sup> will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(3) Unless the Commission orders otherwise, any briefs on review may not exceed 30 pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of 10

(c)(1) Within 15 days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff must notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If the NRC staff desires to be a party thereafter, the NRC staff must notify the presiding officer and the parties, and identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (b)(5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

(2) Once the NRC staff chooses to participate as a party, it will have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.

33. In § 2.1403, the introductory text of paragraph (a) is revised to read as follows:  
**§ 2.1403 Authority and role of the NRC staff.**

(a) During the pendency of any hearing under this Subpart, consistent with the NRC staff's findings in its review of the application or matter <sup>that</sup> ~~which~~ is the subject of the hearing and as authorized by law, the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the matter <sup>that</sup> ~~which~~ is the subject of the hearing. When the NRC staff takes its action, it must notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter before the presiding officer. The NRC staff's action on the matter is effective upon issuance, except in matters involving:

\* \* \* \* \*

issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

36. In § 51.4, the definition of *NRC Staff* is revised to read as follows:

**§ 51.4 Definitions.**

\* \* \* \* \*

*NRC staff* means any NRC officer or employee or his/her authorized representative, except a Commissioner, a member of a Commissioner's immediate staff, an Atomic Safety and Licensing Board, a presiding officer, an administrative judge, an administrative law judge, or any other officer or employee of the Commission who performs adjudicatory functions.

\* \* \* \* \*

37. In § 51.34, paragraph(b) is revised to read as follows:

**§ 51.34 Preparation of finding of no significant impact.**

\* \* \* \* \*

(b) When a hearing is held on the proposed action under the regulations in subpart G of part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the appropriate NRC staff director will prepare a proposed finding of no significant impact which may be subject to modification as a result of review and decision as appropriate to the nature and scope of the proceeding. In such cases, the presiding officer, or the Commission acting as a collegial body, as appropriate, will issue the final finding of no significant impact.

X

① STET

\* \* \* \* \*

38. In § 51.102, paragraph (c) is revised to read as follows:

**NOTATION VOTE**

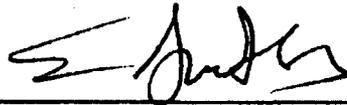
**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** COMMISSINER APOSTOLAKIS  
**SUBJECT:** SECY-10-0106 – PROPOSED RULE – 10 CFR PARTS  
2, 51, AND 54 “AMENDMENTS TO ADJUDICATORY  
PROCESS RULES AND RELATED REQUIREMENTS”  
(RIN 3150-AI43)

Approved XX Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_ Attached XX None \_\_\_



\_\_\_\_\_  
SIGNATURE

12/3/10

\_\_\_\_\_  
DATE

Entered on “STARS” Yes X No \_\_\_

Commissioner Apostolakis' Comments on SECY-10-106: Proposed Rule -10 CFR Parts 2, 51 and 54, "Amendments to Adjudicatory Process Rules and Related Requirements"

I approve the proposed rule as recommended by OGC, subject to the comments below. I appreciate this OGC initiative to provide clarification or correction for issues that arose after the 2004 revisions and to offer broader proposals that would promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

Alternative Approaches on Interlocutory Appeals. I support incorporation of Enclosure 2 into the Federal Register notice. I believe it will be useful to get stakeholders' perspectives on whether the Commission should: allow any party to obtain early Commission review of any ruling on contention admissibility (option 1); or, remove the right of parties other than petitioners to obtain interlocutory review under § 10 CFR 2.311 (option 2). In my view, it is not clear that either option is preferable to the current practice. Both options have potential benefits and drawbacks. For instance, Option 1 would allow all parties to obtain early review of contention admissibility rulings and diminish the potential need for delay late in the proceeding as a result of a Commission decision on the denial of a contention early in the proceeding. On the other hand, Option 1 would likely increase the Commission's workload substantially by allowing early appellate review of a Licensing Board's ruling on contentions that might not otherwise be appealed at the end of the Board proceeding. Thus, I do not prejudge the ultimate resolution of this issue, but I do believe that the issues merit public vetting and further deliberation by the Commission. Even if the Commission ultimately decides not to adopt either option in the final rule, the stakeholder input would be beneficial and might inform a decision to pursue a different course of action, such as a pilot to try option 1 or 2 in one or more cases.

Clarification of the Authority of the Secretary in § 2.346(j). I also support OGC proposal to change the Secretary's authority to take action on "minor procedural matters" to read: "procedural or other minor matters." OGC suggests that some motions raise relatively minor matters that do not fit explicitly within the Secretary's existing authority (e.g., a motion to suspend a hearing notice or a trivial motion to reconsider a Commission order). Express authorization for the Secretary to issue orders on minor matters could avoid the unnecessary delay and burden associated with formally voted orders and affirmations on minor matters, many of which require prompt action. In addition, SECY's practice of notifying Commission offices before issuing such minor procedural orders keeps the Commission informed and affords an opportunity for the Commission's intervention. I think it would be useful to have OGC provide additional information to the Commission on past uses of the Secretary's authority under 2.346(j) and other potential uses in the future but do not believe it is necessary to receive this information before issuing the OGC proposal for comment as part of the proposed rule.



George Apostolakis

12/3/10

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary

**FROM:** COMMISSIONER MAGWOOD

**SUBJECT:** SECY-10-0106 – PROPOSED RULE – 10 CFR PARTS  
2, 51, AND 54 “AMENDMENTS TO ADJUDICATORY  
PROCESS RULES AND RELATED REQUIREMENTS”  
(RIN 3150-AI43)

Approved   X   Disapproved        Abstain       

Not Participating       

COMMENTS: Below        Attached   X   None       

  
\_\_\_\_\_  
**SIGNATURE**

22 November 2010  
\_\_\_\_\_  
**DATE**

Entered on “STARS” Yes   X   No

**Comments of Commissioner Magwood on SECY-10-0106 – Proposed Rule-  
10 CFR Parts 2, 51, and 54 “Amendments to Adjudicatory Process Rules and  
Related Requirements” (RIN 3150-AI43)**

I approve publication of the proposed rule amendments for comment, subject to the attached edits. I thank the staff for its diligence in correcting and updating these regulations. I look forward to reviewing stakeholder comments on the proposed changes, as well as the staff's analysis of these comments and any changes to the proposed rule that the staff recommends as a result of the comments.

I am particularly interested in stakeholder comments on the two options staff offers (in Enclosure 2 to the paper) for amending our procedures for interlocutory review of contention admissibility decisions (10 C.F.R. § 2.311). At this juncture, I can see benefits and drawbacks from both approaches; stakeholder comment, including comment on the resource implications of both options, would be helpful. I therefore approve adding the proposed request for comments on the two options to the body of the Federal Register Notice.

I support the modest expansion of the Secretary's authority proposed for inclusion in § 2.346(j). I expect the Secretary will continue to consult the Commission when exercising the authority granted under this subsection, as has been the current practice. I propose that the Commission consider whether it would be beneficial to add language to the Internal Commission Procedures (ICPs), detailing a "negative consent" process for § 2.346(j) orders, to formalize the process for the future. Under such a process, the Secretary might circulate proposed orders to the Commission offices as attachments to emails indicating that a given order will be issued, absent majority objection, at a specified date and time. I support the recommendation made by Chairman Jaczko and Commissioner Ostendorff to request additional analysis from the Office of the General Counsel. This analysis would be very helpful in the development of any proposed changes to the ICPs to reflect this process and to clarify what constitutes a "procedural or other minor matter" within the Secretary's authority.

I do not support modification of Part 51, on the topic of our mandatory hearing process, in the context of this set of proposed rule amendments. To the extent required, any additional rule modifications to reflect any Commission decision on mandatory hearing procedures should be made as a result of a Staff Requirements Memorandum issued at the conclusion of the Commission's decision-making process on mandatory hearing procedures.

  
\_\_\_\_\_  
William D. Magwood, IV

11/22/10  
\_\_\_\_\_  
Date

Section I, "Submitting Comments and Accessing Information" in the SUPPLEMENTARY INFORMATION section of this document. You may submit comments by any one of the following methods.

**Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-XXXX-XXXX. Address questions about NRC dockets to Carol Gallagher, telephone 301-492-3668; e-mail [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

**Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

**E-mail comments to:** [Rulemaking.Comments@nrc.gov](mailto:Rulemaking.Comments@nrc.gov). If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301-415-1966.

**Hand Deliver comments to:** 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (Telephone 301-415-1966).

**Fax comments to:** Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

## **SUPPLEMENTARY INFORMATION:**

### **I. Submitting Comments and Accessing Information**

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site <http://www.regulations.gov>. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document, including the following documents, using the following methods:

**NRC's Public Document Room (PDR):** The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

**NRC's Agencywide Documents Access and Management System (ADAMS):**

Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, or 301-415-4737, or by e-mail to [PDR.Resource@nrc.gov](mailto:PDR.Resource@nrc.gov).

- I. Background.
- II. The Decision to Issue a Proposed Rule.
- III. Effectiveness of the Final Rule.
- IV. Discussion of Changes and Corrections of Errors.
  - A. Part 2—Title.
  - C. Subpart G—Sections 2.700 through 2.713.
  - D. Subpart L—Sections 2.1200 through 2.1213.
  - E. Subpart M—Sections 2.1300 through 2.1331.
  - F. Subpart N—Sections 2.1400 through 2.1407.
  - G. Other Changes.
- V. Additional Issue for Public Comment—Scope of Mandatory Disclosures.
- VI. Section-by-Section Analysis.
  - A. Introductory Provisions—Sections 2.1 through 2.8.
  - B. Subpart A—Sections 2.100 through 2.111.
  - C. Subpart C—Sections 2.300 through 2.390.
  - D. Subpart G—Sections 2.700 through 2.713.

- E. Subpart H—Sections 2.800 through 2.819
  - F. Subpart L—Sections 2.1200 through 2.1213.
  - G. Subpart M—Sections 2.1300 through 2.1331.
  - H. Subpart N—Sections 2.1400 through 2.1407.
  - I. Parts 51 and 54.
- VII. Plain Language.
- VIII. Voluntary Consensus Standards.
- IX. Environmental Impact: Categorical Exclusion.
- X. Paperwork Reduction Act Statement.
- XI. Regulatory Analysis.
- XII. Regulatory Flexibility Act Certification.
- XIII. Backfit Analysis.

#### **I. Background.**

In a final rulemaking published in the *Federal Register* on January 14, 2004, 69 FR 2181 (2004 Part 2 revisions), the NRC substantially modified its rules of practice governing agency adjudications—10 CFR Part 2. Portions of 10 CFR Parts 1, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76 and 110 were also amended at that time. On May 11, 2004 (69 FR 25997), the NRC corrected errors in 10 CFR Part 2, Appendix D.

Since the new rules of practice became effective, provisions requiring correction or clarification of ambiguities, and several areas where further improvements could be achieved have been identified. Therefore, the NRC is publishing this proposed rule to solicit public comments on proposed corrections of those errors and proposed improvements to the rules governing its adjudicatory proceedings. Participants in NRC adjudicatory proceedings who will use these rules should note that several revisions to 10 CFR Part 2 were also adopted in recent years:

- Licenses, Certifications, and Approvals for Nuclear Power Plants (72 FR 49351; August 28, 2007) (Part 52 Rule);
- Use of Electronic Submissions in Agency Hearings (72 FR 49139; August 28, 2007)

contention, petition, or hearing request; (2) defining good cause as those factors currently in § 2.309(f)(2)(i)–(iii); (3) adding clarifying information regarding the need to address interest and standing; and (4) referring to “nontimely” contentions as “new or amended.” Although we would no longer use the terms “late-filed” or “nontimely” and would use the term “new or amended” to refer to contentions filed after the initial filing date for contentions had expired, the current NRC case law would continue to be applied in ruling on those requests.

The proposed amendments to § 2.309 would apply the good cause factor to all filings after the initial filing deadline and would adopt the current § 2.309(f)(2)(i) through (iii) factors as the standards to be applied when evaluating whether good cause exists. This change would simplify the review of filings after the deadlines in § 2.309(b). These changes would allow the parties, participants, and the presiding officer to focus their resources on the most relevant questions related to the admissibility of new or amended contentions (i.e., whether good cause exists and whether the contentions meet the admissibility requirements of § 2.309(f)).

Section 2.309(c)(1) would require a requestor or petitioner to provide a justification supporting the filing after the deadlines in § 2.309(b), consisting of “good cause” as defined in § 2.309(c)(2). Paragraph (c)(2) would treat the three criteria for considering new or amended contentions that are currently contained in paragraph (f)(2) as the factors that must be considered under the good cause determination of proposed paragraph (c)(1). The NRC believes that the factors in current § 2.309(f)(2)(i) through (iii) are a useful, specific application of “good cause.” Presiding officers should evaluate whether a filing after the deadlines in § 2.309(b) satisfies the factors in § 2.309(c)(2)(i) through (iii) to determine whether a petitioner has demonstrated good cause. ~~Paragraphs (c)(3) through (6) would be reserved for future NRC use.~~ /

3

Proposed paragraph (c)(~~3~~) would make clear that, apart from demonstrating good cause, a /

petitioner seeking admission to the proceeding after the deadlines in § 2.309(b) would need to satisfy standing and contention admissibility requirements. Paragraph (c)<sup>4</sup>(~~1~~) would apply to a participant or a party who seeks admission of a new or amended contention, and who ~~have~~ <sup>has</sup> already satisfied the standing requirements in § 2.309(d).

This revision would, in part, adopt a line of reasoning first proposed by an Atomic Safety and Licensing Board in the Vermont Yankee power uprate proceeding; the Board concluded that new or amended contentions filed after the initial filing need not satisfy the § 2.309(c)(1) factors if the § 2.309(f)(2)(i) through (iii) factors are met. *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813 (2005). The NRC believes that this should be the appropriate standard for presiding officers to apply when evaluating whether good cause exists.

c. Section 2.309(d)—Standing.

Section 2.309(d) sets forth the standing requirements and also contains some requirements that do not generally relate to standing. To clarify and to better articulate the generally applicable standing requirements, several revisions to § 2.309(d) are being proposed. The general standing criteria in § 2.309(d)(1) would remain the same. A revised § 2.309(d)(2) would adopt the requirements of the first sentence of current § 2.309(d)(3), which requires the presiding officer to consider the paragraph (d)(1) factors when determining whether the petitioner has an interest affected by the proceeding. Revised paragraph (d)(3) would retain the existing provision that in enforcement proceedings the licensee or other person against whom the action is taken is deemed to have standing. Current § 2.309(d)(2) contains special requirements for States, local governmental bodies, and Federally-recognized Indian Tribes that seek status as parties in proceedings. But some of these requirements (e.g., the need to propose one or more contentions; the need to designate a single representative) do not relate to

would contain a new citation reference made necessary by the new § 2.309(h). Also, proposed § 2.309(j) would be revised to provide that if the presiding officer cannot issue a decision <sup>on</sup> each request for hearing or petition to intervene within 45 days of the conclusion of the pre-hearing conference, the presiding officer shall issue a notice advising the Commission and the parties as to when the decision will issue. If no pre-hearing conference is conducted, the 45-day period begins after the filing of answers and replies under § 2.309(i).

3. Section 2.311—Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information.

Section 2.311(b) allows parties to appeal orders of the presiding officer to the Commission concerning a request for hearing, petition to intervene, or a request to access SUNSI or SGI within ten days after the service of the order. Any party who opposes the appeal may file a brief in opposition within ten days after service of the appeal. Experience has demonstrated that the filing time provided under this section is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore proposing to extend the time to file an appeal and a brief in opposition to an appeal from ten to 25 days. The NRC does not expect the proposed change in appeal deadlines to result in any delays in licensing. For one thing, higher-quality briefs should expedite appellate decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC <sup>generally</sup> staff finishes its safety and environmental reviews and does not affect the timing of those reviews.

4. Section 2.314—Appearance and practice before the Commission in adjudicatory proceedings.

Lower  
case

that this change to § 2.336(d) would reduce the burden and increase the robustness of updated disclosures. The NRC also proposes to add a sentence to the end of § 2.336(d), stating that the duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the Presiding Officer issues a decision on that contention, or when otherwise specified by the presiding officer or the Commission.

10. Section 2.340—Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses.

Sections 2.340(a) and (b) currently imply that the presiding officer must reach a decision prior to the issuance of a license or license amendment. But this is not necessarily the case. For operating licenses associated with production and utilization facilities, both the Atomic Energy Act and the NRC's regulations allow for the issuance of a license amendment upon a determination of "no significant hazards consideration." See, e.g., 42 U.S.C. 2239, 10 CFR 50.91. Further, Part 2 Subparts L and N allow the staff to act on an application, including an application for an initial or renewed operating license or operating license amendment, and in proceedings for an initial license or license amendment not involving a production and utilization facility, prior to the completion of any contested hearing, assuming that all other relevant regulatory requirements are met. 10 CFR 2.1202(a), 2.1210(c)(3), and 2.1403(a). The NRC is proposing to revise § 2.340 to clarify that production and utilization facility applications—for an initial license, a renewed license, or a license amendment where the NRC has made a determination of no significant hazards consideration—could be acted upon prior to the completion of a contested hearing. The NRC would also make conforming amendments to paragraphs (d) and (e) of this section to clarify that in proceedings involving a manufacturing license under Part 52 Subpart C, and in proceedings not involving production and utilization facilities, the NRC staff—provided it is able to make all of the necessary findings associated with

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|

the licensing action—may act on a license, permit, or license amendment prior to the completion of a contested hearing.

Finally, this section would be amended to clarify that the presiding officer could make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental or ~~and only to the extent the Commission, after a required referral by~~ common defense and security matter exists. ~~Upon making this determination, the presiding officer must refer its determination to the Commission, and may undertake review of those~~ <sup>to the Commission, approves an examination and decision on</sup> ~~the referred matters.~~ <sup>issues following the Commission's consideration and approval of the referral.</sup>

11. Section 2.341—Review of decisions and actions of a presiding officer.

a. Section 2.341(b)—Petitions for review.

Section 2.341 contains requirements pertaining to the review of decisions and actions of a presiding officer by the Commission. Current § 2.341(b)(1) allows parties to file a petition for review of a full or partial initial decision by a presiding officer or any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part. Under the current regulations a petition for review must be filed with the Commission within 15 days of service of the decision. Similarly, § 2.341(b)(3) allows other parties to file an answer supporting or opposing Commission review within ten days after service of a petition for review. And the petitioning party is allowed to file a reply brief within five days of service of any answer.

Experience has demonstrated that the time the NRC's rules allow for petitions for review of an order of a presiding officer (15 days) is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore proposing to extend the time to file a petition for review and an

answer to the petition from ten to 25 days. The NRC is also proposing to extend the time to file a reply to an answer from five to ten days.

The NRC does not expect the proposed change in appeal deadlines to result in any unnecessary delays in licensing. For one thing, higher-quality briefs should expedite appellate decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC <sup>generally</sup> staff finishes its safety and environmental reviews and does not affect the timing of those reviews. Finally, even when a final presiding officer decision approving a license comes before the Commission on a petition for review, the license can be issued immediately, notwithstanding the pendency of a petition for review. See 10 CFR 2.340(f), 2.341(e). ← lower case

b. Section 2.341(c)—Petitions for review not action on deemed denied.

As stated in the 2004 Part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786 (See 69 FR 2225; January 14, 2004). But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. Accordingly, the NRC proposes to add a new § 2.341(c)(1); existing § 2.341(c)(1) would be redesignated as § 2.341(c)(2), and existing § 2.341(c)(2) would be redesignated as § 2.341(c)(3). Proposed § 2.341(c)(1) would adopt the deemed denied provisions of the former § 2.786(c) with the exception of the 30-day time limit, which would be extended to allow 120 days for Commission review. As a practical matter, the 30-day time frame has necessitated extensions of time in most proceedings, as the prescribed briefing period comprehends 30 days. A 120-day Commission review period would allow for sufficient time to review the filings at the outset, without the unintended consequence of the frequent need for extensions. The NRC is therefore proposing to adopt the deemed denied provisions of former § 2.786 with a 120-day time limit as a new § 2.341(c)(1).

c. Section 2.341(a)—Time to act on a petition for review

Section 2.341(a)(2) currently provides the Commission with 40 days to act on a decision of a presiding officer or a petition for review. The current 40-day time frame has necessitated extensions of time in most proceedings, as the prescribed briefing period comprehends 30 days, often leaving the Commission insufficient time for an effective review of the filings. As discussed above with respect to the "deemed denied" provision, a 120-day Commission review period provides for a reasonable period to review the filings without the unintended consequence of the frequent need for extensions. The NRC is therefore proposing to extend the time for Commission review from 40 days to 120 days. As has always been the case, the Commission may act before that time or extend that period as it deems necessary.

d. Section 2.341(f)—Standards for Atomic Safety Licensing Board certifications and referrals

The NRC proposes to revise paragraph (f) of this section to address a perceived inconsistency in the standards for Atomic Safety Licensing Board certifications and referrals to the Commission and Commission review of these issues. Section 2.323(f) currently allows a presiding officer to refer a ruling to the Commission if prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, or if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. Current § 2.341(f) states that referred or certified rulings "will be reviewed" by the Commission only if the referral or certification "raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding" (emphasis added). This language has been interpreted as allowing the Commission to accept referrals or certifications only if *both* standards in § 2.341(f) are met, even though § 2.323(f) allows a presiding officer to refer or certify a question or ruling if *either* of the comparable criteria in § 2.323(f) is met. *Tennessee Valley Authority* (Bellefonte

Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009). The proposed revision to § 2.341(f) would provide the Commission with maximum flexibility by allowing, but not requiring, the Commission to review an issue if it raises significant legal or policy issues, or if resolution of the issue would materially advance the orderly disposition of the proceeding, or if both standards are met.

12. Section 2.346—Authority of the Secretary.

Currently, § 2.346(j) authorizes the Secretary to “[t]ake action on minor procedural matters.”

Since 2004, experience with the Subpart C hearing procedures has shown that greater

efficiencies could be achieved if the Secretary is given explicit authority to take action on ~~more~~

*minor matters in addition to*

~~than~~ minor procedural matters. The NRC ~~is~~ <sup>is</sup> therefore proposing to authorize the Secretary to

“take action on procedural or other minor matters.” This change would allow the Secretary to

take action on a variety of non-substantive procedural matters, such as motions raising matters

that do not explicitly fit within the Secretary’s existing authority (e.g., a motion to suspend a

hearing notice or the unopposed withdrawal of construction and operating license applications).

Time is frequently of the essence on some minor matters; requiring Commission orders and

affirmation sessions can sometimes result in undesirable delay in issuing needed procedural

directives because of the need to schedule affirmation sessions. Accordingly, the NRC is

proposing to amend § 2.346(j) to give the Secretary the authority to “take action on procedural

or other minor matters.” The NRC ~~is~~ <sup>is</sup> also proposing removing the reference to § 2.311 in

paragraph (e). Requests for review under § 2.311 are termed “appeals” rather than “petitions

for review.” Moreover, there are no deadlines for Commission action on appeals under § 2.311.

13. Section 2.347—Ex parte communications.

Section 2.347 prohibits what are known as ex parte communications between persons outside the NRC and NRC adjudicatory personnel on matters relevant to the merits of an

1. Section 2.704—Discovery—required disclosures.

Section 2.704(a) through (c) sets forth the required disclosures that parties other than the NRC staff must make in formal NRC adjudications. <sup>to</sup> In conformance with the timing provisions of § 2.336(d), a change in § 2.704(a)(3) is being proposed. The proposed § 2.704(a)(3) would require that unless otherwise stipulated or directed by order of the presiding officer, a party's initial disclosures must be made within 30 days of the order granting a hearing and that parties must provide disclosure updates every 30 days. Each update would include documents subject to disclosure under this section that have not been disclosed in a prior update, and that are developed, obtained, or discovered during the period that runs from the last disclosure update to 5 business days before the filing of the update. Presently, § 2.704(a)(3) requires that the initial disclosures be made within 45 days after a prehearing conference order following the initial prehearing conference specified in § 2.329. And § 2.704(e) requires a party <sup>that</sup> who has made a disclosure under § 2.704 to supplement <sup>its</sup> ~~their~~ disclosures if the party learns that some of the disclosed material was incomplete or incorrect (provided the additional or new information <sup>was not</sup> ~~was~~ made available to other parties in writing), and where testimony of an expert from whom a report is required (extending to the information contained in the report and provided through a deposition of the expert).

2. Section 2.705—Discovery—additional methods

Section 2.705(b)(2) allows the presiding officer to "alter the limits in these rules on the number of depositions and interrogatories." But the rules do not limit the number of depositions or interrogatories. The NRC is therefore proposing to amend this section to allow the presiding officer to set reasonable limits on the number of interrogatories and depositions. This proposed change would remove the confusion in this section and improve the efficiency of NRC adjudicatory proceedings.

3. Sections 2.709—Discovery against NRC staff and 2.336—General Discovery.

a. Sections 2.709(a)(6)—Required initial disclosures in enforcement proceedings and 2.336—General Discovery.

The NRC is proposing to amend the NRC staff's mandatory disclosure obligations for enforcement proceedings conducted under Part 2 Subpart G. ~~This proposed amendment would limit staff disclosures to disputed issues alleged with particularity in the pleadings.~~ The current regulation that applies to these proceedings, 10 CFR § 2.336, requires the disclosure of documents that are outside of the scope of the enforcement proceeding, which results in the inclusion of many unrelated documents in the mandatory disclosures. Therefore, the NRC is proposing to amend § 2.336(b) to remove Subpart G enforcement proceedings from the general discovery requirements; a corresponding amendment would be made to § 2.709 to specify the staff's disclosure obligations in a Subpart G enforcement proceeding. This amended section would limit the scope of the staff's disclosures to documents relevant to disputed issues alleged with particularity in the pleadings. Not only would these amended disclosure requirements benefit the NRC staff (by reducing the resources necessary to review, prepare, and provide the required documents), but they would also aid the other parties to the proceeding (by reducing the number of documents they need to review to only documents that are relevant to the issues in the proceeding).

Further, this disclosure requirement would parallel the initial document disclosure requirement in § 2.704(a)(2) for parties other than the NRC staff. Although parties other than the NRC staff are also required by § 2.704(a)(1) to identify individuals likely to have discoverable information relevant to disputed issues, the NRC considers a similar disclosure requirement for the NRC staff to be unnecessary. The discoverable portions of any pertinent Office of Investigations report or related inspection report should identify many of the individuals likely to have discoverable information relevant to disputed issues.

the record" or "formal" hearing. *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (2004). This is true despite the fact that the NRC also provides more formal adjudicatory procedures under Subpart G of Part 2. However, the title of Subpart L was not revised in 2004 to reflect the changed (i.e., less formal) character of its procedures. To eliminate any confusion caused by the current title of Subpart L, the NRC proposes to revise the title of Subpart L to "Simplified Hearing Procedures for NRC Adjudications." The revised title would reflect that these proceedings are less formal than the formal Part 2 Subpart G hearings, but are still formal "on the record" hearings under the APA, and not "informal" hearings as might be inferred from the current title.

2. Section 2.1202—Authority and role of NRC staff.

Section 2.1202 pertains to the authority and role of the NRC staff in less formal hearings. The introductory text of § 2.1202(a) could be erroneously interpreted as suggesting that the staff is required to advise the presiding officer on the merits of contested matters. The NRC proposes to revise § 2.1202(a) to require that in Subpart L proceedings the staff's notice to parties regarding relevant staff licensing actions must include an explanation of why both the public health and safety is protected and the action is in accord with the common defense and security, despite the "pendency of the contested matter before the presiding officer."

A conforming change to the introductory text of § 2.1403(a) is also being proposed to require the NRC staff to provide this explanation when the same situation arises in Subpart N proceedings.

3. Sections 2.1205 and 2.710—Summary disposition; Motions for summary disposition; Authority of the presiding officer to dispose of certain issues on the pleadings.

The summary disposition motion requirements in § 2.1205 do not require the inclusion of a statement of material facts. Before the 2004 amendments to 10 CFR Part 2, the NRC's

significant hazards consideration determinations may be made in license amendment proceedings for production or utilization facilities that are subject to the 10 CFR Part 50 requirements; challenges to these determinations are not allowed in accordance with 10 CFR 50.58(b)(6). Excluding no significant hazards consideration determinations from the stay provisions is also consistent with federal case law holding that these findings are final agency actions, which are not appealable to the Commission. *Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 586 F.Supp. 579, 580-81 (D.D.C. 1984).

**E. Subpart M—Sections 2.1300 through 2.1331.**

The following changes are being proposed to Subpart M of 10 CFR Part 2, which sets forth the procedures that are applicable to hearings on license transfer applications.

1. Sections 2.1300 and 2.1304—Provisions governing hearing procedures for Subpart M hearings.

Section 2.1300 states that the provisions of Subpart M together with Subpart C, govern all adjudicatory proceedings on license transfers, but current § 2.1304 states that the procedures in Subpart M “will constitute the exclusive basis for hearings on license transfer applications.” Section 2.1304, part of the original Subpart M, was effectively replaced by § 2.1300 in the 2004 Part 2 revisions, and could have been removed as part of that rulemaking. The NRC is now proposing to remove § 2.1304 and amend § 2.1300 to clarify that in Subpart M hearings on license transfers, both the generally applicable intervention provisions in Subpart C and the specific Subpart M hearing procedures govern.

2. Section 2.1316—Authority and role of NRC staff.

Section 2.1316(c) provides the procedures for the NRC staff to participate as a party in Subpart M hearings. These procedures would be updated to mirror the requirements of § 2.1202(b)(2) and (3), which set forth the NRC staff’s authority and role in Subpart L hearings. Proposed § 2.1316(c)(1) would require the NRC staff—within 15 days of the issuance of an

order granting requests for hearing or petitions to intervene and admitting contentions—to notify the presiding officer and the parties whether it desires to participate as a party in the proceeding. If the staff decides to participate as a party, its notice would identify the contentions on which it will participate as a party. If the NRC staff later desires to be a party, the NRC staff would notify the presiding officer and the parties, and identify the contentions on which it wished to participate as a party, and would make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice. Once the NRC staff chooses to participate as a party in a Subpart M license transfer proceeding, it would have all the rights and responsibilities of a party with respect to the admitted contention or matter in controversy on which the staff chose to

participate. *As with § 2.1202, "the NRC staff must take the proceeding in whatever posture the hearing may be at the time that it chooses to participate as a party." (69 FR 2228; January 14, 2004).*

**F. Subpart N—Sections 2.1400 through 2.1407**

1. Section 2.1407—Appeal and Commission review of initial decision.

Current § 2.1407(a)(1) allows parties to appeal orders of the presiding officer to the Commission within 15 days after the service of the order. Similarly, § 2.1407(a)(3) allows parties that are opposed to an appeal to file a brief in opposition within 15 days of the filing of the appeal. Experience has demonstrated that the time the NRC's rules allow for appeals from an order of a presiding officer is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore proposing to extend the time to file an appeal and a brief in opposition to an appeal from 15 to 25 days. The NRC does not expect the proposed change in appeal deadlines to result in any delays in licensing. For one thing, higher-quality briefs should expedite appellate

decision-making. Moreover, most of the appellate litigation at the NRC is preliminary to any final licensing decisions; it takes place before the NRC <sup>generally</sup> Staff finishes its safety and environmental reviews and does not affect the timing of those reviews. lower case

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### G. Other Changes.

#### 1. Section 2.4—Definitions.

The current definition of "Participant" applies to an "individual or organization," and does not explicitly apply to governmental entities that have petitioned to intervene in a proceeding. The NRC proposes to correct this definition by adding a parenthetical reference to "individual or organization" so that it reads: "individual or organization (including governmental entities)."

The current definition of "NRC personnel" in § 2.4 contains outdated references to §§ 2.336 and 2.1018. The proposed revision of "NRC personnel" would update this definition by removing references to §§ 2.336 and 2.1018, neither of which references the term "NRC personnel."

#### 2. Section 2.101—Filing of application.

In 2005, § 2.101 was amended to remove paragraph (e) and redesignate (f) and (g) as paragraphs (e) and (f). (70 FR 61887; October 27, 2005) The internal references to paragraph (g) were not updated to reflect the new paragraph designations. References in this section to § 2.101(g) would be corrected to reference § 2.101(f). There are no references to former § 2.101(f) in this section.

#### 3. Section 2.105—Notice of proposed action.

Proposed § 2.105 would make four changes to the current regulation: (1) The introductory text of paragraph (a) would be revised by inserting a reference to the NRC's web site; (2) The introductory text of paragraph (b) would be clarified by specifying that the referenced notice pertains to one published in the *Federal Register*, and, (3) The introductory text of paragraph (d) would be corrected to reference the time period stated in § 2.309(b).

Section 2.336(b) contains the NRC staff's mandatory disclosure obligations. Specifically, under § 2.336(b)(3) the NRC staff must disclose all documents supporting the staff's review of the application or proposed action that is the subject of the proceeding without regard to whether the documents are relevant to the admitted contentions.

The 2004 revision to Part 2 imposed mandatory disclosure provisions on all parties that were intended to reduce the overall discovery burden in NRC adjudicatory proceedings. The NRC is concerned that this has not been the case and that the overall discovery burden has not been reduced. The NRC believes that the primary source of the burden stems from the disclosure of hundreds or thousands of documents by the NRC staff that are unrelated to any admitted contention; disclosure of voluminous material by the staff also burdens other parties to the proceeding with searching through hundreds or thousands of unrelated documents to find the material that is relevant to the issues in dispute (other parties' disclosures are already limited to documents relevant to the admitted contentions; the staff's disclosures are not).

All parties are also required to produce privilege logs (a list of discoverable documents that are not being disclosed because the party asserts a privilege to protect the documents). Due to the large number of documents that are captured by the current regulations, the NRC staff must prepare a log of privileged documents, most of which are entirely unrelated to the contentions. Limiting the disclosure obligations to the issues in dispute would reduce the number of documents produced by the NRC staff, and would also provide the other parties to the proceeding with a list of relevant documents that were withheld, which would make it easier for the parties to identify any withheld documents that they may seek to obtain. This change would also align the scope of the NRC staff's disclosure obligations with those of the other parties to the proceeding. At the same time, the parties' opportunity to obtain publicly available documents

would not be affected, as these proposed changes would not affect the full scope of documents that will be available to parties and other members of the public through ADAMS.

The NRC is also seeking comments on whether it should add a new requirement to the end of § 2.336(d) to clarify that the duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the ~~presiding~~ *lower case* officer issues a decision on that contention or when specified by the presiding officer or the Commission.

#### 1. Specific Questions for Public Comment

- a) Would applying NRC staff disclosures under § 2.336(b)(3) to documents related only to the admitted contentions aid parties other than the NRC staff by reducing the scope of documents they receive and review through the mandatory disclosures?
- b) Is the broad disclosure obligation imposed on the NRC staff by current Section 2.336(b) warranted in light of (a) the other parties' more limited disclosure obligations and (b) the parties' ability to find these same documents in an ADAMS search?
- c) Would a shorter, more relevant privilege log aid parties to the proceeding?
- d) Would potential parties prefer to maintain the status quo?
- e) Would limiting the mandatory disclosures of documents as described in Federal Rule of Civil Procedure 26(a)(1)(A)(ii) be the preferred option?

#### 2. Draft Rule Text that Would Limit the Scope of NRC Staff's Mandatory Disclosures

(b) Except for proceedings conducted under Subpart J of this part (or as otherwise ordered by the Commission, the presiding officer, or the Atomic Safety and Licensing Board assigned to the proceeding), the NRC staff must, within 30 days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and make available the following documents:

- (1) The application and applicant or licensee requests associated with the application or proposed action that is the subject of the proceeding;
- (2) NRC correspondence (including e-mail) with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;
- (3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that are relevant to the contentions that have been admitted into the proceeding;
- (4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding. Documents representing the NRC staff's determination include published NRC reports and published draft or final environmental impact statements or environmental assessments; and
- (5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the

claim of privilege or protected status of the documents.

## **VI. Section-by-Section Analysis.**

### **A. Introductory Provisions—Sections 2.1 through 2.8.**

#### **1. Section 2.4—Definitions.**

This section would modify the definition of *Participant* in § 2.4, which currently applies to individuals or organizations that petition to intervene or request a hearing, but are not yet parties. The new definition would clarify that any individual or organization—including States, local governments, and Federally-recognized Indian Tribes—that petitions to intervene or requests a hearing shall be considered a participant. Further, Federally-recognized Indian Tribes do not have to be “affected” Federally-recognized Indian Tribes to participate in NRC licensing actions. “Affected” is reserved for Federally-recognized Indian Tribes that seek to participate in the high-level waste proceeding; it does not apply to the NRC’s other licensing actions. The current definition also indicates that States, local governmental bodies, or affected Federally-recognized Indian Tribes that seek to participate under § 2.315(c) shall be considered participants. This section does not grant these governmental bodies § 2.315(c) participant status; this status is only obtained when the interested governmental body is afforded the opportunity to participate in the proceeding by the Presiding Officer. Governmental bodies that have requested § 2.315(c) participant status, but have not yet been granted or denied such status by the Presiding Officer, are only entitled to participate in a proceeding as a § 2.4 participant.

This section also would modify the definition of “NRC personnel,” which contains outdated references to §§ 2.336 and 2.1018; the proposed revision would remove these references.

#### **B. Subpart A—Sections 2.100 through 2.111.**

##### **1. Section 2.101—Filing of application**

This section would be amended to correct references to § 2.101(g), which should reference § 2.101(f). These changes would not alter the meaning or intent of this regulation.

##### **2. Section 2.105—Notice of proposed action.**

through (iii) factors into amended § 2.309(c)(2)(i) through (iii) as the factors to be considered in evaluating a filing after the deadlines in § 2.309(b). Thus, unlike the current requirement where both the § 2.309(c) and § 2.309(f)(2) factors must be individually addressed, the proposed amendment incorporates the § 2.309(f)(2) factors into amended § 2.309(c)(2)(i) through (iii). Meeting these three factors would provide sufficient justification for the filing after the deadlines in § 2.309(b). Section 2.309(c)(2)(i) would require the requestor or petitioner to demonstrate that the information upon which the new or amended contention is based was not previously available. The phrase "not previously available" in this paragraph means that a requestor or petitioner cannot base a contention on a document or a report that does not yet exist. For example, if at the time of requestor or petitioner's filing, an agency or organization was working on a report scheduled for publication in six months, the requestor or petitioner could not anticipate this publication and rely on the report in the submission of contentions. Also, § 2.309(c)(2)(ii) would require the information that supports the filing after the deadlines in § 2.309(b) to be materially different from information previously available. And § 2.309(c)(2)(ii) would require a requestor or petitioner to submit this filing in a timely fashion based on the availability of the subsequent information. But this interpretation does not mean that a petitioner or requestor could not submit a filing after the publication of a report, provided that the report contains information that meets both the filing criteria in § 2.309(c) and the admissibility criteria in § 2.309(f).

Section 2.309(c)<sup>3</sup>(~~ii~~) would clarify that any new or amended intervention petition must include new or amended contentions if the petitioner seeks admission as a party, and requires a petitioner to meet the standing and admissibility requirements in § 2.309(d) and (f); a petitioner that has already satisfied the § 2.309(d) standing requirements would not have to do so again.

Section 2.309(c)<sup>4</sup>(~~ii~~) would require any new or amended contentions filed by a party to meet

the admissibility requirements in § 2.309(f), and would clarify that a party or a participant who has already demonstrated standing does not need to satisfy the standing requirements in § 2.309(d) again. Section 2.309<sup>(1)</sup>(2) would clarify that <sup>C S</sup> ~~an~~ <sup>(1)-(2)</sup> amended or <sup>new or</sup> new <sup>arising under the National Environmental Policy Act</sup> contentions must meet the filing requirements of § 2.309(c). <sup>also</sup>

c. Section 2.309(h)—Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.

Section 2.309(d)(2)(i) and (ii) apply only to "affected" Federally-recognized Indian Tribes, which is only proper in the context of a high-level radioactive waste disposal proceeding. Proposed § 2.309(h), which is the current § 2.309(d)(2), would be revised to clarify that, in the case of § 2.309(h)(1) and (2), any Federally-recognized Indian Tribe that wishes to participate in any potential proceeding for a facility located within its boundaries does not need to further establish its standing. Section 2.309(h)(3), which is the current § 2.309(d)(2)(iii), would only apply to a high-level waste disposal proceeding and would retain the references to affected Federally-recognized Indian Tribes; the references in this section would mirror the language used in the § 2.1001 definition of *Party*.

3. Section 2.311—Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information.

Proposed § 2.311(b) would extend the time to file an appeal and a brief in opposition to an appeal from ten to 25 days.

4. Section 2.314—Appearance and practice before the Commission in adjudicatory proceedings.

Proposed § 2.314(c)(3) would extend the time to file an appeal to an order disciplining a party from ten to 25 days.

5. Section 2.315—Participation by a person not a party.

Proposed § 2.315(c) would clarify that interested States, local government bodies, and Federally-recognized tribes, who are not parties admitted to a hearing under § 2.309 and seek

The additional 90 days would allow the Commission 120 days of review time before a petition for review is deemed denied.

Similarly, the time for the Commission to act on a decision of a presiding officer or a petition for review would be expanded to 120 days to bring this section into alignment with the new timeline in proposed § 2.341(c)(1).

c. Interlocutory review.

Section 2.341(f) would allow, but not require, the Commission to review certifications or referrals that meet any of the standards in this paragraph.

12. Section 2.346—Authority of the Secretary.

This proposed section would make explicit <sup>that</sup> the Secretary's authority <sup>to take action</sup> under § 2.346(j), which is currently limited to minor procedural matters, <sup>also</sup> to include <sup>§</sup> non-minor procedural matters—such as the unopposed withdrawal of construction and operating license applications—which would avoid the need for formal Commission orders and affirmation sessions to issue procedural directives. Also, the reference in paragraph (e) to 2.311 has been removed because <sup>appeals</sup> requests <sup>do not have, associated with them, deadlines for Commission action.</sup> ~~for review~~ under 2.311 ~~are term "appeals" rather than "petitions for appeal."~~ ||

13. Sections 2.347 and 2.348—Ex parte communications; Separation of functions.

These sections currently reference § 2.204 demands for information, which are not orders and do not entail hearing rights. Because demands for information are not adjudicatory matters, the restrictions on *ex parte* communications and the separation of functions limitations do not apply. The references to § 2.204 would be removed from both sections.

**D. Subpart G—Sections 2.700 through 2.713.**

1. Section 2.704—Discovery—required disclosures.

This section, which currently requires initial disclosures to be made within 45 days after the issuance of a prehearing conference order following the initial prehearing conference, would be amended to require the filing of a mandatory disclosure update every 30 days. These updates

information, it would be expected to file an update informing the presiding officer and the other parties that no documents or information are being disclosed. The staff would also be required to provide, with initial disclosures and disclosure updates, a privilege log listing the withheld documents that includes sufficient information to assess the claim of privilege or protected status. These requirements parallel the § 2.704 requirements for parties other than the NRC staff.

b. Section 2.709(a)(7)—Form and type of NRC staff disclosures.

Section 2.709(a)(7) is a new paragraph that would allow the staff to satisfy its disclosure obligations for publicly available documents by providing the title, date, and NRC ADAMS accession number for the document. This change would mirror the procedures now used by parties other than the NRC staff to disclose publicly available documents.

4. Section 2.710—Motions for summary disposition.

This section would be amended to conform to the proposed amendments to § 2.1205, which would require parties to attach a statement of material facts to a motion for summary disposition. This proposed change would have no effect on the current practice of including a statement of material facts with a motion; it would clarify that the statement needs to be attached to the motion and does not have to be “separate.”

**E. Subpart H—Sections 2.800 through 2.819.**

1. Section 2.802—Petition for rulemaking.

This section currently allows petitioners for a rulemaking to request the suspension of an adjudicatory proceeding to which they are a party. This section would be amended to allow any petitioner for a rulemaking that is a participant in a proceeding (as defined by § 2.4) to request suspension of that proceeding.

**F. Subpart L—Sections 2.1200 through 2.1213.**

1. Section 2.1202—Authority and role of NRC staff.

Administrative practice and procedure, Age-related degradation, Backfitting, Classified information, Criminal penalties, Environmental protection, Nuclear power plants and reactors,

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552, the NRC is proposing to adopt the following amendments to 10 CFR Parts 2, 51, <sup>and</sup> 54, ~~60, and 63~~.  
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## Part 2—AGENCY RULES OF PRACTICE AND PROCEDURE

1. The authority citation for Part 2 continues to read as follows:

**Authority:** Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 147, as amended, 94 Stat. 788 (42 U.S.C. 2167); sec. 149, as amended, 100 Stat. 853 (42 U.S.C. 2169); 5 U.S.C. 552; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10143(f); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.321 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note). Subpart C also

issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712, also issued under 5 U.S.C. 557. Section 2.340 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553, and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart N also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1472 (42 U.S.C. 2135).

2. The heading of 10 CFR Part 2 is revised to read as set forth above.

3. In § 2.4, the definitions of "Participant" and paragraph (2) of "NRC ~~Personnel~~" are revised to read as follows:

*lower case*

**§ 2.4 Definitions.**

\* \* \* \* \*

*NRC personnel* means:

\* \* \* \* \*

(2) For the purpose of §§ 2.702 and 2.709 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission; and

\* \* \* \* \*

*Participant* means an individual or organization (including a governmental entity) that has

Hearing requests, intervention petitions, and new or amended contentions filed after the deadlines in paragraph (b), will not be entertained absent a determination by the presiding officer that there is good cause for its submission after the deadlines in paragraph (b).

(2) *Good cause.* To show good cause for a request for hearing, petition to intervene, or a new or amended contention filed after the deadlines in paragraph (b), the requestor or petitioner must demonstrate that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

~~(3) (6) Reserved~~  
3 *New petitioner.*

(X) A hearing request or intervention petition filed after the deadlines in paragraph (b) must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs 2.309(d) and (f).  
(1)

4 *Party or participant.*

(X) A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph 2.309(f). If the party has already addressed the requirements for standing under § 2.309(d) in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.  
(1) *or participant*

\* \* \* \* \*

(d) \* \* \*

(2) Rulings. In ruling on a request for hearing or petition for leave to intervene, the

Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule

(5) *Environmental Contentions.* For a new or amended contention arising under the National Environmental Policy Act and based on conclusions in an NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, the party or participant also must show that the data or conclusions in the NRC's documents differ significantly from the data or conclusions in the applicant's environmental report.

on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

(3) Standing in enforcement proceedings. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

\* \* \* \* \*

(f) \* \* \*

~~(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, or other pertinent documents, that differ significantly from the data or conclusions in the applicant's documents and if the amended or new contentions otherwise satisfy the provisions of paragraph (c) of this section.~~

\* \* \* \* \*

(h) Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.

(1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to

intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing Board ruling on the request will admit as a party to the proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian Tribe.

(i) Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate potential parties.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe must also demonstrate standing. |

(3) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this

(i) In a contested proceeding for the initial issuance or renewal of a combined license under Part 52 of this chapter, or the amendment of a combined license where the NRC has not made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the amendment of a combined license under Part 52 of this chapter where the NRC has made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate (appropriate official), after making the requisite findings and complying with any applicable provisions of § 2.1202(a) or § 2.1403(a), may issue the amendment before the presiding officer's initial decision becomes effective. Once the presiding officer's initial decision becomes effective, the appropriate official shall take action with respect to that amendment in accordance with the initial decision. If the presiding officer's initial decision becomes effective before the appropriate official issues the amendment, then the appropriate official, after making the requisite findings, shall issue, deny, or appropriately condition the amendment in accordance with the presiding officer's initial decision.

*(c) Initial decision on findings under 10 CFR 52.103 with respect to acceptance criteria in nuclear power reactor combined licenses.*

In any initial decision under § 52.103(g) of this chapter with respect to whether acceptance criteria have been or will be met, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties, and any matter designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties but identified by the presiding officer as matters requiring further examination, the parties shall be referred to the Commission for its determination; the Commission may, in its

^

discretion, treat any of these referred matters as a request for action under §2.206 and process the matter in accordance with § 52.103(f) of this chapter.

(d) *Initial decision—manufacturing license under 10 CFR Part 52.*

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a manufacturing license under Part 52 Subpart C of this chapter (including an amendment to or renewal of a manufacturing license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding for the initial issuance or renewal of a manufacturing license under Part 52 Subpart C of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the initial issuance or renewal of a manufacturing license under Part 52 Subpart C of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New

Reactors, as appropriate, may issue the license, permit, or license amendment in accordance with § 2.1202(a) or § 2.1403(a) before the presiding officer's initial decision becomes effective. If, however, the presiding officer's initial decision becomes effective before the license, permit, or license amendment is issued under § 2.1202 or § 2.1403, then the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, shall issue, deny, or appropriately condition the license, permit, or license amendment in accordance with the presiding officer's initial decision.

(e) *Initial decision—other proceedings not involving production or utilization facilities.*

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In a proceeding not involving production or utilization facilities, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer, <sup>but identified by the presiding officer as requiring further examination,</sup> matters not put into controversy by the parties must be referred to the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate. Depending on the resolution of those matters, the Director, Office of Nuclear Material Safety and Safeguards or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, after making the requisite findings, shall issue, deny, revoke or appropriately condition the license, or take other action as necessary or appropriate.

(2) Presiding officer initial decision and issuance of permit or license.

(i) In a contested proceeding under this paragraph, the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue, deny, or appropriately condition the permit, license, or license amendment in accordance with the presiding officer's

2.206.

(k) *Issuance of other licenses.*

The Commission or the Director, Office of Nuclear Material Safety and Safeguards, or the Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, shall issue a license, including a license under 10 CFR Part 72 to store spent fuel in either an independent spent fuel storage facility (ISFSI) located away from a reactor site or at a monitored retrievable storage installation (MRS), within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

*add  
space 1*

16. In § 2.341, paragraphs (a), (b)(1) and (3), (c), and (f)(1) are revised to read as follows:  
**§ 2.341 Review of decisions and actions of a presiding officer.**

(a)(1) Review of decisions and actions of a presiding officer are treated under this section provided, however, that no party may request a further Commission review of a Commission determination to allow a period of interim operation under 10 CFR 52.103(c). This section does not apply to ~~review of~~ <sup>or to appeals in</sup> appeals under § 2.311 ~~and~~ <sup>↑</sup> the high-level waste proceeding, which are governed by § 2.1015.

*2; //  
//*

(2) Within 120 days after the date of a decision or action by a presiding officer, or within 120 days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations, and other authorities, with references to the pages of the brief where they are cited.

\* \* \* \* \*

(f) Interlocutory review.

(1) A ruling referred or question certified to the Commission under §§ 2.319(l) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding.

\* \* \* \* \*

17. In § 2.346, paragraph (j) is revised to read as follows:

**§ 2.346 Authority of the Secretary.**

(e) Extend the time for the Commission to grant review on its own motion under § 2.341;

\* \* \* \* \*

(j) Take action on procedural or other minor matters.

\* \* \* \* \*

18. In § 2.347, paragraphs (e)(1)(i)-(ii) are revised to read as follows:

**§ 2.347 Ex parte communications.**

\* \* \* \* \*

(e)(1) \* \* \*

(i) When a notice of hearing or other comparable order is issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e), or 2.312; or

(ii) Whenever the interested person or Commission adjudicatory employee responsible for the communication has knowledge that a notice of hearing or other comparable order will be

Each party shall file written post-hearing proposed findings of fact and conclusions of law on the contentions addressed in an oral hearing under § 2.1207 or a written hearing under § 2.1208 within 30 days of the close of the hearing or at such other time as the presiding officer directs.

*add space 11*

Proposed findings of fact and conclusions of law must conform to the format requirements in § 2.712(c).

\* \* \* \* \*

29. In § 2.1213, paragraph (f) is added to read as follows:  
**§ 2.1213 Application for a stay.**

\* \* \* \* \*

(f) Stays are not available on matters limited to whether a no significant hazards consideration determination was proper in proceedings on power reactor license amendments.

30. Section 2.1300 is revised to read as follows:  
**§ 2.1300 Scope of subpart M.**

The provisions of this Subpart, together with the generally applicable intervention provisions in Subpart C of this part, govern all adjudicatory proceedings on an application for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition. This Subpart provides the only mechanism for requesting hearings on license transfer requests, unless contrary case specific orders are issued by the Commission.

**§ 2.1304 [Removed]**

31. Section 2.1304 is removed.

32. In § 2.1316, paragraph (c) is revised to read as follows:  
**§ 2.1316 Authority and role of NRC staff.**

\* \* \* \* \*

issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

36. In § 51.4, the definition of *NRC Staff* is revised to read as follows:  
**§ 51.4 Definitions.**

\* \* \* \* \*

*NRC staff* means any NRC officer or employee or his/her authorized representative, except a Commissioner, a member of a Commissioner's immediate staff, an Atomic Safety and Licensing Board, a presiding officer, an administrative judge, an administrative law judge, or any other officer or employee of the Commission who performs adjudicatory functions.

\* \* \* \* \*

37. In § 51.34, paragraph(b) is revised to read as follows:  
**§ 51.34 Preparation of finding of no significant impact.**

\* \* \* \* \*

(b) When a hearing is held on the proposed action under the regulations in subpart G of part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the appropriate NRC staff director will prepare a proposed finding of no significant impact which may be subject to modification as a result of review and decision as appropriate to the nature and scope of the proceeding. In such cases, the presiding officer, or the Commission acting as a collegial body, as appropriate, will issue the final finding of no significant impact.

\* \* \* \* \*

38. In § 51.102, paragraph (c) is revised to read as follows:

**§ 51.102 Requirement to provide a record of decision; preparation.**

\* \* \* \* \*

(c) When a hearing is held on the proposed action under the regulations in part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the initial decision of the presiding officer or the final decision of the Commissioners acting as a collegial body will constitute the record of decision. An initial or final decision constituting the record of decision will be distributed as provided in § 51.93.

39. In § 51.109, paragraph (f) is revised to read as follows:

**§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository**

\* \* \* \* \*

(f) In making the determinations described in paragraph (e), the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in § 51.26(c). If the Commission reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

\* \* \* \* \*

40. Section 51.125 is revised to read as follows:

**§ 51.125 Responsible Official.**

The Executive Director for Operations shall be responsible for overall review of NRC NEPA compliance, except for matters under the jurisdiction of a presiding officer, administrative judge,

administrative law judge, Atomic Safety and Licensing Board, or the Commission acting as a collegial body.

**Part 54—REQUIREMENTS FOR RENEWAL OF OPERATING LICENSES FOR NUCLEAR POWER PLANTS**

41. The authority citation for Part 54 continues to read as follows:

Authority: Secs. 102, 103, 104, 161, 181, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); sec. 201, 202, 206, 88 Stat. 1242, 1244, as amended (42 U.S.C. 5841, 5842). Section 54.17 also issued under E.O.12829, 3 CFR, 1993 Comp., p.570; E.O. 12958, as amended, 3 CFR, 1995 Comp., p. 333; E.O. 12968, 3 CFR, 1995 Comp., p.391.

42. Section 54.27 is revised to read as follows:

**§ 54.27 Hearings.**

A notice of an opportunity for a hearing will be published in the *Federal Register* in accordance with 10 CFR 2.105 and 2.309. In the absence of a request for a hearing filed within 60 days by a person whose interest may be affected, the Commission may issue a renewed operating license or renewed combined license without a hearing upon 30 day notice and publication in the *Federal Register* of its intent to do so.

\* \* \* \* \*

Dated at Rockville, Maryland this \_\_\_\_ day of MONTH 2010.

For the Nuclear Regulatory Commission.

\_\_\_\_\_  
Annette L. Vietti-Cook,  
Secretary of the Commission.

Alternatives Approaches on Interlocutory Appeals

The NRC is seeking public comments as to whether to amend 10 CFR Part 2 regarding interlocutory review of rulings by a presiding officer granting or denying a request for hearing or intervention petition, including late-filed requests or petitions. Currently, § 2.311(c) effectively allows the requestor or petitioner to appeal an order wholly denying an intervention petition or request for hearing. Therefore, if the presiding officer grants the intervention petition and denies the admissibility of one or more proposed contentions, the petitioner may not appeal the denial of any proposed contentions until the presiding officer issues a final decision at the end of the proceeding. Conversely, any party other than the petitioner may immediately appeal the order on the grounds that the requestor or petitioner lacks standing or that all of their proposed contentions were inadmissible. Although this basic scheme for interlocutory review of intervention petitions and requests for hearing has been in place since 1972 (see 37 Fed. Reg. 28,710 (Dec. 29, 1972)), there have been some suggestions that a change to the current practice might be warranted to either provide earlier appellate review of contention admissibility or, alternatively, to discourage frivolous appeals. The NRC is considering two options for a      on the potential amendment. The NRC requests comment on the options and possible rule language that would implement each option, *including comments on the resource implications of both options for all parties and for the Commission.*

Option 1

The first option would amend § 2.311(c) and (d) to allow any party to appeal an order granting a request for hearing or petition to intervene in whole or in part within 25 days of the presiding officer's issuance of the order. This amendment would effectively allow all parties to immediately appeal rulings on the admissibility of any particular contention (including late-filed contentions). The NRC is considering adopting the following rule language if it were to adopt this option:

§ 2.311(c) An order granting or denying a request for hearing or a petition to intervene in whole or in part, including late-filed requests or petitions, is appealable within 25 days of the issuance of the order on the question as to whether the petition should have been granted in whole or in part. *request or*

\* \* \* \* \*

(d) An order denying a request for access to the information described in paragraph (a) of this section is appealable by the requestor on the question as to whether the request should have been granted. An order granting a request for access to the information described in paragraph (a) of this section is appealable by a party other than the requestor on the question as to whether the request for access to the information described in paragraph (a)(3) of this section should have been denied in whole or in part. However, such a question with respect to SGI may only be appealed 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.

The potential advantage of amending § 2.311 is that it allows early resolution of contention admissibility issues. Specifically, it eliminates the possibility that, after a Board has issued its final order in the proceeding, the Commission on appeal will remand the proceeding to the Board for consideration of a contention that the Commission has determined should have been admitted and thereby prolong the proceeding. Consistent with the general principles applied by courts and agencies that favor limited interlocutory review, the disadvantages of departing from the current practice under § 2.311 include the potential increase in the Commission's appellate workload at the early stage of a proceeding and the attention given to matters that may be unnecessary to address at all because a party decides not to pursue the matter at the conclusion of the proceeding or further developments, such as settlement, obviate the need to address the admissibility question. This amendment would not alter a party's ability to appeal orders on the question of standing.

Option 2

The second option would delete § 2.311(d)(1) in order to remove the right of parties other than the petitioner to appeal orders granting an intervention petition. This would effectively leave all parties with similar appellate rights, including the right to seek interlocutory review under § 2.341(f)(2). The potential advantage of this option is that it would reduce the Commission's appellate workload by removing any incentive for parties other than the petitioner to oppose all proffered contentions solely to preserve their right to appeal. The main disadvantage would be removing the means by which an early determination can be made as to the proper admission of some contentions.

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AUTHORIZED COMMISSION  
ADJUDICATORY EMPLOYEES UNLESS  
THE COMMISSION DETERMINES  
OTHERWISE

**AFFIRMATION ITEM**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** COMMISSIONER OSTENDORFF  
**SUBJECT:** SECY-10-0106 – PROPOSED RULE – 10 CFR PARTS 2, 51, AND 54 “AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS” (RIN 3150-AI43)

Approved  X in part  Disapproved  X in part  Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  X  None \_\_\_\_\_

W O Ostendorff  
SIGNATURE

11/12/10  
DATE

Entered on “STARS” Yes  X  No \_\_\_\_\_

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THE COMMISSION DETERMINES  
OTHERWISE

**Commissioner Ostendorff's Comments on SECY-10-0106:  
Proposed Rule – 10 CFR Parts 2, 51, and 53 “Amendments to Adjudicatory Process Rules  
and Related Requirements”**

I approve publication of the proposed rule that would amend the NRC's adjudicatory process rules. I thank the staff for this well-organized and clear paper that appropriately highlighted and explained the basis for the changes that are being proposed. As for the Part 2 revisions, they generally seem well-thought-out and responsive to challenges that have been identified since the 2004 rulemaking. I also appreciate the fact that this proposed rule was coordinated with the Office of Commission Appellate Adjudication, the Office of the Secretary, and the Atomic Safety and Licensing Board Panel. The perspectives of all of these offices are invaluable, and solicitation of wide-ranging input should continue.

For interlocutory appeals, I approve the proposal to seek public comment on our interlocutory appeal standards. Based on my experience thus far with Commission adjudicatory matters, I am inclined to agree that the current approach is adequate. However, I am sympathetic to concerns raised by the ASLBP regarding the current rules of interlocutory appeal, so I think it would be worthwhile to at least solicit and consider stakeholder comments on this matter.

I do not approve of the proposal to delegate additional authority to the Secretary at this time for issuance of orders over “minor matters.” Though I can appreciate the difficulties that are occasionally encountered in defining the limits of SECY's authority to issue adjudicatory orders, I did not get a clear sense from this section of the paper what types of additional orders this expanded authority might include. Nor did I get a clear sense of what specific problems have arisen in the past that this delegation would remedy. The Commission should always be cautious in delegating additional authority without a complete understanding of the implications of the delegation. Therefore, I support the Chairman's proposal that OGC provide further analysis of this matter for the Commission's consideration.