RULEMAKING ISSUE
(Notation Vote)

August 13, 2010 SECY-10-0106

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: PROPOSED RULE—10 CFR PARTS 2, 51, AND 54 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS" (RIN 3150-AI43)

PURPOSE:

To obtain Commission approval to publish a proposed rule to amend portions of 10 CFR Part 2, to make conforming changes to other provisions of the regulations, and to solicit public comment on possible changes to the mandatory disclosure requirements that are intended to avoid duplication of effort or unnecessary administrative burden to the parties. Major revisions to the Part 2 regulations were issued in January 2004. Since that time provisions requiring correction and clarification have been discovered by the Office of the General Counsel (OGC), and several areas in need of additional improvement have been identified. This enclosed draft *Federal Register* notice (FRN) contains OGC's recommended amendments to the NRC's adjudicatory rules.

SUMMARY:

The proposed rule (Enclosure 1) contains a number of improvements to the NRC's hearing process, as well as many minor corrective and clarifying amendments. The most significant changes include amendments to the 10 CFR § 2.309 standards for review of hearing requests, intervention petitions, and new or amended contentions filed after the deadlines in paragraph (b) of that section and to the discovery provisions related to enforcement proceedings. The amendments would also provide for more time for appellate filings and would request public comment on whether there should be changes to the mandatory disclosure requirements for non-enforcement proceedings. OGC believes that the changes in this proposed rule will promote fairness, efficiency, and openness in NRC adjudicatory proceedings.

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OGC recommends making this rule, should it become final, immediately effective for all ongoing and future NRC adjudicatory proceedings. In an ongoing adjudicatory proceeding, the new or amended requirements would be effective and govern all obligations and disputes that arise after the effective date of the final rule. The requirements would not, however, be applied retroactively to decisions or determinations of a presiding officer, and disputes over an adjudicatory obligation or situation arising before the effective date of the new rule would be governed by the former rule provisions.

OGC recommends that this rule be issued as a proposed rule for notice and comment. Although the Administrative Procedure Act does not require the use of notice and comment rulemaking for rules of agency procedure and practice, OGC believes that the benefits of issuing this rule as a proposed rule for public comment outweigh the benefits that could be gained by issuing the rule as a final rule.

BACKGROUND:

In a final rulemaking published in the Federal Register on January 14, 2004 ("major 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. 69 FR 2182.

Since the new rules of practice became effective, provisions needing correction or clarification have been discovered, and several areas have been identified where further improvements to the rules governing the hearing process can be achieved. Prior rulemakings have addressed some of these issues, but OGC believes that this comprehensive rulemaking is necessary to correct remaining errors and to implement improvements that were not adopted in the rulemakings that have occurred since 2004.

SUMMARY OF SIGNIFICANT PROPOSED RULE CHANGES:

Changes to 10 CFR § 2.309

The proposed rule would significantly change the requirements in § 2.309(c) and (f)(2) for hearing requests, intervention petitions, and new or amended contentions filed after the initial filing deadline. The language in the current § 2.309 is confusing because two different filing tests are stated in two separate paragraphs of § 2.309, without any indication in the regulatory text as to how they interrelate. Section 2.309(c) applies the traditional eight factor balancing test to "nontimely" hearing requests, intervention petitions, and contentions; the most important of these factors is "good cause." Section 2.309(f)(2) applies a three-factor test to new or amended contentions after the initial filing; the Commission has also applied these three factors to a intervention petition filed after the deadlines in § 2.309(b). *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 33 (2006). The § 2.309(f) three-factor test appears to be a specific application of the case law definition of "good cause." The proposed rule would simplify the requirements governing hearing requests, intervention petitions, or new or amended contentions filed after the deadlines in § 2.309(b) by: (1) making 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; (2) defining good cause as those factors currently in § 2.309(f)(2)(i)–(iii) (which require information used as the basis for new or amended contentions to be new and materially different, and for the

contentions to be timely filed after discovery of the new information); (3) adding clarifying information regarding the need to address interest and standing; and (4) removing references to nontimely filings. Any contention that is filed after the initial filing deadline would be called "new or amended," rather than "late-filed," the term currently used. The term "late-filed" can be misleading because these contentions are normally timely filed after new information becomes available.

The proposed amendments to § 2.309 would apply the good cause factor to all filings after the deadlines in paragraph (b) 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 will significantly simplify the review of filings after initial filing deadline. These changes would allow both the parties and the presiding officer to focus their resources on the most relevant questions related to the admissibility of these filings (i.e., whether good cause exists and whether the contentions meet the admissibility requirements of 2.309(f)).

The proposed rule would also change the requirements in § 2.309(i), which currently requires the presiding officer to seek Commission approval if the presiding officer cannot issue a decision within 45 days after the filing of all answers and replies in § 2.309(h). Section 2.309(i) would be redesignated as § 2.309(j), and would require that the presiding officer notify (instead of seek approval from) the Commission and the parties if the 45-day deadline will not be met. This notification must include the expected date of when the decision will issue.

Request for Public Comment on Interlocutory Appeals

Section 2.311 establishes a scheme for interlocutory appeals from orders admitting or denying a request for hearing or petition to intervene. Currently, if a petitioner is held to not have standing or all of the petitioner's contentions are denied, then the petitioner can immediately appeal the Licensing Board order to the Commission. If at least one contention is admitted, but one or more are denied, then the petitioner must wait until the Licensing Board has issued its final order in the proceeding before it can appeal the denial of contentions. Parties, such as the license applicant and the NRC staff, however, can appeal the admission of all of the contentions admitted immediately after issuance of the initial Board order on the grounds that *none* of them are admissible, and therefore there should be no hearing.

The Atomic Safety and Licensing Board Panel (ASLBP) is suggesting that the rule be amended to preclude parties from appealing rulings on the admissibility of contentions (including new or amended contentions) prior to the issuance of the final Board order. Rather than having such appeals as a matter of right, the ASLBP believes that the Commission should only entertain interlocutory appeals challenging the admission of contentions when the standards that the Commission uses in accepting interlocutory appeals (as set forth in 10 CFR § 2.341(f)(2)) have been satisfied. The ASLBP argues that under the current rule applicants in particular are encouraged to oppose every proffered contention regardless of merit in order to preserve their appeal right, which it suggests encourages applicants in particular to opposes contentions regardless of merit in order to preserve the "automatic" right of appeal. This in turn, the ASLBP suggests, significantly contributes to the workload of the Boards, Commission, OCAA, and OGC. The main disadvantage would be removing the means by which an early determination can be made as to the proper admission of some contentions.

Another approach would be to require all appeals of decisions on contention admissibility (including rulings on new or amended contentions) to be filed immediately after the issuance of the Board order. The arguable advantage of this approach is that it allows early resolution of contention admissibility issues, avoiding the potentially needless expenditure of resources by all hearing participants. Further, 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. The argument against this approach is that the perceived advantages of allowing all appeals at the early stage may be largely illusory. It will likely substantially increase the adjudicatory workload for all of the participants in the adjudication, OCAA, and the Commission itself, and present the Boards with case management challenges. This approach could theoretically result in the admissibility of every contention in every proceeding being appealed to the Commission on an interlocutory basis. In any event, this option would require the Commission to devote its attention to matters that under the current rules the Commission would not have been asked to address because, in many cases, parties at the end of a proceeding choose not to appeal decisions denying the admissibility of contentions or a settlement agreement may have obviated the need to address the admissibility question. Currently, the Commission receives periodic appeals of the denial of contentions following issuance of Licensing Boards' final orders in the proceeding.

Overall, OGC believes that the current approach has served the agency well and has achieved the proper balance and does not recommend that the Commission modify the regulation. But, OGC has prepared for the Commission's consideration rule text and explanatory material to be included in the *Federal Register* notice, should the Commission decide to seek public comment on either or both of the alternative approaches. These alternative approaches are set forth in Enclosure 2.

Changes to the Discovery Provisions in 10 CFR 2.336, 2.704, 2.709

Narrowing the scope of NRC staff disclosures in enforcement proceedings.

Section 2.336, which governs NRC staff disclosures in enforcement proceedings, could be interpreted as requiring the disclosure of documents that are well outside of the scope of the enforcement proceeding, which could result in the inclusion of many unnecessary and unrelated documents. Subpart G should be amended to specify the staff's disclosure obligations in Subpart G enforcement proceedings; a conforming amendment would be made to remove Subpart G enforcement proceedings from the scope of § 2.336 mandatory disclosures. The new Subpart G mandatory disclosure provisions would limit the scope of the staff's disclosures to documents relevant to disputed issues alleged with particularity in the pleadings. OGC believes that these amended disclosure requirements would benefit the NRC staff (by reducing the resources necessary to review, prepare, and provide the required documents), and 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, OGC believes that a similar disclosure requirement for the NRC staff is unnecessary

because the enforcement order and the discoverable portions of any pertinent Office of Investigations report should identify many of the individuals likely to have discoverable information relevant to disputed issues.

An additional amendment to § 2.709 would add paragraph (a)(6)(i) to 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, together 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. Currently, the regulations provide for disclosure every 14 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 required of other parties by proposed § 2.704(a)(3). An amendment to § 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 this 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.

Revised mandatory disclosure schedule

Currently, all parties are required by § 2.336(d) to update their disclosures within 14 days of obtaining or discovering new information, which is unnecessarily burdensome; in the proposed rule disclosure updates would be made every 30 days. These updates would include all documents obtained or discovered during the period that runs from five days before the last disclosure update to five business days before the filing of the update. Documents discovered during the period between the five business day cutoff and the 30-day deadline would be included in the next update. OGC is also proposing that the Commission request comments on a variation of this proposed disclosure updates timeline that would require updates every 30 days, but would, as specified in the hearing milestones approach, mirror the 14-day disclosure requirements of the current version of § 2.336(d). A similar change is also being proposed to the timing of, and the supplementation requirements for, the initial disclosures under Subpart G for parties other than the NRC staff. These disclosures would have to be made 30 days after the grant of a hearing request, and the document disclosures would have to be supplemented within 30 days of the discovery of new documents.

Request for public comment on the scope of mandatory disclosures

Under the mandatory disclosure provisions of § 2.336(b)(3), the NRC staff must disclose NRC correspondence with the applicant or licensee “associated with the application or proposed action,” and documents “supporting the staff’s review, including documents that provide support for, or opposition to, the application or proposed action.” Because the disclosure obligation is not limited to the *issues in the proceeding* but instead extends to documents “*associated with*” the application or proposed NRC action, the staff has been required to review, produce, and, in some cases, redact a large number of documents that are irrelevant to the issues actually in

dispute. Thus, the current mandatory disclosure provisions have proven to be highly burdensome on the NRC staff and OGC hearing staff with little compensating benefit to other parties. Further, most of the documents that are now provided through mandatory disclosures are available to the public through ADAMS, with the exception of documents that are properly withheld under existing law (e.g., FOIA). These withheld documents are not made available on ADAMS or through mandatory disclosures.

OGC is therefore proposing that the Commission request public comment on a proposal to limit the documents disclosed by the staff under § 2.336(b)(3) to documents related to the admitted contentions. OGC believes that this change could reduce the burden on all the parties by focusing the staff's disclosures on documents that are directly related to the admitted contentions. This would reduce the number of unrelated documents that parties receive throughout the course of a proceeding and would allow all of the parties to focus on the issues in dispute.

Extension of time to appeal presiding officer orders to the Commission

Experience has demonstrated that the time the NRC's rules allow for petitions for review and appeals from an order of a presiding officer (10-15 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. OGC 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. OGC is therefore proposing to extend the time to file an appeal, petition for review, or answer to appeal or petition to the Commission to 25 days; the time to file a reply to an answer to a petition for review would be extended from five to ten days. Sections 2.311, 2.314, 2.341, and 2.1407 would adopt this new timeline.

Petitions for Commission review not acted on deemed denied in § 2.341

Section 2.341 contains requirements pertaining to the review of decisions and actions of a presiding officer by the Commission. As stated in the 2004 Part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786. 69 FR at 2225. 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. OGC is therefore proposing that the Commission adopt the provisions of former § 2.786(c) with an extended period of time for Commission review—120 days instead of 30. The 30-day review period in former Section 2.786 provided insufficient time for Commission review following the completion of briefing, routinely resulting in multiple extensions of time. In contrast, the automatic denial of a petition for review after 120 days, absent an extension from the Commission, would allow the Commission to concentrate its resources on the merits of the petitions, which would improve the overall efficiency of the adjudicatory process.[1]

[1] The Commission originally adopted a discretionary review system, of which the deemed denied provision was a part, to ensure that "its review procedures not impose an expensive and time-consuming (continued. . .)

Clarification of the Authority of the Secretary in § 2.346

Section 2.346(j), as currently written, 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 would be achieved if the Secretary were authorized to take action on more than minor procedural matters. OGC believes that the Secretary should be authorized to take action on "procedural and other minor 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 a trivial motion to reconsider a Commission order). This change would allow the Secretary to take action on a variety of non-substantive matters, whether or not procedural. Time is of the essence on many minor matters—requiring Commission orders and affirmation sessions can sometimes result in undesirable delay in issuing needed decisions. Giving the Secretary authority to act for the Commission on minor matters will not result in orders contrary to Commission policy; the Secretary's current practice is to notify and informally consult with the Commission Offices before issuing orders invoking her authority.

Authority and role of the NRC staff in certain adjudications in § 2.1202

Section 2.1202 of Subpart L 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. Proposed § 2.1202(a) would 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 paragraph (a) of § 2.1403 is also proposed to require the NRC Staff to provide this explanation when the same situation arises in Subpart N proceedings.

Other Less Substantial Changes made in the Proposed Rule

The following less substantial changes are also in the proposed rule:

- Section 2.1209 of Subpart L (to be renamed "Simplified Hearing Procedures for NRC Adjudications") would be amended to provide format requirements for findings of fact and conclusions of law that mirror the requirements for Subpart G proceedings.
- Section 2.1213(f) of Subpart L would be amended to exclude from the stay provisions those matters limited to whether a no significant hazards consideration determination for a power reactor license amendment was proper.
- Section 2.1300 of Subpart M ("Procedures for Hearings on License Transfer Applications") would be amended to clarify that proceedings under Subpart M are governed by the provisions in both Subpart C and Subpart M. Section 2.1304 is duplicative of § 2.1300 and would be deleted.

(. . .continued)
burden on parties to licensing proceedings and ultimately on the public. . . .[Such a system] would allow the Commission to exercise an informed review function restricted to major matters." 41 FR 54206.

- Section 2.1316(c) of Subpart M, on the participation of the NRC staff as a party, would be amended to conform to the more detailed § 2.1202(b)(2) and (3), governing the participation of the NRC staff as a party in Subpart L proceedings.
- Other citation and typographical errors and omissions that have been noticed since the major revisions to the NRC's Rules of practice in early 2004 would also be corrected.
- Many other minor changes that do not raise policy issues are also being proposed throughout this draft *Federal Register* notice.

COORDINATION:

The FRN attached to this SECY paper has been reviewed by the Rules and Directives Branch of the Office of Administration. OGC incorporated comments from OCAA and the ASLBP. The EDO and relevant staff offices has been briefed on this SECY paper.

RESOURCES:

0.2 FTE will be required to complete this rulemaking in FY2011. These resources have been budgeted for.

RECOMMENDATIONS:

That the Commission:

Approve the enclosed proposed rule (Enclosure 1) for publication in the Federal Register.

Certify, under the Regulatory Flexibility Act, 5 U.S.C. § 605(b), that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed Federal Register notice.

Note:

- The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. § 605(b);
- The enclosed FRN contains the Regulatory Analysis for this rulemaking;
- No Environmental Impact Statement or Environmental Assessment has been prepared for this rulemaking because of the categorical exclusion in 10 CFR § 51.22(c)(1);
- Copies of the FRN of this proposed rulemaking will be distributed to all affected Commission licensees, Agreement States, and other States. The notice will be sent to other interested persons upon request;
- The staff has determined that this action is not a "major rule," as defined by the Congressional Review Act, 5 U.S.C. § 804(2), and has confirmed this determination with the OMB. The appropriate Congressional and Government Accountability Office contacts will be informed;

- The appropriate Congressional committees will be informed;
- A press release will be issued by the Office of Public Affairs when the proposed rulemaking is filed with the Office of the Federal Register; and
- The rule does not contain changes in information collection requirements.

/RA/

Stephen G. Burns
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Enclosures:
(1) Draft proposed rule *Federal Register* notice
(2) Alternatives Approaches on Interlocutory Appeals

Enclosure 1

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 51, and 54

RIN 3150-AI43

[NRC-2008-0415]

Amendments to Adjudicatory Process Rules and Related Requirements

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its adjudicatory rules of practice. This proposed rule would make changes to the NRC's adjudicatory process that NRC believes will promote fairness, efficiency, and openness in NRC adjudicatory proceedings. This proposed rule would also correct errors and omissions that have been identified since the major revisions to the NRC's Rules of Practice in early 2004.

DATES: Comments on the proposed rule must be received on or before **[INSERT DATE 75 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].** Comments received after this date will be considered if it is practical to do so. However, the NRC is able to ensure consideration only of comments received on or before this date.

ADDRESSES:

Please include Docket ID NRC-XXXX-XXXX in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see

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.

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. 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.

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,

Licensing Boards should be aware of the effectiveness of the final rule and take the necessary steps to notify parties of their obligations once the final rule becomes effective.

IV. Discussion of Changes and Corrections of Errors.

A. Part 2—Title.

The current title of Part 2, Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, does not accurately reflect the scope of this Part, nor does it track the language of the APA. The NRC is proposing a new title for Part 2: Agency Rules of Practice and Procedure, which would better reflect the scope of its Subparts and would mirror the language of the APA.

B. Subpart C—Sections 2.300 through 2.390.

1. Section 2.305—Service of documents; methods; proof.

Section 2.305(c)(4) currently refers to “any paper,” which could be interpreted to exclude electronic documents filed through the NRC’s E-Filing system. The NRC is therefore proposing to clarify that a signed certificate of service must be included with “any document” served upon the parties in a proceeding under this Part. Under this rule, the certificate of service must include the name and address of each person upon whom service is being made (which for electronic submissions under the E-Filing system should include, at a minimum, the name and e-mail address used for service of each person in the E-Filing system service list for a proceeding upon whom service needs to be made) and the date and method of service. Because it is the responsibility of a participant submitting a document to the E-Filing system to comply with the service requirements, a certificate of service that simply states the document is being served “per the service list in the E-Filing system” without listing the names and addresses of each of those being served is insufficient to comply with § 2.305(c)(4). The NRC notes that § 2.304 requires that electronic documents be signed using a participant’s digital certificate; in such circumstances it is not necessary to submit an electronic copy of the

document that includes an actual signature.

Paragraph 2.305(g)(1) does not currently provide an address for service upon the NRC staff when a filing is not being made through the E-Filing system and no attorney representing the NRC staff has filed a notice of appearance in the proceeding. The proposed paragraph (g)(1) would provide addresses to be used to accomplish service on the NRC staff in these circumstances.

2. Section 2.309—Hearing requests, petitions to intervene, requirements for standing, and contentions.

Section 2.309 contains the generally applicable procedures for requesting hearings and submitting petitions to intervene in NRC proceedings, and sets forth the requirements for submitting contentions and establishing legal standing to participate in NRC proceedings. The NRC is proposing to make several changes to § 2.309.

a. Section 2.309(b)—Timing.

Section 2.309(b)(5) currently references orders issued under § 2.202, but does not reference notices of violation imposing a civil penalty issued under § 2.205. Section 2.205 notices of violation, like § 2.202 orders, provide “twenty (20) days . . . or other time specified in the notice” for individuals to file an answer. This provision does not match the 60 days allowed by § 2.309(b), which could be interpreted as applying to § 2.205 notices of violation. The proposed § 2.309(b)(5) would correct this omission by adding a reference to § 2.205 to reflect that notices of violation issued in § 2.205 civil penalty proceedings have timing requirements similar to those of § 2.202 orders.

b. Sections 2.309(c) and (f)— Subsequent Submission of Petition/Request or New or Amended Contentions.

Current § 2.309(c)(1) contains eight balancing factors that determine whether to grant or admit “nontimely” hearing requests, intervention petitions, or contentions. These factors include the three factors for standing—also found at § 2.309(d)(1)(ii) through (iv)—and the following five

factors: good cause for the failure to file on time; the availability of other means to protect the requestor's or petitioner's interest; the extent to which the requestor's or petitioner's interest will be represented by other parties; the extent to which the requestor's or petitioner's interest will broaden the issues or delay the proceeding; and the extent to which the requestor's or petitioner's participation may reasonably be expected to assist in developing a sound record. The "good cause" factor is given the most weight, and "[i]f a petitioner cannot show good cause, then its demonstration on the other factors must be 'compelling.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005) (footnote with citation omitted). Good cause is not defined in the regulations, but has been defined by the NRC in case law as a showing that the petitioner "not only . . . could not have filed within the time specified in the notice of opportunity for hearing, but also that it filed as soon as possible thereafter." *Id.* In addition, § 2.309(f)(2) identifies three factors to be considered in determining whether to admit a new or amended contention. These factors include whether the new or amended contention is based on information that was not previously available. For example, if a document has not been prepared and is referred to as a forthcoming document, the appropriate time to file a contention based upon the document is after its publication. The two remaining factors in § 2.309(f)(2) include whether the information that was not previously available is materially different from information that was previously available, and whether the new or amended contention has been submitted in a timely fashion after the availability of the new information. The § 2.309(f) three factor test appears to be a specific application of the case law definition of "good cause." The proposed rule would simplify the requirements governing requests for hearing, intervention petitions, or new or amended contentions filed after the deadlines in § 2.309(b) by: (1) making 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; (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.

Proposed paragraph (c)(7) 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)(8) would apply to a participant or a party who seeks admission of a new or amended contention, and who have 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

standing. The present § 2.309(d)(2) provisions would be revised and would be moved to a new § 2.309(h), which is discussed below.

d. Section 2.309(d)(2) moved to 2.309(h)—State, local governmental body, and Federally-recognized Indian Tribe.

As stated above, the present § 2.309(d)(2) provisions for government participation, which do not contain generally applicable standing requirements like the rest of § 2.309, would be revised and moved to a new § 2.309(h). The proposed § 2.309(h)(1), based on the existing § 2.309(d)(2)(i), would require any State, local governmental body or Federally-recognized Indian Tribe seeking to participate as a party to submit at least one admissible contention. This section would also include the requirement that each governmental entity designate a single representative for the hearing. If a request for hearing or petition to intervene were granted, the NRC would admit as a party 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, as applicable. This proposed section would also require, as provided in the statement of considerations for the 2004 Part 2 revisions, that:

> 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. Each must separately satisfy the relevant contention requirement, and each must designate its own representative (that is, the Governor must designate a single representative, and the State official must separately designate a representative). (69 FR 2182, 2222; January 14, 2004).

The proposed § 2.309(h)(2) would be based on the existing § 2.309(d)(2)(ii), which states that in any potential proceeding for a facility (the term “facility” is defined in § 2.4) located within

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)

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 of 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 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.

Paragraph 2.314(c)(3) allows anyone disciplined under § 2.314(c) to file an appeal with the Commission within ten days after issuance of the order. Experience since the 2004 revisions of Part 2 has demonstrated that ten days frequently is not adequate for parties to prepare quality appeals. The NRC is therefore proposing to extend the time to file an appeal of an order disciplining a party from ten to 25 days. The NRC believes that extending the time for appeals will result in higher-quality appeals.

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

Current § 2.315(c) allows interested State, local governmental bodies, and Federally-recognized Indian Tribes that have not been admitted as parties under § 2.309 a reasonable opportunity to participate in hearings. The NRC is proposing to amend § 2.315(c) to clarify that States, local governmental bodies, or Federally-recognized Indian Tribes that are allowed to participate in hearings take the proceeding as they find it, consistent with longstanding NRC case law. *See,* e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-13, 17 NRC 469, 471-72 (1983), citing 10 CFR § 2.714(c) (current 2.315(c)); *Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Station), LBP-80-6, 11 NRC 148, 151 (1980).

6. Section 2.319—Power of the presiding officer.

As part of the 2004 revisions to Part 2, the NRC eliminated “redundant or duplicate provisions in Subpart J that would be covered by the generally applicable provisions in Subpart C” (69 FR 2212; January 14, 2004). Section 2.319(l) would be updated to clarify the scope of the power of the Presiding Officer to refer rulings or certify questions to the Commission, consistent with the change to § 2.323, discussed below.

7. Section 2.323—Motions.

The NRC proposes to amend paragraph (f) of this section to clarify the criteria for referrals in this paragraph, and to make the referral criteria consistent with the Commission's standards for consideration of such referrals. The criterion on "prompt decision … necessary to prevent detriment to the public interest or unusual delay or expense" would be removed to make clear that this criterion concerns the prompt decision *of the Commission*. The second criterion on "the decision or ruling involves a novel issue that merits Commission review" would be revised to make clear that: (1) this criterion concerns the *presiding officer's* decision, and (2) the presiding officer's decision must raise or create "significant and novel" issues that may be either "legal or policy" in nature.

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

Section 2.335 details the procedures through which a challenge to the Commission's regulations may be raised as part of an adjudicatory proceeding. The current text of the rule limits these challenges to "a party to an adjudicatory proceeding," which would seem to exclude petitioners from challenging the Commission's regulations. The Commission recognizes that challenges to the Commission's regulations are frequently contained in petitions to intervene and requests for hearing. Further, the Commission recognizes that petitioners may have a legitimate interest in raising such challenges before they are granted party status and that Atomic Safety and Licensing Boards have allowed petitioners to raise these concerns before being admitted as parties. *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007). "Also, a contention that challenges any Commission rule is outside the scope of the proceeding because, absent a waiver, 'no rule or regulation of the Commission … is subject to attack … in any adjudicatory proceeding.' Similarly, any contention that amounts to an attack on applicable statutory requirements must

be rejected by a licensing board as outside the scope of the proceeding. A petitioner may, however, within the adjudicatory context submit a request for waiver of a rule under 10 C.F.R. § 2.335, and outside the adjudicatory context file a petition for rulemaking under 10 CFR 2.802 or a request that the NRC Staff take enforcement action under 10 CFR 2.206." *Id.* (citations omitted). The NRC is therefore proposing to amend this section to clarify that, in accordance with NRC practice, "participants to an adjudicatory proceeding," not just parties, may seek a waiver or an exception for a particular proceeding.

9. Section 2.336—General Discovery

Section 2.336(d) currently requires parties to update their mandatory disclosures every 14 days. Experience with adjudications since early 2004 has demonstrated that the current disclosure provisions are much more burdensome for litigants than was initially anticipated. Part of the burden is the frequency of required updates to the mandatory disclosures. The NRC is therefore proposing to replace the requirement to disclose information or documents within 14 days of discovery with a continuing duty to provide a disclosure update every 30 days. The Commission is also considering an alternative timeline to the proposed rule for disclosure updates. Like the proposed rule, this approach would require disclosure updates every thirty days, but, as specified hearing milestones approach, this would mirror the 14-day disclosure requirements of the current version of § 2.336(d). This hearing-sensitive timeline would mitigate the burdens of the current rule, while preserving the utility of more frequent disclosure updates as hearing milestones approach.

Each update under the proposed versions of § 2.336(d) 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 five business days before the last disclosure update to five business days before the filing of the update. It is anticipated

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

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 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 issues following the Commission's consideration and approval of the referral.

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 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 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 than minor procedural matters. The NRC is 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 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

ongoing hearing; this section currently applies to § 2.204 demands for information. Unlike the NRC actions subject to §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e) and 2.312 (which would continue to be referenced in § 2.347(e)(1)(i) and (ii)), hearing rights do not attach to a demand for information because it is not an order; it is a pre-enforcement document requesting information. 56 FR 40663, 40670, 40682; August 15, 1991. The NRC is therefore proposing to amend the ex parte communication provisions in § 2.347(e)(1)(i) and (ii) by deleting the two references to § 2.204. Formerly, § 2.204 pertained to orders for modification of licenses and orders to show cause, and these orders did involve the right to a hearing. (50 FR 38113; September 20, 1985). Thus, when § 2.780—the precursor to § 2.347—was established in 1988, the references to § 2.204 were proper. But in 1991 the references became erroneous when the provisions for orders for modification of licenses were deleted and replaced by the § 2.204 provisions regarding demands for information. Accordingly, the NRC is proposing conforming changes to § 2.347(e)(1)(i) and (ii).

14. Section 2.348—Separation of functions.

The separation of functions provisions in § 2.348 prohibit certain communications between specified sets of NRC personnel on matters relevant to the merits of an ongoing adjudicatory hearing. Similar to the § 2.347 proposal discussed above, the NRC is proposing to correct the separation of functions provisions in § 2.348(d)(1)(i) and (ii) by deleting the two references to § 2.204. As explained above, unlike the other specified NRC actions, hearing rights do not attach to a demand for information. When § 2.781—the precursor to § 2.348—was established in 1988, the references to § 2.204 were proper. But the references became erroneous in 1991 for the reasons stated above with respect to § 2.347(e)(1)(i) and (ii). Accordingly, the NRC is now proposing the conforming changes to § 2.348(d)(1)(i) and (ii).

C. Subpart G—Sections 2.700 through 2.713

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).

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.

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

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

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

requirements governing motions for summary disposition required these motions to be accompanied by a "separate, short and concise statement of material facts as to which the moving party contends that there is no genuine issue to be heard." When the summary disposition motion requirements were included in the hearing procedures in 10 CFR Part 2, Subpart L, the requirement for a statement of material facts was inadvertently omitted from § 2.1205. Proposed § 2.1205 would restore the requirement for a statement of material facts for which the moving party contends that there is no genuine issue. This section would not include the requirement for a “separate” statement of material facts in dispute, as the rule already requires that the statement be "attached" to the motion. The NRC is proposing a conforming change to § 2.710 to remove the word, "separate," which would ensure that §§ 2.710 and 2.1205 are identical in this regard.

4. Section 2.1209—Findings of fact and conclusions of law.

Section 2.712(c) specifies the format for proposed findings of fact and conclusions of law in Subpart G proceedings, but a similar format provision does not exist in Subpart L. The NRC, therefore, is proposing to amend § 2.1209 by adding the format requirements now contained in § 2.712(c). These format requirements would aid presiding officers in Subpart L proceedings by ensuring that proposed findings of fact and conclusions of law clearly and precisely communicate the parties’ positions on the material issues in the proceeding, with exact citations to the factual record.

5. Section 2.1213—No significant hazards consideration determinations not subject to stay provisions.

The proposed amendment to § 2.1213 would add a new paragraph (f). The proposed paragraph would exclude from the stay provisions matters limited to whether a no significant hazards consideration determination for a power reactor license amendment was proper. No

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.

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 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.

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).

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 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.

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 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.

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.

This section would be updated to include a reference to the NRC's web site. Paragraph (b) of this section would be updated to clarify that the referenced "notice" is one that is published in the *Federal Register,* and paragraph (d) would be amended to include a reference to the time period included in § 2.309(b).

C. Subpart C—Sections 2.300 through 2.390.

1. Section 2.305—Service of documents; methods; proof.

Section 2.305, which currently requires any paper served in an NRC proceeding to include a signed certificate of service, would be amended to clarify that a signed certificate of service must be filed with any document filed with the NRC. Under § 2.304(d)(1) persons submitting electronic documents to the NRC through the E-Filing system do not need to physically sign their documents; signature with a participant's digital ID certificate satisfies the requirement that a document be signed.

Section 2.305(g)(1), which does not currently provide an address for service upon the NRC staff when a filing is not being made through the E-Filing system and no attorney representing the NRC staff has filed a notice of appearance, would be updated to provide participants with an address to use in these circumstances.

2. Section 2.309—Hearing requests, petitions to intervene, requirements for standing, and contentions.

a. Section 2.309(b)—Timing.

Section 2.309(b), which does not provide a time for answers to § 2.205(c) orders, would be amended to clarify that recipients of § 2.205(c) orders have the time specified in the order to file their answers.

b. Section 2.309(c) and (f)— Subsequent Submission of Petition/Request or New or Amended Contentions.

Section 2.309(c) would be updated to consolidate the nontimely filing requirements and to clarify the intent of the regulations. Amended § 2.309(c) would incorporate the § 2.309(f)(2)(i)

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)(7) 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)(8) 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(f)(2) would clarify that all amended or new contentions must meet the filing requirements of § 2.309(c).

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

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.

7. Section 2.323—Motions

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 on 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.

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 the Secretary's authority under § 2.346(j), which is currently limited to minor procedural matters, to include 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 requests 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

would include all disclosable documents and information obtained up to 5 business days before the disclosure update. Any documents or information obtained or developed during the period that runs from the last disclosure update to 5 business days before the filing of the update would be included in the next 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.

2. Section 2.705—Discovery—additional methods.

This section, which currently allows the presiding officer to "alter the limits . . . on the number of depositions and interrogatories," would be amended to remove the impression that these rules impose a limit on the number of depositions and interrogatories—they do not. Instead, the new rule would clarify that the presiding officer "may set limits on the number of depositions and interrogatories."

3. Section 2.709—Discovery against NRC staff.

a. Section 2.709(a)(6)—Initial disclosures.

This new paragraph would require the NRC staff to provide initial disclosures within 30 days of the order granting a hearing and without awaiting a discovery request. The NRC staff disclosures would include all NRC staff documents relevant to disputed issues alleged with particularity in the proceedings, including any Office of Investigations Report and supporting Exhibits, and any Office of Enforcement documents regarding the order. The staff would also be required to file a mandatory disclosure update every 30 days. These updates would include all disclosable documents and information obtained or developed during the period that runs from the last disclosure update to 5 business days before the filing of the update. Any documents or information obtained or developed during the period between the 5 business day cutoff and the update would be included in the next update. If the staff does not disclose any documents or

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.

This section currently requires the NRC staff to include its position on the matters in controversy when it notifies the presiding officer of its decision on a licensing action, which could be incorrectly interpreted as requiring the staff to advise the presiding officer on the merits of the contested matters. This amended section would clarify the authority and role of the NRC staff in less formal hearings; staff notices regarding licensing actions would have to 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."

2. Section 2.1209—Findings of fact and conclusions of law.

This section currently does not specify the formatting requirements for findings of fact and conclusions of law. Amended § 2.1209 would incorporate the § 2.712(c) formatting requirements for findings of fact and conclusions of law to ensure that proposed findings of fact and conclusions of law clearly and precisely communicate the parties' positions on the material issues in the proceeding, with exact citations to the factual record.

3. Section 2.1213—Application for a stay.

Section 2.1213 does not currently exclude matters limited to whether a "no significant hazards consideration" determination for a power reactor license amendment was proper from the stay provisions. Section 50.58(b)(6) prohibits challenges to these determinations; section 2.1213 would therefore be amended to exclude from the stay provisions matters limited to whether a no significant hazards consideration determination was proper.

G.Subpart M—Sections 2.1300 through 2.1331.

1. Section 2.1300—Scope of Subpart M.

The NRC is proposing to remove § 2.1304 and to amend § 2.1300 to clarify that the generally applicable intervention provisions in Subpart C and the specific provisions in Subpart

M govern in Subpart M proceedings.

2. Section 2.1304—Hearing procedures.

The NRC is proposing to remove § 2.1304 and to amend § 2.1300 to clarify that the generally applicable intervention provisions in Subpart C and the specific provisions in Subpart M govern in Subpart M proceedings.

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

This section currently allows the NRC staff to submit a simple notification at any point in the proceeding to become a party. The NRC is proposing to adopt the requirements in § 2.1202(b)(2) and (3), which 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. The staff's notice would identify the contentions on which it will participate as a party; the staff would be allowed to join the proceeding at a later stage by providing notice to the presiding officer, identifying the contentions on which it wishes to participate as a party, and making the disclosures required by § 2.336(b)(3) through (5).

H. Subpart N—Sections 2.1400 through 2.1407.

1. Section 2.1403—Authority and role of the NRC staff.

This section, which is essentially identical to § 2.1202, would be amended to mirror the changes to that section.

This section would also be updated to correct the reference to § 2.101(f)(8), which should reference § 2.101(e)(8); this change would not alter the meaning or intent of this regulation.

2. 2.1407—Appeal and Commission review of initial decision.

Proposed § 2.1407(a) would extend the time to file an appeal and an answer to an appeal from 15 to 25 days.

I. Parts 51 and 54.

1. Section 51.4—Definitions.

This section would be amended to remove an outdated reference to the former Atomic Safety and Licensing Appeal Board in the definition of *NRC Staff.* This change would not alter the meaning or intent of this regulation.

2. Section 51.34—Preparation of finding of no significant impact.

This section would be amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes would not alter the meaning or intent of this regulation.

3. Section 51.102—Requirement to provide a record of decision; preparation.

This section would be amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes would not alter the meaning or intent of this regulation.

4. Section 51.109—Public hearings in proceedings for issuance of materials licensed with respect to a geologic repository.

This section would be amended to remove an outdated reference to the former Atomic Safety and Licensing Appeal Board. This change would not alter the meaning or intent of this regulation.

5. Section 51.125—Responsible official.

This section would be amended to remove outdated references to “Subpart G of Part 2” and to the former Atomic Safety and Licensing Appeal Board. These changes would not alter the meaning or intent of this regulation.

6. Section 54.27—Hearings.

This section would be amended to replace an outdated reference to a 30-day period to request a hearing with a reference to the correct 60-day period to request a hearing. This section 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 published in the *Federal Register.*

VII. Plain Language.

The Presidential memorandum dated June 1, 1998, entitled "Plain Language in Government Writing" directed that the government's documents be written in clear and accessible language. This memorandum was published on June 10, 1998 (63 FR 31883). In complying with this directive, editorial changes have been made to 10 CFR Part 2 to improve the organization and readability of the sections being revised. These types of changes are not discussed further in this document. The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the ADDRESSEES caption of this document.

VIII. Voluntary Consensus Standards.

The National Technology Transfer and Advancement Act of 1995, Pub. Law 104-113, requires that Federal agencies use technical standards that are developed by voluntary, private sector, consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this rule, the NRC is approving changes to its procedures for the conduct of hearings in 10 CFR Part 2. This action does not constitute the establishment of a government-unique standard as defined in Office of Management and Budget (OMB) Circular A-119 (1998).

IX. Environmental Impact: Categorical Exclusion.

The proposed rule involves an amendment to 10 CFR Part 2, and thus qualifies as an action for which no environmental review is required under the categorical exclusion set forth in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rulemaking.

X. Paperwork Reduction Act Statement.

This proposed rule does not contain information collection requirements, and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

XI. Regulatory Analysis.

The proposed rule emanates from the desire to make corrections, clarifications, and conforming changes to the NRC's rules of practice and to improve the hearing process. Those amendments that merely reflect either clarifications or corrections to the adjudicatory regulations are not changes to the existing processes. These amendments would not result in a cost to the NRC or to participants in NRC adjudicatory proceedings, and a benefit would accrue to the extent that potential confusion over the meaning of the NRC's regulations is removed.

The more substantial changes suggested in the proposed rule would likewise not impose costs upon either the NRC or participants in NRC adjudications, but would instead bring benefits. Allowing 30 days for the updating of disclosures made under § 2.336(d) would, in fact, reduce burdens on the parties. Fairness and equitable treatment would be furthered by the changes made to the 10 CFR 2.309 filing provisions and to the 10 CFR Part 2 discovery provisions. These discovery amendments would improve adjudicatory efficiency, as would the amendments made to the format requirements for findings in final § 2.1209.

The NRC does not believe the option of preserving the status quo is a preferred option. Failing to correct errors and clarify ambiguities will result in continuing confusion over the meaning of the rules, which could lead to the unnecessary waste of resources. Also, experience has shown that the agency hearing process can be improved through appropriate rule changes. The NRC believes that the proposed rule would improve the fairness, efficiency, and openness of NRC hearings without imposing costs on either the NRC or on participants in NRC

adjudicatory proceedings. This constitutes the regulatory analysis for the proposed rule.

XII. Regulatory Flexibility Act Certification.

In accordance with the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the NRC certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule would apply in the context of NRC adjudicatory proceedings concerning nuclear reactors or nuclear materials. Reactor licensees are large organizations that do not fall within the definition of a small business found in section 3 of the Small Business Act, 15 U.S.C. 632, within the small business standards set forth in 13 CFR Part 121, or within the size standards established by the NRC (10 CFR 2.810). Based upon the historically low number of requests for hearings involving materials licensees, it is not expected that this rule would have any significant economic impact on a substantial number of small businesses.

XIII. Backfit Analysis.

The NRC has determined that the backfit rule does not apply to the proposed rule amendments because they do not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required for this proposed rule.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 54

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, 54, 60, and 63.

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:

§ 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

petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status by an Atomic Safety and Licensing Board or other presiding officer. Participant also means a party to a proceeding and any interested State, local governmental body, or Federally-recognized Indian Tribe that seeks to participate in a proceeding under § 2.315(c). For the purpose of service of documents, the NRC staff is considered a participant even if not participating as a party.

* * * * *

4. In § 2.101, paragraphs (b), (d), (e)(1), (f)(2)(i)(D), f(2)(ii), and (f)(5) are revised to read as follows:

§ 2.101 Filing of application.

* * * * *

(b) After the application has been docketed each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except applicants under part 61 of this chapter, which must comply with paragraph (f) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, telephone number, and e-mail address (if available) of the applicant's representative who may be

contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph the applicant should not make public distribution of those parts of the application subject to § 2.390(d). The applicant shall submit to the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

* * * * *

(d) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will give notice of the docketing of the public health and safety, common defense and security, and environmental parts of an application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except that for applications pursuant to Part 61 of this chapter, paragraph (f) of this section applies to the Governor or other appropriate official of the State in which the facility is to be located or the activity is to be conducted and will publish in the Federal Register a notice of docketing of the application which states the purpose of the application and specifies the location at which the proposed activity would be conducted.

* * * * *

(f) * * *

(2)(i) * * *

(D) Serve a notice of availability of the application and environmental report on the chief executives or governing bodies of the municipalities or counties which have been identified in the application and environmental report as the location of all or part of the alternative sites if copies are not distributed under paragraph (f)(2)(i)(C) of this section to the executives or bodies.

(ii) All distributed copies shall be completely assembled documents identified by docket number. However, subsequently distributed amendments may include revised pages to previous submittals and, in these cases, the recipients will be responsible for inserting the revised pages. In complying with the requirements of paragraph (f) of this section the applicant may not make public distribution of those parts of the application subject to § 2.390(d).

* * * * *

(5) The Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, will cause to be published in the Federal Register a notice of docketing which identifies the State and location of the proposed waste disposal facility and will give notice of docketing to the governor of that State and other officials listed in paragraph (f)(3) of this section and will, in a reasonable period thereafter, publish in the Federal Register a notice under § 2.105 offering an opportunity to request a hearing to the applicant and other potentially affected persons.

* * * * *

5. In § 2.105, the introductory text of paragraph (a), paragraph (a)(11), the introductory text of paragraph (b), and the introductory text of paragraph (d) are revised to read as follows:

§ 2.105 Notice of proposed action.

(a) If a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest, it will, before acting thereon, publish in the Federal Register, as applicable, or on the NRC web site, http://www.nrc.gov, or both, at the Commission's discretion, either a notice of intended operation under § 52.103(a) of this chapter and a proposed finding that inspections, tests, analysis, and acceptance criteria for a combined license under Subpart C of part 52 have been or will be met, or a notice of proposed action with respect to an application for:

* * * *

(b) A notice of proposed action published in the Federal Register will set forth:

* * * * *

(d) The notice of proposed action will provide that, within the time period provided under § 2.309(b):

* * * *

6. In § 2.305, the heading is revised, and paragraphs (c)(4) and (g)(1) are revised to read as follows:

§ 2.305 Service of documents, methods, proof.

* * * * *

(c) * * *

(4) To provide proof of service, any document served upon participants to the proceeding as may be required by law, rule, or order of the presiding officer must be accompanied by a signed certificate of service stating the names and addresses of the persons served as well as the method and date of service.

* * * * *

(g) * * *

(1) Service shall be made upon the NRC staff of all documents required to be filed with participants and the presiding officer in all proceedings, including those proceedings where the NRC staff informs the presiding officer of its determination not to participate as a party. Service upon the NRC staff shall be by the same or equivalent method as service upon the Office of the Secretary and the presiding officer, e.g., electronically, personal delivery or courier, express mail, or expedited delivery service. If no attorney representing the NRC Staff has filed a notice of appearance in the proceeding and service is not being made through the E-Filing System, service will be made using the following addresses, as applicable: by delivery to the Associate General Counsel for Hearings, Enforcement & Administration, One White Flint North, 11555-0001 Rockville Pike, Rockville MD 20852; by mail addressed to the Associate General Counsel for Hearings, Enforcement & Administration, U.S. Nuclear Regulatory Commission, Washington DC 20555-0001; by e-mail to OgcMailCenter@nrc.gov; or by facsimile to (301) 415-3725.

* * * * *

7. In § 2.309, paragraphs (b)(5), the introductory text of paragraph(c)(1), paragraphs (c)(1)(i), (d)(2), (d)(3), and (f)(2), are revised, paragraphs (f)(2)(i) through (f)(2)(iii) are redisignated as paragraphs (c)(1)(i)(A) through (C) and revised, paragraph (h) is redesignated as paragraph (i) and revised, current paragraph (i) is redesignated as paragraph (j) and revised, and a new paragraph (h) is added to read as follows:

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

* * * * *

(b) * * *

* * * * *

(5) For orders issued under §§ 2.202 or 2.205 the time period provided therein.

* * * * *

(c) Subsequent Submission of Petition/Request or New or Amended Contentions. (1)

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

(7) 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).

(8) 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.

* * * * *

(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

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

section.

(i) Answers to hearing requests, intervention petitions, and requests to admit new or amended contentions after the initial filing. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition—

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding may file an answer to a hearing request, intervention petition, or a request to admit amended or new contentions after the initial filing within 25 days after service of the request or petition. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(j) Decision on request/petition.

(1) In all proceedings other than a proceeding under 10 C.F.R. 52.103, the presiding officer shall issue a decision on each request for hearing or petition to intervene within 45 days of the conclusion of the initial pre-hearing conference, or if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies under paragraph (i) of this section. With respect to a request to admit amended or new contentions, the presiding officer shall issue a decision on each such request within 45 days of the conclusion of any pre-hearing conference that may be conducted regarding the proposed amended or new contentions, or if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies, if any. In the event the presiding officer cannot issue a decision within 45-days, the presiding officer shall issue a notice advising the Commission and the parties, and the notice shall include the

expected date of when the decision will issue.

(2) The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 C.F.R. 52.103. The Commission's decision may not be the subject of any appeal under 10 C.F.R. 2.311.

8. In § 2.311, paragraph (b) is revised to read as follows:

* * * * *

(b) These appeals must be made as specified by the provisions of this section, within 25 days after the service of the order. The appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief. Any party who opposes the appeal may file a brief in opposition to the appeal within 25 days after service of the appeal. The supporting brief and any answer must conform to the requirements of § 2.341(c)(2). No other appeals from rulings on requests for hearings are allowed.

* * * * *

9. In § 2.314, paragraph (c)(3) is revised to read as follows:

* * * * *

(c) * * * * *

(3) Anyone disciplined under this section may file an appeal with the Commission within 25 days after issuance of the order. The appeal must be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. The Commission shall consider each appeal on the merits, including appeals in cases in which the suspension period has already run. If necessary for a full and fair consideration of the facts, the Commission may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. In the latter event, unless the Commission

provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. The hearing must begin as soon as possible. In the case of an attorney, if no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Commission, as appropriate, shall notify the State bar(s) to which the attorney is admitted. The notification must include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Commission.

* * * * *

10. In § 2.315, paragraph (c) is revised to read as follows:

§ 2.315 Participation by a person not a party.

* * * * *

(c) The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), and Federally-recognized Indian Tribe that has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. The participation of any State, local governmental body, or Federally-recognized Indian Tribe shall be limited to unresolved issues and contentions, and issues and contentions that are raised after the State, local governmental body, or Federally-recognized Indian Tribe becomes a participant. Each State, local governmental body, and Federally-recognized Indian Tribe shall, in its request to participate in a hearing, designate a single representative for the hearing. The representative shall be permitted to introduce evidence, interrogate witnesses where cross examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions. The representative shall identify those

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

review. The presiding officer shall apply the criteria in § 2.341(f)(1) in determining whether to grant the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

* * * * *

13. In § 2.335, paragraphs (b), (c), and (e) are revised to read as follows:

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

* * * * *

(b) A participant to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception be made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other participant may file a response by counter-affidavit or otherwise.

(c) If, on the basis of the petition, affidavit, and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning participant has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the

rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

* * * * *

(e) Whether or not the procedure in paragraph (b) of this section is available, a participant to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

14. In § 2.336, the introductory text to paragraphs (b) and (d) are revised to read as follows:

§ 2.336 General discovery.

* * * * *

(b) Except for enforcement proceedings initiated under Subpart B of this part and conducted under Subpart G of this part, and 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 or provide to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

* * * * *

(d) The duty of disclosure under this section is continuing. A disclosure update must be made every thirty (30) days after initial disclosures. The disclosure update is limited to 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 5 business days before last disclosure update to 5 business days before the filing of the update. The duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when Presiding Officer issues a decision on that contention, or at such other

time as may be specified by the Presiding Officer or the Commission.

15. Section 2.340 is revised to read as follows:

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

(a) *Initial decision—production or utilization facility operating license.*

(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 an operating license or renewed license (including an amendment to or renewal of an operating license or renewed license) for a production or utilization facility, 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 construction permit, operating license, or renewed license, or the amendment of an operating or renewed 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 construction permit, operating license,

or renewed license 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.

(b*) Initial decision—combined 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 combined license under Part 52 of this chapter (including an amendment to or renewal of combined 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 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 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. 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

initial decision once that decision becomes effective.

(ii) 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, may issue the permit, license, or 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 permit, license, or amendment is issued under § 2.1202 or § 2.1403, then 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 amendment in accordance with the presiding officer's initial decision.

(f) *Immediate effectiveness of certain presiding officer decisions.*

A presiding officer's initial decision directing the issuance or amendment of a limited work authorization under 10 CFR 50.10, an early site permit under Subpart A of Part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under Part 50 of this chapter, a combined license under Subpart C of Part 52 of this chapter, a manufacturing license under Subpart F of Part 52 of this chapter, or a license under 10 CFR Part 72 to store spent fuel in an independent spent fuel storage facility (ISFSI) or a monitored retrievable storage installation (MRS), an initial decision directing issuance of a license under Part 61 of this chapter, or an initial decision under 10 CFR 52.103(g) that acceptance criteria in a combined license have been met, is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective.

(g)–(h) [Reserved]

(i) *Issuance of authorizations, permits, and licenses—production and utilization facilities.*

The Commission, the Director, Office of New Reactors, or the Director, Office of Nuclear Reactor Regulation, as appropriate, shall issue a limited work authorization under 10 CFR 50.10, an early site permit under Subpart A of Part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under Part 50 of this chapter, a combined license under Subpart C of Part 52 of this chapter, or a manufacturing license under Subpart F of Part 52 of this chapter 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 authorization, permit or 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.

(j) *Issuance of finding on acceptance criteria under 10 CFR 52.103.*

The Commission, the Director, Office of New Reactors, or the Director, Office of Nuclear Reactor Regulation, as appropriate, shall make the finding under 10 CFR 52.103(g) that the acceptance criteria in a combined license have been, or will be met, within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made the finding under 10 CFR 52.103(g) that acceptance criteria have been, or will be met, for those acceptance criteria which are 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.

(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.

(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.

(2) If a petition for review is granted, the Commission 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

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

issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e), or 2.312.

* * * * *

19. In § 2.348, paragraphs (d)(1)(i) and (ii) are revised to read as follows:

§ 2.348 Separation of functions.

* * * * *

(d)(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 an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a notice of hearing or other comparable order will be issued in accordance with §§ 2.104(a), 2.105(e)(2), 2.202(c), 2.205(e), or 2.312.

* * * * *

20. In § 2.704, paragraph (a)(3) is revised to read as follows:

§ 2.704 Discovery—required disclosures.

(a) * * *

(3) Unless otherwise stipulated by the parties or directed by order of the presiding officer, these disclosures must be made within 30 days of the order granting a hearing. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully completed its investigation of the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures. The duty of disclosure under this section is continuing. A disclosure update must be made every 30 days after initial disclosures. The disclosure update must contain any information or 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. The duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the hearing with respect to that contention has concluded, or at such other time as may be specified by the presiding officer or the Commission.

* * * * *

21. In § 2.705, paragraph (b)(2) is amended to read as follows:

§ 2.705 Discovery—additional methods.

* * * * *

(b) * * *

(2) Upon his or her own initiative after reasonable notice or in response to a motion filed under paragraph (c) of this section, the presiding officer may set limits on the number of depositions and interrogatories, and may also limit the length of depositions under § 2.706 and the number of requests under §§ 2.707 and 2.708. The presiding officer shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules if he or she determines that:

* * * * *

22. In § 2.709, paragraphs (a)(6) and (a)(7) are added to read as follows:

(a)* * * * *

(6) *Initial disclosures in an enforcement proceeding.*

(i) In a proceeding arising from an order issued under §§ 2.202 or 2.205, the NRC staff must, except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, provide to the other parties within thirty (30) days of the order granting a hearing

and without awaiting a discovery request:

(A) All NRC staff documents relevant to disputed issues alleged with particularity in the pleadings, including any Office of Investigations report and supporting exhibits, and any Office of Enforcement documents regarding the order; and

(B) A list of all documents otherwise responsive to paragraph (a)(6)(i)(A) 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.

(ii) Supplementation of document disclosures. The duty of disclosure under this section is continuing. A disclosure update must be made every thirty (30) days after initial disclosures. The disclosure update must contain any information or 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 five (5) business days before the filing of the update. The duty of mandatory disclosure with respect to new information or documents relevant to a contention ends when the hearing with respect to that contention has concluded, or at such other time as may be specified by the presiding officer or the Commission.

(7) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location (including the ADAMS accession number, when available), the title and a page reference to the relevant document, data compilation, or tangible thing.

23. In § 2.710, paragraph (a) is revised to read as follows:

§ 2.710 Motions for summary disposition.

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision

by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. Summary disposition motions must be filed no later than 20 days after the close of discovery. The moving party shall attach to the motion a short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within 20 days after service of the motion. The party shall attach to any answer opposing the motion a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within 10 days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses to the motion will be entertained.

* * * * *

24. In § 2.802, paragraph (d) is revised to read as follows:

§ 2.802 Petition for rulemaking.

* * * * *

(d) The petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant pending disposition of the petition for rulemaking.

* * * * *

Subpart L—Simplified Hearing Procedures for NRC Adjudications

25. The Title of Subpart L is revised to read as set forth above:

26. In § 2.1202, the introductory text of paragraph (a) is revised to read as follows:

§ 2.1202 Authority and role of 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 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 underlying regulatory matter for which a hearing was provided. 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 by the staff, except in matters involving:

* * * * *

27. In § 2.1205, paragraph (a) is revised to read as follows:

§ 2.1205 Summary disposition.

(a) Unless the presiding officer or the Commission directs otherwise, motions for summary disposition may be submitted to the presiding officer by any party no later than 45 days before the commencement of hearing. The motions must be in writing and must include a written explanation of the basis of the motion. The moving party must attach a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard, and affidavits to support statements of fact. Motions for summary disposition must be served on the parties and the Secretary at the same time that they are submitted to the presiding officer.

28. Section 2.1209 is revised to read as follows:

§ 2.1209 Findings of fact and conclusions of law.

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. 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.

* * * * *

(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 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 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:

* * * * *

34. In § 2.1407, paragraphs (a)(1) and (a)(3) are revised to read as follows:

§ 2.1407 Appeal and Commission review of initial decision

(a)(1) Within 25 days after service of a written initial decision, a party may file a written appeal seeking the Commission's review on the grounds specified in paragraph (b) of this section. Unless otherwise authorized by law, a party must file an appeal with the Commission before seeking judicial review.

* * * * *

(3) Any other party to the proceeding may, within 25 days after service of the appeal, file an answer supporting or opposing the appeal. The answer may not be longer than 20 pages and should concisely address the matters specified in paragraph (a)(2) of this section. The appellant does not have a right to reply. Unless it directs additional filings or oral arguments, the Commission will decide the appeal on the basis of the filings permitted by this paragraph.

Part 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

35. The authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041; and sec. 193, Pub. L. 101-575, 104 Stat. 2835 (42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 51.80. and 51.97 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100-203, 101 Stat. 1330-223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also

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); secs 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.

Enclosure 2

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 potential amendment. The NRC requests comment on the options, and possible rule language that would implement each option.

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.
>
> * * * * *
>
> (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.