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**Rulemaking Comments**

**From:** Anthony Z. Roisman [aroisman@nationallegalscholars.com]
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**Attached are comments on the proposed Part 2 Amendments originally noticed in the Federal Register on February 28, 2011. Please contact me if you have questions or if the attachments are not readily accessible. The Law Review Article is incorporated by reference in the comments and attached to be part of the record for the rulemaking.**

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# COMMENTS ON PROPOSED AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (76 FED. REG. 10781)

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MARCH 28, 2011

## INTRODUCTION[1]

When the current version of Part 2 was adopted in 2004 the Commission stated:

> The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient.

69 Fed.Reg. 2182 (Changes to Adjudicatory Process) January 14, 2004 ("2004 SOC"). No fair observer of the contested hearings that have occurred since that time, particularly those involving license renewal, would say that the current version of Part 2 achieves that laudable goal. Rather, the process is marked by a chaotic hurricane of pleadings addressed, for the most part, not to the merits of the safety and environmental issues that are the appropriate focus of such hearings, but to the whether issues sought to be raised by the public meet procedural requirements such that the issues are appropriate for consideration in a hearing. The meat of the hearing, i.e. the activities that address the merits of issues such as pre-filed testimony, proposed areas of cross-

[1] Mr. Roisman is an attorney and has represented parties before the Atomic Energy Commission and the Nuclear Regulatory Commission since 1969. He was the lead counsel for an intervening public participant in the construction permit applications for proposed Consumers Power reactors in Midland, Michigan, the proposed Public Service of New Hampshire reactors in Seabrook, New Hampshire, the Clinch River Breeder Reactor in Oak Ridge, Tennessee and in the operating license applications for Indian Point Unit 2, in Buchanan, New York and Vermont Yankee in Vernon, Vermont. He has been involved in several relicensing proceedings. He also represented public participants in numerous matters before the AEC and NRC including the rule-making hearings regarding ECCS criteria, worker radiation exposure, and the standards for implementation of the National Environmental Policy Act by the AEC. A number of these matters were eventually resolved in Federal Court where Mr. Roisman was lead counsel including Calvert Cliffs Coord. Cttee v. AEC and NRDC v. NRC (GESMO). He has written law review articles regarding NRC practices and procedures and has presented his views in meetings sponsored by the NRC including the Regulatory Information Conference. He was a Member, Nuclear Regulatory Commission Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals - 1982-83 and a Member, Nuclear Regulatory Commission Advisory Panel on Atomic Safety and Licensing Board Nominations - 1980-85. His full CV is attached. The views expressed here are Mr. Roisman's, and not his clients.

examination, motions for summary disposition and the hearings themselves, consume relatively little time compared to the time spent on addressing contention admissibility and the timeliness of new or amended contentions.

When the Commission announced the current proposed amendments to Part 2 it stated:

> 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.

76 Fed.Reg. 10781 (February 28, 2011). However, while that goal is laudable, the proposed changes do little, if anything, to achieve it and fail to address the fundamental problems that plague the NRC licensing hearing process. License renewal hearings provide ample proof of the failure of the current Part 2 regulations to "promote fairness, efficiency, and openness" and, in fact demonstrate that the current Part 2 regulations are unfair, inefficient and lack transparency.

For example, the Indian Point relicensing proceeding, commenced on August 1, 2007 with the filing of a Notice of Opportunity for Hearing in the Federal Register. 72 FR 42134. However, the portion of the hearing that will address the merits of the issues raised will not begin until June 19, 2011 when under the ASLB Scheduling Order, pre-filed direct testimony from the intervenors will be due. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010). Thus, the preliminary, essentially non-substantive, skirmishing over the admissibility of contentions and amended or new contentions took 46 months. By contrast, from the point where the real meat of the hearing begins - filing of testimony - until completion of the hearings and filing of all post-hearing pleadings will take approximately 11 months assuming the hearings last three weeks and do not begin until 60 days after all pre-hearing filings occur. *Id.* The time spent on the preliminary matters related to

admissibility of contentions and the timeliness and appropriateness of new or amended contentions is not substantively productive - i.e. resolution of such issues as to whether an amended basis is timely or a contention contains sufficient specificity and basis to be admitted - and represents an enormous expenditure of time and money by all parties, an expenditure that falls particular hard on the public which does not have an economic incentive to justify expenditures and is not funded by taxes and licensing fees.

The core of the problem is that hearings are noticed when the application is still in a state of flux and before any of the work by Staff has been completed. As the applicant refines and completes the application - often adding dozens of application amendments - and as the Staff publishes draft and final impact statements and draft and final safety evaluations - new documents are disclosed and new issues are raised, compelling the conscientious intervenor to seek to amend existing contentions and their bases or to add new contentions. No one suggests that the additional work done by the applicant or by the Staff is not valuable. However, each of those changes by applicant and staff are done without any limitation or adverse consequence to them. Thus, for example, an applicant is not penalized for waiting until long after its application has been accepted for filing by Staff, to identify the particular elements of an aging management plan that it has known for years it would have to provide but that was not particularized in its application. Staff uses requests for information (RAIs) to fill in gaps in the application and each response can raise new and previously unknown issues. Again, no one suggests Staff should not seek this information or that their efforts are not productive. But, since there is no adverse consequence to either Staff or applicant when relevant information is produced in dribs and drabs during the hearing process and such serialized production of data forces an intervenor to refine

existing contentions or file new ones - a process which produces immediate objections from Staff and applicant as to virtually every proposed new or amended contention - intervenors are compelled to expend their limited resources to make their case over and over again because of the application and review process utilized by applicants and Staff.

A glaring example of the chaos created by the current system is well-summarized by the Commission in its opinion last year in *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17 (July 8, 2010) where it noted:

> The procedural history of Contentions 2, 2A, 2B, and 2C is lengthy and muddled – due, in large part, to Entergy's multiple revisions to the relevant portions of its license renewal application as it responded to multiple Staff inquiries and, in a related vein, Entergy's apparent lack of precision as to the specific subsection of section 54.21(c)(1) with which it sought to comply for the components at issue.

*Id.* at 23. Entergy's "multiple revisions" and "lack of precision" compelled the intervenor to file four separate versions of essentially the same contention, each of which filings was vigorously opposed as either untimely, failing to meet the requirements of 10 C.F.R. § 2.309(f)(1), or both. But Entergy suffered no consequences for its sloppy and dilatory tactics while the intervenor was forced to expended a substantial amount of its limited resources just to get one issue heard and eventually had to abandon legal representation and pursue the case *pro se*. Such a result, which is repeated over and over again in hearings under the current version of Part 2, is not consistent with the Commission's oft expressed commitment to full and effective public participation. This commitment was acknowledged by former Chairman Dale Klein, who stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are

made in consultation with the public, our Congress, and other stakeholders."[2] He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."[3]

The adverse effect of the current process on effective public participation cannot be overstated. When virtually every contention and every amendment to a contention produces a deluge of opposition from both applicants and Staff, all focused on whether the procedural technicalities of 10 C.F.R. § 2.309(f) have been met, the ability of the public to participate effectively is essentially destroyed and the value of their contribution on the merits of relevant issues is diminished dramatically. For a general analysis of the inherent unfairness of the current Part 2 regulations see "Regulating Nuclear Power in the New Millennium (The Role of the Public)" Roisman, *et al.* Pace Environmental Law Review, Volume 26 (Summer 2009) Number 2 at pp. 317-363 which is incorporated herein by reference and attached hereto.

The following proposal offers a solution to some of the problems created by the current Part 2 regulations without abandoning the Commission's goal of making the"hearing process more effective and efficient". Unlike the proposed amendments currently before the

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[2] Dale E. Klein, Chairman, U.S. Nuclear Regulatory Comm'n, Presentation to the Convention on Nuclear Safety: The U.S. National Report, at Slide 3 (Apr. 15, 2008), http://www.nrc.gov/reading-rm/doc-collections/commission/; *see also* The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Regulatory Information Conference: Guiding Principles: Culture, Transparency, and Communication (Mar. 9, 2005), http://www.nrc.gov/reading-rm/doc-collections/commission/; The Honorable Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks to the Organization for Economic Co operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities: Openness and Transparency-The Road to Public Confidence (May 22, 2007), http://www.nrc.gov/reading-rm/doc-collections/commission/.

[3] Klein, *supra* note 1, at Slide 11.

Commission, these proposed amendments address fundamental problems with Part 2. The essence of these proposals is to initiate the opportunity for public participation in the process at the same time as the applicant initiates its efforts to obtain a license, license amendment or any other relief or benefit from the NRC, but to postpone the date on which contentions must be filed until both applicant and Staff have completed their work and attested to that fact. The only criteria for admission as a party would be "standing" and once admitted a party would be entitled to see all documents relevant to the application whether in the possession of Staff or the applicant, to attend all meetings, to listen in on all phone calls and to initiate its own meetings and phone calls with the Staff. Within 30 days after applicant and Staff have attested to the completion of their work, contentions would be due. The current rules for contention admissibility would be tightened to require essentially all bases and all supporting evidence, except expert witness reports, to be submitted with a proposed contention. Shortly after contentions, if any, had been admitted, direct testimony, including expert witness reports, would be due and the current practice for moving from that point to hearings would be followed.

Under this approach there would be no incentive for an applicant to delay submitting all the information it intends to use to support its application and no reason for Staff to publish draft and final impact statements or safety reports until they had finished all of their work. Intervenors, having had access to all the relevant data would have no excuse for not fully presenting their case at the time they file their contentions, with the exception of expert witness reports which would await, but only by 30 days, the Board ruling on admissibility of a contention. The net effect would be that resources of intervenors, applicant and Staff would be devoted primarily to the merits of concerns raised by intervenors and much less money would be

spent on lawyers arguing over substantively irrelevant procedural technicalities. By involving intervenors in the process from the outset and imposing upon them the obligation to be knowledgeable about all the information developed during the completion of the application and NRC Staff review, there is a greater probability that issues raised as contentions will be focused on real substantive concerns and not merely on the lack of details in an application which is now often the basis for initial contentions. In addition, intervenor participation in the application and Staff review process provides ample opportunities for concerns to be addressed directly among the parties and without the formality of the hearing process, thus saving the hearing process for those issues on which the parties genuinely are unable to reach agreement.

One added advantage of the approach proposed is that the ASLB will not spend its resources on resolving non-substantive disagreements about timing of filings and the admissibility of multiple iterations of essentially the same contention. The ASLB, once it rules on standing, might be called upon to resolve a dispute about access to data during the completion of the application and Staff reviews, but such disputes are unlikely to occur if the final regulation is clear and the Commission's Statement of Considerations expresses the Commission's strong policy in favor of open access to all relevant documents. In addition, such disputes could be handled by a single ASLB member performing much the same function as a Federal Magistrate does in Federal District Court litigation.

What follows are proposed regulations to accomplish the goals outlined above. If the Commission is favorably inclined to the basic approach proposed here, these proposed regulations would benefit from more careful drafting that 1) makes the language more precise and 2) modifies other regulations that would be impacted by these proposed changes. In

addition, should the Commission decide to proceed along the lines suggested, republishing the proposed amendments to Part 2 to allow fuller participation from industry, public and governmental intervenors and NRC Staff licensing hearing participants would be beneficial. No participant in the current licensing process favors the current chaos. These proposals offer one, but not the only, option to address that chaos. For now, these are the only proposals before the Commission that address the most pressing fundamental problems in Part 2.

At the end of these proposed changes are a few comments on the current proposed changes to Part 2.

## PROPOSED CHANGES TO 10 C.F.R. PART 2

### PROPOSED
### 10 C.F.R. § 2.100A

Prior to filing an application for a permit, a license, a license transfer, a license amendment, a license renewal, or a standard design approval and prior to contacting any employee or contractor of the NRC regarding such an application, an applicant shall file a formal notice with the NRC of its intention to file such an application, including the nature of the intended application and scope of the application, and shall publish at least a ½ page notice of intent in all daily newspapers of general distribution within the area where the facility involved is, or may be, located, with at least three national daily newspapers and on its website for a period of at least one month. The content of the notice shall be prescribed by NRC Staff and shall have as its purpose the widest possible disclosure of the applicant's intent and the nature of the intended application.

### PROPOSED 10 C.F.R. § 2.100B

Upon receipt of a notice of intent pursuant to 10 C.F.R. § 2.100A, NRC Staff shall determine if the notice meets all the requirements and intent of that Section and once such a determination is made it shall have published in the Federal Register and in the same newspapers as those used by the applicant in complying with 10 C.F.R. § 2.100A, and as frequently, at least a ½ page notice of opportunity to participate in the NRC regulatory process with regard to such proposed action. The notice shall require that all persons who wish to participate in any way in the regulatory process with regard to such proposed action must file, within 30 days of the publication of the notice in the Federal Register and the newspapers, a request to participate. Such a request to participate must demonstrate that the proposed participant meets the requirements of 10 C.F.R. § 2.309(d).

**PROPOSED 10 C.F.R. § 2.308A**

Upon filing of the Federal Register Notice prescribed by 10 C.F.R. § 2.100B, the Commission shall designate an Atomic Safety and Licensing Board Panel to determine whether any request for participation filed is 1) timely and 2) meets the requirements of 10 C.F.R. § 2.309(d). Any person that meets those requirements shall be deemed a "participant" and shall have all the rights and responsibilities identified in 10 C.F.R. § 2.308B. The Atomic Safety and Licensing Board Panel may consider untimely filings for participant status but shall not grant such requests unless good cause is shown why the proposed participant could not have learned of the proposed action and filed a timely request to participate and, if granted participant status, the participant must take the proceeding as it finds it including the need to meet any filing requirements regarding documents and the need to comply with any time limits imposed by these regulations or the Board.

**PROPOSED 10 C.F.R. § 2.308B**

Once a person is determined to be a participant within the meaning of 10 C.F.R. § 2.308A, they shall have the following rights and responsibilities:

1. The participant shall receive a copy of all documents generated, received, reviewed or relied upon by an applicant, its employees, contracts or experts and by the NRC Staff or any contractor of the NRC Staff, with regard to the intended application or any issues relevant to the determination of the application within one week of when the document was generated, received, reviewed or relied upon;

2. The participant shall receive advance notice of all meetings and phone calls between the applicant, the NRC Staff or any contractor of the NRC Staff or the applicant, with regard to the intended application or the application itself and the participant shall have the right to listen in on any such call or be an attendee at any such meeting. NRC Staff may limit the number of representatives of the participant who may attend such meetings but not to less than two. These rights shall not include the right to actively participate in the call or meeting unless NRC Staff or the applicant request such participation.

3. The participant shall provide a copy to NRC Staff and the applicant of all documents with regard to the intended application or any issues relevant to the application generated, received, reviewed or relied upon by it, its employees, experts or contractors within one week of their generation, receipt, review or reliance upon the document.

4. The participant shall have the right to request either phone calls or meetings with NRC Staff with regard to the intended application or any issues relevant to the application and such requests shall be granted absent good cause for denial. An applicant may participate in any of

these meetings or calls to the same extent a participant can participate in meeting or calls pursuant to 2. above.

**PROPOSED 10 C.F.R. § 2.308C**

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A notice of opportunity for a hearing shall be filed within 30 days after the following conditions have been met. If there is a dispute regarding whether conditions have been met, an Atomic Safety and Licensing Board Panel shall resolve the dispute:

1. Applicant files a final and complete application for the requested action, files a certification, signed by a duly authorized officer of the applicant, that the applicant has no present intent to file any additional information in the form of amendments to the application AND NRC Staff files a final Safety Evaluation Report (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to any safety issues related to the proposed application; AND

2. Applicant files a final and complete Environmental Report for the requested action, files a certification, signed by a duly authorized officer of the applicant, that applicant has no present intent to file any additional information in the form of amendments to the Environmental Report AND NRC Staff files a Final Environmental Impact Statement or Supplemental Final Environmental Impact Statement (with no outstanding or unresolved issues) and a certification, signed by a duly authorized representative of the NRC Staff, that the NRC Staff has no present intent to file any additional requests for information with regard to, or amendments to, the FEIS or FSEIS regarding any environmental issues related to the proposed application.

**PROPOSED 10 C.F.R. § 2.308D**

After the Certification required by 10 C.F.R. § 2.308C an Applicant or the NRC Staff may file an amendment to the documents specified there only by leave of the Atomic Safety and Licensing Board and only upon demonstrating that it meets all of the following requirements:

(i) The information upon which the amendment is based was not previously available and could not have been previously available;

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

(iii) The amendment has been submitted within 15 days of the availability of the subsequent information or the subsequent information has been made available to the participants in the proceeding within 15 days of its availability and a request for an extension of time to file the amendment has been filed within 10 days of availability of the subsequent information with the Atomic Safety and License Board.

**PROPOSED AMENDED 10 C.F.R. § 2.309(a)**

(a) General requirements. *Within 45 days of the filings required by 10 C.F.R. § 2.308C, any person who has been determined to be a participant pursuant to 10 C.F.R. § 2.308A may request a hearing on the proposed application. The request shall specify the contentions which the person seeks to have litigated in the hearing. A person who has not been determined to be a participant pursuant to 10 C.F.R. § 2.308A may also seek a hearing but must meet all the requirements applicable to a participant and must take the proceeding as it exists.* In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of

paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition limited to the contentions it determines meet the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party. (Proposed changes shown in *italics*).

**PROPOSED 10 C.F.R. § 2.309(c)(3)**

If an untimely request for a hearing is accepted, the requestor shall take the hearing as it finds it and shall comply with all the obligations and time requirements applicable to a participant.

**PROPOSED AMENDED 10 C.F.R. § 2.309(b)(3)**

(3) In proceedings for which a Federal Register notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than *forty-five (45) days* from the date of publication of the notice in the Federal Register; (Proposed changes shown in *italics*).

**PROPOSED AMENDED 10 C.F.R. § 2.309(e)**

(e) Discretionary Intervention. The presiding officer may consider a request for *discretionary participation* when at least one requestor/petitioner has established standing. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to *lack standing to participate as a matter of right under paragraph § 2.308A* and (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek *participation* as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance: (Proposed changes shown in *italics*).

**PROPOSED AMENDED 10 C.F.R. § 2.309(f)(1)**

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

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7 (ii) Provide a *full explanation* of the basis for the contention;

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(v) Provide a *full statement* of the alleged facts which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to *all the specific sources and documents that were produced pursuant to 10 C.F.R. §*

*2.308B* on which the requestor/petitioner intends to rely to support its position on the issue and *identify all experts to be used in support of the position on the issue along with a copy of the CV of the expert and all publications by the expert relevant to the position to be taken by the expert*;

(vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee *and/or NRC Staff* on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) and *the Final Environmental Impact Statement or Final Supplemental Environmental Impact Statement* that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application, FEIS or FSEIS fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief;

7 *(vii) No contention of omission or failure to comply with NRC regulations or federal statutes may be filed unless either the alleged omission or failure has been identified by the Petitioner in written comments filed with regard to the Application, the draft Safety Evaluation Report, the draft Final or Final Supplemental Environmental Impact Statement during the time allowed for such comments or the Petitioner demonstrates it could not have known of the omission or failure until the filing of the final Application or the Final SER or the FEIS and FSEIS.* (Proposed changes are shown in *italics*).

**PROPOSED AMENDED 10 C.F.R. § 2.309(f)(2)**

(2) Contentions must be based on *all* documents or other information *made available pursuant to 10 C.F.R. § 2.308B*, at the time the petition is to be filed. The petitioner may amend

7 contentions or file new contentions only with leave of the presiding officer upon a showing

that—

(i) The information upon which the amended or new contention is based was not previously available;

7 (ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

*In the event of an amendment to the Application, Safety Evaluation Report, Final or Final Supplemental Environmental that is allowed pursuant to 10 C.F.R. § 2.308D, amended or new contentions solely based on the § 2.308D amendment will be considered timely if filed within 90 days of the Board's Order allowing the § 2.308D amendment.* (Proposed changes in *italics*).

## COMMENTS ON CHANGES PROPOSED BY THE COMMISSION

Most of the proposed changes are technical modifications that will generally improve the hearing process. There are other similar changes that could be made to further clarify the process and improve fairness and efficiency. The following are a few examples of such potential improvements.

3 1. There is little reason to have separate language to describe the summary disposition process under Part G and Part L. It would be preferable to state that one set of criteria and one set of filing obligations applies regardless of the Part under which summary disposition is sought.

2. There is considerable confusion about the requirements of 10 C.F.R. § 2.323 regarding the time when motions need to be filed. The language would appear to apply to all motions but it

has been argued that the provision regarding the latest date by which a summary disposition motion must be filed allows summary disposition to be filed long after the "occurrence or circumstance from which the motion arises". 10 C.F.R. § 2.323(a). Summary disposition motions have the potential to considerably delay the hearing process if filed late in the proceeding. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010) at 9("The Board finds that such motions for summary disposition, if filed late in the proceeding when the parties are heavily engaged in other tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serve to narrow the scope or expedite the resolution of the adjudicatory proceeding"). Thus, such motions should be filed as early as possible. However, the 10 day filing date for motions is much too short even for routine motions, much less for summary disposition. For example, the obligation to consult imposed by § 2.323(b), if taken seriously, would be difficult to meet if a total of 10 days are allowed. The language of § 2.323(a) should be amended to set the time for filing motions at 30 days after the "occurrence or circumstance from which the motion arises" and it should be made clear that it applies to all motions. If there are motions that do not warrant that much time or need more time, the Board has the inherent authority to adjust the deadlines.

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3. A problem has arisen with disclosures from the Staff in Subpart L proceedings. Staff obligations to provide document disclosures in Subpart L proceedings are controlled by 10 C.F.R. §§ 2.336(b), 2.1202(c) and 2.1203. Under these provisions the Staff is required to produce or identify by readily available location all the documents filed by the applicant, all the

documents - either pro or con - used in the review of the application and all the documents relevant to any admitted contention on which the Staff chooses to participate.[4] Contrary to these clear obligations, Staff takes the position that documents generated by consultants to NRC are not subject to disclosure. The problem is well-illustrated by the experience in the *Indian Point* relicensing proceeding. First, Staff has chosen to participate as a party on all admitted contentions in the proceeding. Nonetheless, Staff document disclosures are limited to what it perceives to be its obligations under § 2.336(b) and do not include all documents and data compilations relevant to the contentions. For example, one of the admitted contentions relates to the AMP for buried piping. Staff has numerous activities ongoing regarding the problems with leaking underground pipes.

http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html. However, Staff has produced, at most, only the underground piping documents that its reviewers are looking at as part of the Indian Point license renewal process. Not only does that practice violate the clear mandate of § 2.1202(c) but it also rewards the Staff if its review is inadequate by allowing it to avoid producing or identifying a larger group of documents relevant to the contention which it reviewers should have examined.

Moreover, Staff often does not even meet its obligations, as narrowly defined by it in §

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[4] 10 C.F.R. § 2.1202(c) provides that once Staff chooses to participate as a party as to any contention it "shall 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". All parties are subject to the disclosure obligations of 10 C.F.R. § 2.336(a) which include the obligation to produce or identify by location "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions" and thus, once Staff elects to participate as a party with respect to a contention, the obligations under § 2.336(a) apply, but only with regard to that contention. Pursuant to 10 C.F.R. § 2.3, the specific provisions of § 2.1202(c) supersede the language in § 2.336(a) that excludes Staff from § 2.336(a) obligations.

2.336(b). In a recently released FSEIS for Indian Point Staff referenced work done for it by Sandia Laboratories in responding to an admitted contention related to deficiencies in the analysis of clean up costs associated with the SAMA analysis. *See* NUREG-1437, Supplement 38, Vol. 1 at 5-4 and Vol. 3 at Appendix G pp. G-22 to G-29. Sandia not only consulted with Staff but participated actively in the review of the information and prepared reports. Staff did not list any documents generated by Sandia in the course of this work in its Hearing File Index and has failed to produce any of the relevant documents for several months. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York Motion to Compel NRC Staff To Produce Documents Relied upon in Staff's Final Supplemental Environmental Impact Statement (4/22/11). Finally, at an earlier time in the hearing process, an intervenor had to resort to a Motion to Compel to require Staff to produce the computer code used by it, its consultants and applicant to conduct the SAMA analysis because Staff first refused to produce the code and then insisted it would only produce the code if the intervenor paid the $1000 licensing fee imposed on commercial users of the government-developed and funded MAACS2 Computer Code. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), State of New York's Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee In Compliance with the National Environmental Policy Act and NRC Disclosure Regulations (1/10/10).

5 The Commission should clarify the discovery obligations of Staff in contested proceedings making clear that 1) Staff must comply with all the disclosure obligations 10 C.F.R. § 2.336(a), just like all other parties, with respect to any contention on which NRC Staff chooses to participate as a party; and 2) with regard to its obligations under 10 C.F.R. § 2.336(b)(3) Staff

must produce all documents in its possession or the possession of its experts or consultants that were reviewed and/or generated as part of the analysis of the application.

4. Under current hearing practice all parties are allowed to respond to any motion or pleading filed by any other party unless they have been consolidated with that party pursuant to 10 C.F.R. § 2.309(f)(3). This practice has created unnecessary pleadings that delay the resolution of issues. NRC Staff is never consolidated with another party, even if they are on the same side of an issue, and thus is allowed to file a brief in support of a pleading of any other party. Public and government intervenors who have not adopted contentions are also free to file briefs in support of the pleadings of other parties. These "support" pleadings are either redundant, merely stating, in slightly different form, what the proponent has already stated or raise new arguments, in which case the opponents of the initial pleading are given an opportunity to file a supplemental opposition, thus prolonging the process. However, in light of the consultation obligations imposed by 10 C.F.R. § 2.323(b), all parties are aware of a pleading before it is filed and have an opportunity to consult regarding the merits of the pleading. A party that supports a proposed pleading can provide its input and suggestions to the proponent before the pleading is filed, thus obviating the need for a separate filing. The regulations should be amended to indicate that pleadings in support of motions are allowed only if the support pleading is making a new point and only if the filer of the supporting pleading attests that it attempted to have the proponent of the motion include the point in the initial pleading. A similar rule should apply to pleadings in opposition, requiring parties who are taking the same position in opposition to a pleading to file a single brief. This will cut down on redundant pleadings and substantially eliminate the need for supplemental pleadings.

## RESPONSE TO SPECIFIC QUESTIONS

(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?

Q1a

As the previous discussion indicates, NRC Staff is not currently meeting its disclosure obligations. Reducing those obligations so that their current disclosure practices more closely conform to the regulations is unwarranted. In addition, no documents are actually "produced" but merely listed on logs with ML numbers and members of the public are only burdened by Staff failure to fully produce all relevant documents and by the production of documents on logs that are often excessively cryptic. If NRC Staff would improve the quality of the information provided on the logs, the task of reviewing Staff disclosures would be simplified and expedited.

NRC Staff has a public function which will only be further diminished by reducing their disclosure obligations. Staff antipathy to disclosing the documents it generates, reviews and relies upon in doing its work is inconsistent with the Commission's frequently expressed desire for improved public participation and transparency. If Staff would organize its efforts around discrete issues and maintain running logs of the documents being used by personnel addressing those issues, whether within licensing activities or not, a task made much easier as a result of computers and electronic documents, the burden on Staff would be reduced and the disclosures to the public would be improved. Part of the reason Staff perceives that it is burdened by document production is its failure to integrate public disclosure of all, non-confidential and non-privileged, documents into its routine work. The alternative, if disclosure obligations for

hearings are reduced and if Staff continues its crabbed interpretation of its disclosure obligations, is for public participants in the NRC process to file weekly requests under FOIA for all NRC Staff documents. That is not a desirable, but it may be a necessary, process. It would be far preferable for Staff and the public if Staff embraced its duty of operating in the open and facilitated public access to relevant documents related to specific issues of public concern.

Q1b

(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?

Since the Staff does not fulfill the disclosure obligations under Section 2.336(b) as currently written, the premise of the question is not correct. In addition, anyone who uses ADAMS on a regular basis knows that ADAMS is neither a comprehensive nor a reliable source of NRC documents. The search capabilities, while improved over the last year, are still a far cry from search capabilities with WestLaw and LEXIS. Thus, finding documents is laborious and it is difficult to effectively narrow searches to the precise information being sought. This necessitates reviewing hundreds of irrelevant documents in order to find the documents being sought. In addition, the disclosure of documents on ADAMS is inconsistent. For example, documents dated months, or even years, earlier suddenly appear on ADAMS without explanation for the delay. That makes it impossible to rely on ADAMS as a source of all relevant documents on any subject. In addition, documents are sometimes on ADAMS but, for some reason, cannot be opened or downloaded.

To be candid, the entire electronic production of documents at NRC is a mess. The

Electronic Hearing Docket is often incomplete and there is no standardized protocol for when documents will be on the EHD or which documents will be posted. For example, some of the monthly disclosure of documents by NRC Staff with regard to a particular licensing proceeded are posted to the EHD and some are not. The time after a pleading is filed and before it appears on the EHD is not standardized. Documents posted to the Hearing File by Staff are incomplete. For example, a review of the Hearing File for Indian Point relicensing lists document disclosures by Staff but do not include any privilege logs. In addition the document disclosures are merely ML numbers with no document description, not even the description provided in the monthly disclosure itself. In short, the present ongoing electronic disclosure of documents by NRC is in disarray, is not comprehensive or reliable and thus cannot be a substitute for full disclosure of documents in individual licensing proceedings by Staff.

Q 1c

(c) Would a shorter, more relevant privilege log aid parties to the proceeding?

This question is confusing. If it is asking would it be preferable for Staff to claim fewer documents are privileged, then the answer is certainly less. If it is asking should Staff withhold the same number of documents but disclose only some of them on a privilege log, the answer is obviously no. If it is asking should Staff be given more discretion to decide what is relevant, the answer is no, at least until the Staff has demonstrated that it is actually committed to full disclosure of all relevant documents. An improved privileged log, with more description of the nature of the document being withheld would be helpful. In addition, privilege logs used by Staff in the *Indian Point* proceeding, with the exception of the initial disclosures, have not included the recipients of the documents for which a privilege is claimed, making it hard to determine if the

privilege is validly asserted. There are many improvements that could be made to the privilege claim process by Staff but the question does not really address those. Consulting with persons who are more readily engaged in discovery in routine court litigation might improve the quality of the privilege log process. There are numerous law professors in the Washington, D.C. area who could be consulted to assist NRC in developing a more efficient and effective process for disclosing documents. The Sedona Conference would also be a good source of expertise. The present process of disclosure and privilege claims does not appear to be benefitting from persons with substantial experience with such processes outside the NRC.

Q 1d

(d) Would potential parties prefer to maintain the status quo?

As the preceding discussion indicates, the status quo with regard to Part 2 in general and discovery of Staff in particular, is not working. It needs to be changed in major ways.

Q 1e

(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?

No. A better implementation and enforcement of those obligations would be a preferred option. If, as suggested above, the entire Part 2 process were changed to provide for public intervention at the outset of the NRC process when the first suggestion of an application for a license or amendment is received by NRC, much of the disclosure problem would go away as the public participant would be able to be actively involved in the process from the outset and documents relevant to the proposal would be routinely available to the public. Thus, when a hearing notice was finally issued the obligations of disclosure that track the federal rules would

have been largely already met.

## CONCLUSION

The current system does not work. Major changes, not minor adjustments, are needed to make it work. Until that happens, the NRC hearing process will not "promote fairness, efficiency, and openness".

Respectfully submitted,

Anthony Z. Roisman

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-summarize article in FRN.

# REGULATING NUCLEAR POWER IN THE NEW MILLENNIUM
## (THE ROLE OF THE PUBLIC)

ANTHONY Z. ROISMAN,* ERIN HONAKER,** AND ETHAN SPANER***

## I. INTRODUCTION

On October 9, 2008, the Energy Information Administration of the U.S. Department of Energy reported that twenty-five applications for new civilian commercial nuclear power reactors had been filed with the Nuclear Regulatory Commission (NRC) and are under review. In August 2008, the NRC disclosed in its 2008-2009 Information Digest Report that it "will increase staffing levels to accommodate up to twenty-three [combined construction and operating license] applications for a total of thirty-four new nuclear units over the next few years."[1] In the same Report, the NRC also disclosed that as "of February 2008, approximately half of the licensed reactor units have either received or are under review for license renewal" and "48 units (26 sites) have received renewed licenses."[2]

In short, we are in the midst of the "Second Coming" of nuclear power. Many changes have been made in the process for deciding whether to license or re-license a commercial nuclear power plant from the early days of the "First Coming." The single

* Mr. Roisman is the managing partner of the National Legal Scholars Firm and a Research Fellow in Environmental Studies at Dartmouth College. He is a graduate of Dartmouth College (1960) and Harvard Law School (LL.B. 1963). Mr. Roisman has been lead counsel or co-lead counsel in several landmark environmental cases, including *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), and *Anderson v. W.R. Grace*, (D. Mass., settled in 1986).

** Ms. Honaker is expected to graduate from Pace Law School in 2010 with a certificate in Environmental Law.

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1. U.S. NUCLEAR REGULATORY COMM'N, 2008-2009 INFORMATION DIGEST 43 (2008), *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/.

2. *Id.* at 47.

NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
VICE PRESIDENT, GENERAL COUNSEL & SECRETARY

May 16, 2011

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

SUBJ: NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2
Docket ID NRC-2008-0415

Dear Madam Secretary:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to submit comments on the Nuclear Regulatory Commission's proposed amendments to its rules of practice in 10 CFR Part 2 governing agency adjudications. See 76 Fed. Reg. 10,781 *et seq.* (Feb. 28, 2011). These proposed revisions are intended to correct errors and omissions from the 2004 rulemaking amending 10 CFR Part 2, clarify the intended meaning of certain provisions in Part 2, and "promote fairness, efficiency, and openness" in adjudicatory proceedings. NEI's comments on specific proposed changes are set forth in Section I of the attachment to this letter.

In our view, the more noteworthy proposed changes include proposed revisions to 10 CFR Section 2.305 (methods of service), Section 2.309(c) and (f) (the "good cause" factors for evaluating non-timely filings), Section 2.309(c)(5) (environmental contentions), Section 2.311 (deadlines for interlocutory appeals), Section 2.335 (waiver requirements for considering Commission rules in individual adjudications), Section 2.336 (schedule for mandatory disclosure updates), Section 2.340 (issuance of licensing decisions before hearing completion), Section 2.341 (deadlines for filing/briefing petitions for review, Commission review) and Section 2.704 (mandatory disclosures). Our comments address these and other specific proposed modifications to Part 2 requirements.

Additionally, NRC seeks stakeholder comment on specific questions relating to the scope of the NRC Staff's mandatory disclosure obligation and interlocutory review of ASLB rulings (see

[1] NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

76 Fed. Reg. 10,798-91). NEI's comments on these topics are set forth in Section II of the attachment to this letter.

Please do not hesitate to contact me if there are any questions concerning these comments.

Sincerely,

Ellen C. Ginsberg

Attachment

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05/16/2011

# COMMENTS OF THE NUCLEAR ENERGY INSTITUTE
## NRC Proposed Revisions to Adjudicatory Process Rules in 10 CFR Part 2
## Docket ID NRC-2008-0415

The Nuclear Energy Institute (NEI)[1] is pleased to submit the following comments regarding the Nuclear Regulatory Commission's proposed amendments to its rules of practice in 10 CFR Part 2 governing agency adjudications. See 76 Fed. Reg. 10,781 *et seq.* (Feb. 28, 2011). The last substantive changes to Part 2 were promulgated in 2004. The current proposed amendments are intended to correct errors and omissions from that rulemaking, clarify certain provisions in 10 CFR Part 2, and "promote fairness, efficiency, and openness" in adjudicatory proceedings. NEI's comments on specific proposed changes are set forth in Section I below. Our additional comments on other issues, as solicited by the NRC, are set forth in Section II.

As background, NRC states that while the proposed amendments are procedural rules exempt from the notice and comment provisions of the Administrative Procedure Act (APA) and NRC regulations, the agency is seeking public comment to benefit from stakeholder input. NRC also addresses the "grandfathering" question, noting that new and amended requirements in the final rule will not be retroactively applied to adjudicatory decisions and/or determinations issued before the effective date of the final rule. "[N]or 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." See 76 Fed. Reg. 10,782.

## I. NEI COMMENTS ON SPECIFIC PROPOSED AMENDMENTS TO PART 2

### Revisions to 10 CFR Part 2 — *(Title)*

To better reflect the scope of its subparts and mirror the language of the APA, the NRC proposes to change the title of 10 CFR Part 2 from "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders" to "Agency Rules of Practice and Procedure." See 76 Fed. Reg. 10,782. NEI does not object to this revision.

Additionally, the NRC proposes to revise references to "presiding officer" throughout Part 2, to provide consistent use and capitalization of the term. See 76 Fed. Reg. 10,789. We believe these changes are appropriate.

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[1] The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

**Revisions to 10 CFR § 2.4 — (*Definitions*)**

NRC proposes to change the definition of "participant" in Section 2.4 to 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." Additionally, NRC proposes to delete "affected" from the phrase "affected Federally-recognized Indian tribe" as used in the definition of "participant," because "affected Federally-recognized Indian tribe" applies only to Indian tribes that seek to participate in the NRC high-level waste repository proceeding. Federally-recognized Indian tribes do not have to be "affected Federally-recognized Indian tribes" in order to participate in other NRC licensing actions. See 76 Fed. Reg. 10,791, 10,796.

NRC also proposes changes to the definition of "NRC personnel" in Section 2.4 to eliminate outdated references to 10 CFR §§ 2.336 and 2.1018. See 76 Fed. Reg. 10,791, 10,796. NEI does not object to either of these proposed changes.

***Part 2, Subpart A — Procedure for Issuance, Amendment, Transfer, or Renewal of a License, and Standard Design Approval***

**Revisions to 10 CFR § 2.101 — (*Filing of application*)**

NRC proposes to revise Section 2.101 to change incorrect internal references to Section 2.101(g) to Section 2.101(f). (Currently there is no Section 2.101(g).) This correction would not change the intent or meaning of this provision. See 76 Fed. Reg. 10,791, 10,796. NEI does not object to these proposed corrections.

**Revisions to 10 CFR § 2.105 — (*Notice of proposed action*)**

NRC proposes to revise Section 2.105 by (i) adding to Section 2.105(a) a reference to the NRC's Web site, (ii) clarifying that the referenced "notice" in Section 2.105(b) is one that is published in the *Federal Register*; and (iii) replacing the specific deadline in Section 2.105(d) with a reference to "the time period included in Section 2.309(b)." See 76 Fed. Reg. 10,791, 10,796-97. NEI does not object to these changes.

***Part 2, Subpart C — Rules of General Applicability***

**Revisions to 10 CFR § 2.305 — (*Service of documents; methods; proof*)**

Section 2.305(c)(4) (*Method of service accompanying a filing*):

The NRC proposes to revise Section 2.305(c)(4) to provide that any "document" (rather than any "paper," as currently provided) served upon participants to the proceeding must be accompanied

by a signed certificate of service. See 76 Fed. Reg. 10,782, 10,791, 10,797. One effect of this revision would be to "clarify" (in the NRC's words) that a certificate of service that states only that the document is being served through the NRC's e-filing system (EIE) is *inadequate*:

> 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 10 CFR part 2. 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. 76 Fed. Reg. 10,782.

NEI disagrees with this suggested change. Alternatively, we propose that any revision to Section 2.305(c)(4) be clarified to state the opposite: unless the presiding officer states otherwise, a certificate of service that simply states the document is being served 'per the service list in the E-Filing system' without providing names and addresses of those being served is sufficient to comply with Section 2.305(c)(4). Given that all parties are required to use the NRC's e-filing system absent unusual circumstances (or the need to submit documents under a protective order), NRC has failed to demonstrate any compelling reason why simply referencing the e-filing service for normal filings is not adequate.

It is the responsibility of each party to ensure that it has access to the EIE, so that it can access necessary documents filed by other parties. The parties uploading a document to the EIE have no way of knowing whether the other parties have received the EIE notice or have changed their e-mail address. For this reason, it is difficult for a party to state, with confidence, anything more than that he/she has uploaded the document to the EIE. Thus, the Commission should not require a party to attest to having performed a duty (*i.e.*, served the other parties) when that party has no control over the EIE system or the contact information provided by another party to the NRC. We recommend that the NRC permit parties to certify only that they filed a pleading with EIE unless special arrangements were made prior to the filing. This would conform to practice for electronic filing in many federal courts.

NEI-1

Section 2.305(g)(1) (*Service on the NRC staff*):

NRC proposes to revise Section 2.305(g)(1) to specifically provide for a method of service of documents on the NRC Staff if no attorney representing the NRC Staff has yet filed a notice of appearance in the proceeding and service is not being made through the E-Filing System. See 76 Fed. 10, 782, 10,791, Reg. 10,797. NEI does not object to this proposed change.

**Revisions to 10 CFR § 2.309 — (*Hearing requests, petitions to intervene, requirements for standing, and contentions*)**

Section 2.309(b)(5) (*Timing*):

NRC proposes to revise Section 2.309(b)(5) to specify that recipients of an order under 10 CFR 2.205(c) (orders imposing an NRC civil penalty) have the time specified in the order to file their answers. See 76 Fed. Reg. 10,782, 10,791. Currently, this provision does not specify a time for answers to Section 2.205(c) orders. In NEI's view, the correction of this omission is appropriate.

Sections 2.309(c) and (f) (*Subsequent submissions of petition/request or new or amended contentions*)

This is one of the most significant modifications proposed in this rulemaking. Currently, non-timely hearing requests and/or petitions must address each of the eight factors in 10 CFR 2.309(c) (*Non-timely filings*) as well as the requirements of Section 2.309(f)(2) (*Contentions*). The NRC proposes to revise this regulation to incorporate different "good cause" criteria to replace the existing factors that are to be applied by an NRC Atomic Safety and Licensing Board ("Licensing Board") to determine whether to consider "non-timely" hearing requests and new/amended contentions (late-filed contentions). See 76 Fed. Reg. 10,783, 10,791-92, 10,797. This change is described as an "update" and a "clarification" of the intent of the regulations. The proposed rule would modify this framework by incorporating the factors in Section 2.309(f)(2) into amended Section 2.309(c)(2)(i)-(iii), as follows:

(c) *Subsequent submission of petition/request or new or amended contentions.*

(1) Determination by presiding officer. Hearing requests, intervention petitions, and new or amended contentions filed after the deadlines in paragraph (b) of this section, 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) of this section.

(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) of this section, 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.

Under the amended rule, the showing made regarding these three "good cause" criteria would determine whether there is sufficient justification for non-timely filings made after the deadlines in Section 2.309(b). In place of the array of factors traditionally addressed in demonstrating good cause for late filings, the new emphasis would be on whether the underlying information supporting the non-timely filing was "not previously available," whether it is "materially different from information previously available," and whether the filing was made in a timely fashion based on the availability of the new information.[2]

The NRC specifically requests stakeholder comment on the effect of relying solely on "good cause" and eliminating the remaining late-filing factors. 76 Fed. Reg. 10,783. In our view, the Commission should *not* eliminate the eight late-filed factors in Section 2.309(c)(1). These late-filed factors should continue to apply fully, even in cases where contentions are filed after the initial hearing request only because the information on which they are based was not available until after the filing deadline. It is especially important that the eight late-filed factors be applied to a request for hearing or petition to intervene submitted after the initial deadline.

Although Licensing Boards, following the 2004 changes to 10 CFR Part 2, often focus primarily on the "good cause" factor in Section 2.309(c)(1), the requirement to apply the factors in 10 CFR § 2.309(c) did not change with the promulgation of the revised Part 2 at that time. *See* "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) ("If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding."). We believe the 2004 approach should be continued. The NRC should not casually eliminate decades of Commission adjudicatory practice in pursuit of simplified "non-timely" criteria.

We are concerned that simplifying the "good cause" criteria as NRC proposes could lead to additional litigation of untimely contentions that broaden the scope of a licensing proceeding at a late date, that are unlikely to assist in developing a sound record, or that duplicate the concerns of other parties to the proceeding. By eliminating most of the Section 2.309(c) criteria that the NRC has previously found necessary to ensure efficient adjudications, the proposed approach would also increase the likelihood that new requests for hearing or petitions to intervene would be granted late in the hearing process. There is no evidence that application of the balancing factors, in addition to the three-part "good cause" test, has led or would lead to inefficient and ineffective proceedings. To the contrary, the current approach has served the NRC well over the years. This existing approach *does not preclude* the filing of timely new contentions, and will continue to allow the granting of legitimate petitions. And, given that many new reactor licensing proceedings are far along in the adjudicatory process, changing the rules governing

NEI-2

[2] In this context, "not previously available" means that a requestor or petitioner cannot base a contention on a document or a report that does not yet exist or is not yet complete. 76 Fed. Reg. 10,791-92.

consideration of new or amended contentions and new requests for hearing/petitions to intervene could lead to unnecessary litigation of new issues eventually admitted for hearing under the proposed new (and less stringent) standards. NEI-2

Further, we observe that application of only a three-part "good cause" test could, applied literally, lead to litigation of many contentions that would otherwise be inadmissible under the balancing factor test. Similarly, the proposed approach could lead to granting of requests for hearing/petitions to intervene that would otherwise be denied. For example, NRC Licensing Boards applying the three "good cause" criteria have on occasion admitted untimely contentions based on NRC documents that contain new information relative to the applicant's Environmental Report (ER) — where that information was nevertheless available during the course of the NRC Staff's review (*e.g.*, public utility commission decision that post-dates ER but pre-dates the issuance of an NRC Staff review document). At a minimum, the Commission should clarify that the agency's use of new "information or document" for purposes of "good cause" does not mean that a contention meets the good cause test based only on a new document that includes old information. NEI-3

Section 2.309(c)(3) (*New petitioner*):

NRC also proposes to add a new Section 2.309(c)(3) to clarify that any non-timely new or amended petition to intervene must include new or amended proposed contentions if the petitioner seeks admission as a party. This provision also would require the petitioner to meet requirements relating to legal standing and contention admissibility in Section 2.309(d) and (f). See 76 Fed. Reg. 10,791-92, 10,797. NEI does not object to this change.

Section 2.309(c)(4) (*Party or participant*):

NRC proposes to add a new Section 2.309(c)(4) to require that any new or amended proposed contentions (also) meet the admissibility requirements in Section 2.309(f). This new provision would also clarify that a party or participant that has previously met legal standing requirements in the proceeding where the contention is filed would not have to do so again. See 76 Fed. Reg. 10,797. NEI does not object to this change.

Section 2.309(c)(5) (*Environmental contentions*):

NRC proposes to add a new Section 2.309(c)(5) to provide that for new or amended contentions arising under the National Environmental Policy Act (NEPA) and based on conclusions in a draft or final NRC environmental impact statement (EIS), environmental assessment (EA), or any supplements thereto, the party or participant "must show that the data or conclusions in the NRC's documents differ significantly from the data or conclusions in the applicant's environmental report." See 76 Fed. Reg 10,792, 10,797.

We agree with this revision but do not believe the proposed language goes far enough. NEI recommends that, as amended, Section 2.309(c)(5) also provide that the "differ significantly" test NEI-4

or showing does not allow new contentions based on information that became available to the parties during the course of the NRC Staff's review. This will insure that interested persons raise concerns in a timely fashion after the *information* becomes available, rather than waiting until the NRC Staff completes its review. Further, the Commission should make clear in Section 2.309(c)(5) that new information in the DEIS, FEIS, or EA relative to the ER is not, by itself, sufficient to meet the good cause for late-filing standards. This "differ significantly" test should be *in addition to* the three "good cause" factors. Further, the Commission should clarify that similar considerations apply to NRC Staff Safety Evaluation Reports.

NEI-4

Section 2.309(h) (*States, local governmental bodies, and Federally-recognized Indian tribes seeking party status*):

NRC proposes to revise and move Section 2.309(d)(2), relating to participation of States, local governmental bodies, and Federally-recognized Indian tribes, to an amended Section 2.309(h). As amended, the text of Section 2.309(h)(1) would address several issues, including the following:

- Revised Section 2.309(h)(1) would correct the distinction between Federally-recognized Indian tribes and "affected" Federally-recognized Indian tribes. (The latter applies only in the context of the NRC high-level radioactive waste disposal facility proceeding.)

- Revised Section 2.309(h)(1) also would provide that if a State, local governmental body, or Federally-recognized Indian tribe seeks to participate as a party, it must submit a request for hearing or a petition to intervene with at least one admissible contention.

- Revised Section 2.309(h)(1) also would provide that if a State, local governmental body, or Federally-recognized Indian tribe seeks to participate as a party, it must designate a single representative for the hearing. If the hearing request is granted, the NRC would admit as a party only 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.

We agree with these proposed revisions.

As amended, Section 2.309(h)(2) would address standing issues, as follows:

- In NRC proceedings relating to an NRC production or utilization facility (as defined in 10 CFR 50.2) located within the boundaries of a State, local governmental body, or Federally-recognized Indian tribe, the State, local governmental body, or Federally-recognized Indian tribe seeking to participate as a party need not demonstrate legal standing to participate.

- In NRC proceedings relating to an NRC production or utilization facility located outside its boundaries, the State, local governmental body, or Federally-recognized Indian tribe seeking to participate as a party must demonstrate legal standing to participate.

We agree with these proposed revisions.

As amended, Section 2.309(h)(3) – the current Section 2.309(d)(2)(iii) – would apply only to an NRC licensing proceeding for a high-level radioactive waste repository. This provision would retain references to "affected" Federally-recognized Indian tribes and would mirror the definition of "party" in Section 2.1001. It would allow intervention in a 10 CFR Part 60 or Part 63 proceeding by the State and local governmental body in which such repository area is located and by any affected Federally-recognized Indian tribe if the requirements of 10 CFR 2.309(f) regarding contention admissibility are met. Other petitions for intervention must meet the requirements of 10 CFR 2.309(a) through (f). We agree with these proposed revisions.

Existing Section 2.309(h) (*Answers to requests for hearing and petitions to intervene*) would be re-designated as Section 2.309(i), and would be clarified to provide that the same deadlines will apply to answers and replies with respect to proposed new or amended contentions as apply to intervention petitions and hearing requests filed after the deadlines in Section 2.309(b). This is an appropriate clarification that conforms to generally accepted practice.

**Revisions to 10 CFR § 2.311 — (*Interlocutory review of rulings on requests for hearings and petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information*)**

NRC proposes to *extend from 10 to 25 days* after service of the order the time allowed to file certain permissible interlocutory appeals and briefs in opposition to an appeal. 76 Fed. Reg. 10,792, 10,798. Parties opposing the appeal would be allowed to file a brief in opposition within 25 days (rather than 10 days) after service of the appeal. As amended, the provision would continue to require that a supporting brief and any answer conform to the requirements in 10 CFR 2.341(c)(2). No other appeals from rulings on requests for hearings would be allowed.

We agree with the NRC that the additional time allowed could increase the quality of briefs on appeal. As the NRC also suggests, the extension of time occurs early in the hearing process and appears unlikely to affect the overall hearing schedule. While we are cautious about any delay in the hearing schedule, NEI does not object to this proposal. The proposal appears to reflect a reasonable allocation of time in the overall hearing process to what are potentially significant legal issues affecting the basic nature of the proceeding.

**Revisions to 10 CFR § 2.314 — (*Appearance and practice before the Commission in adjudicatory proceedings*)**

10 CFR § 2.314(c)(3) allows anyone disciplined under the rules to appeal the discipline to the Commission. NRC proposes to revise this provision to *extend from 10 to 25 days* the time

allowed to file an appeal with the Commission from an order disciplining a party. See 76 Fed. Reg. 10,784-85, 10,792, 10,798. NEI does not object to this proposed change, which appears unlikely to affect the overall hearing schedule and which may, as the NRC observes, "result in higher-quality appeals." Nonetheless, we note that the issues on such an appeal should be well-defined and would not seem to require the extension.

**Revisions to 10 CFR § 2.315 — (*Participation by a person not a party*)**

NRC proposes to revise existing Section 2.315(c) to state explicitly that interested States, local government bodies, and Federally-recognized Indian tribes that are not admitted as parties to a hearing but seek to participate "must take the proceeding as they find it." 76 Fed. Reg. 10,792, 10,798-99. Their participation "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." 76 Fed. Reg. 10,798. This result, which is consistent with NRC practice, is also intended to preclude non-party participation from interfering with the schedule established for the proceeding. We believe this clarification is appropriate.

**Revisions to 10 CFR § 2.319 — (*Power of the presiding officer*)**

Section 2.319(l) currently authorizes a presiding officer to "Certify questions to the Commission for its determination, either in the presiding officer's discretion, or on motion of a party or on direction of the Commission." NRC proposes to revise this provision to authorize the presiding officer to "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." See 76 Fed. Reg. 10,785, 10,792, 10,799. This modification, which is intended to clarify the scope of the presiding officer's authority to refer rulings and certify questions, is consistent with the proposed changes regarding motions in Section 2.323. NEI does not object to this amendment.

NRC also proposes to add a new Section 2.319(r) to authorize a presiding officer to "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." Thus, an admitted contention that the presiding officer finds to contain legal issues only, would have to be decided solely on the basis of the briefs and/or oral arguments. See 76 Fed. Reg. 10,792, 10,799. NEI does not object to this amendment.

**Revisions to 10 CFR § 2.323 — (*Motions*)**

The NRC proposes to revise Section 2.323(f)(1) (*Referral and certifications to the Commission*) to allow the presiding officer to promptly refer a ruling to the Commission if, in his/her judgment, the presiding officer's decision "raises significant and novel legal or policy issues," or if prompt Commission decision is "necessary to materially advance the orderly disposition of the proceeding." See 76 Fed. Reg. 10,785, 10,792, 10,799. The existing referral criteria (whether prompt referral is necessary to prevent detriment to the public interest or unusual delay and

expense) would be deleted. In addition to authorizing the presiding officer to take this action independently, Section 2.323(f)(2), as amended, would also allow the presiding officer to do so in response to a petition from a party. NEI does not object to this amendment.

**Revisions to 10 CFR § 2.335 — (*Consideration of Commission rules and regulations in adjudicatory proceedings*)**

Currently, Section 2.335(b) states that parties to an adjudicatory proceeding may seek waivers or exceptions from NRC regulations. The NRC proposes to revise this provision to clarify that the regulation applies not only to parties to adjudicatory proceedings, but also to petitioners. See 76 Fed. Reg. 10,785, 10,792, 10,799. 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." *Id.* at 10,792. NEI does not object to the change, which reflects current NRC practice.

Separately, we recommend that the Commission expand the current requirements for a waiver in 10 CFR Part 2 to adopt the NRC case law establishing the standards to be met for a waiver of a Commission regulation in individual adjudications. In a series of cases, the Commission has applied a four-part test for deciding whether to grant a waiver:

i. The rule's strict application "would not serve the purposes for which [it] was adopted;"

ii. The person seeking the waiver has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;"

iii. Those circumstances are "unique" to the facility rather than "common to a large class of facilities;" and

iv. A waiver of the regulation is necessary to reach a significant safety or environmental problem.[3]

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**Revisions to 10 CFR § 2.336 — (*General discovery*)**

Section 2.336(d) currently requires parties to update mandatory disclosures with any information or documents subsequently developed or obtained within 14 days. NRC proposes to revise Section 2.336(d) to require the filing of a mandatory disclosure update *every 30 days*:

NEI-6

[3] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (internal citations omitted). Incorporating the four criteria would be consistent with current practice and would inform stakeholders of the criteria to be applied.

> (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 [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] presiding officer issues a decision on that contention, or at such other time as may be specified by the presiding officer or the Commission. 76 Fed. Reg. 10,799.

NEI-6

NEI supports the proposal to revise the 14-day disclosure update requirement to a 30-day update requirement. Application of the update requirements has proven challenging in practice and has led to many case-specific deviations.[4] We generally agree that 30 days is a more appropriate time frame for updating disclosures. However, we also suggest that the update requirement be expressed in terms of a "monthly" update. This would allow parties, for example, to file their updates no later than the 1st, 5th, or the 15th of each month, rather than repeatedly calculating the due date based on when the last update was filed.

We also agree with the discussion in the proposed rule that some period of time is needed prior to the disclosure due date to collect, review, and produce documents on the due date. The NRC is proposing that the disclosure period run from five business days before the last disclosure update to five business days before the filing of the update. We believe that, as a practical matter, five days is insufficient for broad contentions that are not narrowly focused on a particular issue. For example, if a contention requires an electronic search of e-mails or other documents, five days is not sufficient time for an applicant's Information Technology (IT) department to collect documents and transmit them for legal review (*e.g.*, privilege, relevance). Where a supplemental disclosure involves many individuals (*e.g.*, more than 25 employees) or many contentions, the process of collecting and identifying relevant documents can take much longer than 5 business days. In many cases, the existing time period is also insufficient to allow adequate coordination between the licensee, its outside legal counsel, and the NRC staff in producing discovery documents. Accordingly, we recommend that the proposed time period for disclosures be changed to "15 days before the last disclosure update to 15 days before the filing of the update." Alternatively, NEI requests that the NRC make clear that the period of time allowed for disclosures can be adjusted by the Licensing Board or upon agreement of the parties based on case-specific factors (*e.g.*, number of documents, scope of production, IT capabilities).

NEI-7

Further, we support NRC's proposal to add a new sentence to Section 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. See 76 Fed. Reg. 10, 785, 10,792, 10,799.

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[4] On this point, the Supplementary Information for the proposed rule states: "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." 76 Fed. Reg. at 10,785.

**Revisions to 10 CFR § 2.340 — (*Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits and licenses*)**

The NRC proposes to revise Section 2.340 (dividing it into new sub-sections 2.340(a)(1) and (2)) to clarify that for contested applications involving a production and utilization facility—for an initial license (construction permit, operating license, or combined license), a renewed license, or a license amendment where the NRC has not made a determination of no significant hazards consideration—the license or amendment cannot be issued by NRC Staff prior to the completion of the hearing. In contrast, contested applications involving an *amendment to a license* where the NRC has made a determination of no significant hazards consideration can be acted upon by the NRC Staff prior to the completion of a contested hearing. In addition, in contested cases involving manufacturing licenses or facilities other than a production or utilization facility, the NRC Staff can act upon the application prior to the completion of a contested hearing. These clarifications conform to existing statutory requirements and are appropriate.

This proposed revision also addresses the topic of matters in controversy before the presiding officer. As amended, Section 2.340 would retain the scope and applicability of the existing regulations specifying that the presiding officer in all contested cases is limited to deciding 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. The limitation is reflected in the revised rules for contested cases on all types of applications, with minor clarification by adding a cross-reference to the provisions for referrals of issues to the Commission. We believe the revised language is appropriate. See 76 Fed. Reg. 10,785-86, 10,792-93, 10,799-800.

**Revisions to 10 CFR § 2.341 — (*Review of decisions and actions of a presiding officer*)**[5]

Section 2.341(b) (*Petitions for review*):

The NRC proposes to extend *from 15 to 25 days* the time allowed for filing appeals to the Commission from a presiding officer's full or partial initial decision. Similarly, NRC proposes to extend the time for responding to appeals *from 10 to 25 days* following service of the appeal. The time allowed for the petitioning party to file a reply to the answer would be extended *from 5 to 10 days* following service of the answer. See amended Sections 2.341(b)(1) and 2.341(b)(3); 76 Fed. Reg. 10, 786, 10,793, 10,801-02. Regarding these proposed revisions, NRC observes that the existing filing deadlines are "unnecessarily short" and that these deadlines sometimes result in superficial appellate briefs. NRC also notes that most adjudicatory bodies allow substantially more time than the Commission does for litigants to research and prepare briefs, and that well-considered briefs enable the Commission to make faster and better-reasoned decisions. *Id.* at 10,786.

[5] NRC does not propose to amend the language in 10 CFR 2.341(a)(1) providing 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)." See 76 Fed. Reg. 10,786.

While we are cautious about supporting any rule changes that might lead to any delay in hearing schedules, we do not object to this proposal. The expanded filing schedule appears to reflect a reasonable allocation of time in the overall hearing process for consideration of significant legal issues on appeal.

Section 2.341(c) (*Petitions for review not acted upon deemed denied*):

As a result of an inadvertent omission during the 2004 rulemaking amending 10 CFR Part 2, Section 2.341 does not currently contain a time period after which a petition for review is "deemed denied." The NRC is proposing to add a new Section 2.341(c)(1) that would re-incorporate the "deemed denied" provisions of the former Section 2.786(c) with an additional 90 days for Commission review before petitions for review are deemed denied. Thus, the additional 90 days would allow the Commission *120 days of review time* before a petition for review is deemed denied. See 76 Fed. Reg. 10,786, 10,793, 10,802.

We generally support the proposed addition of a "deemed denied" provision and agree with the NRC that, as a practical matter, a 30-day time period is impracticable given the briefing schedule. However, we are concerned that a 120-day Commission review period could lead to unnecessary delays in resolution of a proceeding. We believe that a 90-day review period would provide sufficient time to review the filings without the need for frequent extensions, and request that the NRC modify this portion of the proposed rule accordingly. NEI-8

Section 2.341(a) (*Time to act on a petition for review*):

The NRC proposes to expand from 40 days to 120 days the time allowed for the Commission to act on a decision of a presiding officer or a petition for review. See 76 Fed. Reg. 10,786, 10,793, 10,801. This revision is designed to align this provision with the proposed amended Section 2.341(c)(1), discussed above.

NEI does not believe that NRC has provided a compelling rationale for giving the Commission an additional 90 days to act on its own motion following a presiding officer's decision. Extending the period for the Commission to act from 40 to 120 days adds unnecessary uncertainty to the effect of Atomic Safety and Licensing Board decisions where there was no appeal by any parties. If the Commission has reason to review a presiding officer decision on its own motion, it should be expected to act quickly before the parties have taken action to implement the Licensing Board decision. We therefore request that the NRC modify this portion of the proposed rule to extend the time period from *40 to 90 days* (not 120 days). NEI-9

Section 2.341(f) (*Standards for Atomic Safety and Licensing Board certifications and referrals*):

NRC proposes to revise Section 2.340(f) to clarify a perceived inconsistency in the standard for Licensing Board certifications and referrals to the Commission and Commission review of these

issues. This inconsistency stems from the slightly different standards for review set forth in existing Sections 2.323(f) and 2.341(f). See 76 Fed. Reg. 10,786, 10,793, 10,802.

We support the proposed change. As amended, Section 2.341(f)(1) would provide that: "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."

**Revisions to 10 CFR § 2.346 — (*Authority of the Secretary*)**

Section 2.346 currently sets forth the authority of the Secretary of the Commission to perform a number of specific actions and, in addition, "take action on minor procedural matters." The NRC proposes to revise this provision to more broadly authorize the Secretary to "take action on procedural or other minor matters." See 76 Fed. Reg. 10,786, 10,793, 10,802. The Commission states that its experience with Subpart C hearing procedures since the 2004 amendments to Part 2 indicates that greater efficiencies could be achieved if the Secretary is given explicit authority to "take action on more than minor procedural matters." It further points out that such a change could expedite decision-making in situations where time is of the essence and the need to prepare an order and/or schedule an affirmation session can result in undesirable delay in issuing procedural directives. 76 Fed. Reg. 10,786-87.

NEI supports the proposal to authorize the Secretary to take action on more than minor procedural matters. We agree that this revision should reduce the potential for delay in procedural matters where time is of the essence, and/or where prompt action by the Commission could eliminate unnecessary uncertainty among the parties as to the proper course of action.

**Revisions to 10 CFR § 2.347 — (*Ex parte communications*)**
**and 10 CFR §2.348 — (*Separation of functions*)**

NRC proposes to revise Sections 2.347 and 2.348 to delete obsolete references to regulations. See 76 Fed. Reg. 10,787, 10793, 10,802. NEI does not object to the proposed deletion of the *ex parte* prohibition and separation of functions requirements for demands for information under Section 2.204.

***Part 2, Subpart G — Rules for Formal Adjudications***

**Revisions to 10 CFR § 2.704 — (*Discovery--required disclosures*)**

The NRC proposes to revise Section 2.704 to reduce the time allowed for making disclosures from 45 days after issuance of a prehearing conference order to 30 days after the date of an order granting the hearing. The NRC is also proposing to require parties to supplement their disclosures every 30 days (for the period from the last disclosure update to five days before the next disclosure update). See 76 Fed. Reg. 10,787, 10793, 10,802.

The initial round of mandatory disclosures can be very burdensome for parties. NEI does not support this proposed change because it would increase the burden on the parties by shortening the time period for completing discovery-required disclosures. Further, given the small number of adjudications that are expected to be conducted under 10 CFR Part 2 Subpart G, the need for this departure from current practice is not clear. (The Supplementary Information merely states that the change to Section 2.704 is proposed to conform with the timing provisions of amended Section 2.336(d); see 76 Fed. Reg. 10,787.) Moreover, for a Subpart G proceeding, other methods of discovery (*e.g.*, interrogatories, deposition) are available. As a result, the need for automatic disclosure supplements is not as pressing as it might otherwise be for licensing proceedings that lack alternate discovery methods. Further, use of the other discovery mechanisms available under Part 2, Subpart G creates an additional burden on the parties that further militates against shortening the time for initial disclosures to 30 days.

NEI-10

In the event that the NRC makes this change in the final rule, the relevant time period should be consistent with that proposed in Section 2.336(d). The time period of interest should run "from five [or fifteen] business days before the last disclosure update to five [or fifteen] business days before the filing of the update." The proposed Section 2.704 does not take into account the five-day [or fifteen-day] period *before* the last disclosure update. Additionally, updates should be "monthly," as discussed above in connection with the proposed changes to Section 2.336.

**Revisions to 10 CFR § 2.705 — (*Discovery--additional methods*)**

While Section 2.705(b)(2) currently allows the presiding officer to "alter the limits in these rules on the number of depositions and interrogatories," NRC rules do not explicitly limit the number of depositions or interrogatories. To provide clarification and improve efficiency, the NRC proposes to revise Section 2.705 to allow the presiding officer to "set limits on the number of depositions and interrogatories." See 76 Fed. Reg. 10,787, 10,793, 10,802. NEI supports this proposed change. Allowing the presiding officer to set reasonable limits on the number of interrogatories and depositions has always been available as a matter of discretion and has been encouraged by Commission policy to facilitate timely proceedings.

**Revisions to 10 CFR § 2.709 — (*Discovery against NRC staff*)**

The NRC proposes to revise Section 2.709 to limit the scope of the NRC Staff's mandatory disclosure obligations in NRC enforcement proceedings conducted under 10 CFR Part 2 subpart G. See 76 Fed. Reg. 10, 787-88, 10,793-94, 10,802-03. To effect this change, NRC would amend Section 2.336(b) to remove subpart G enforcement proceedings from the general discovery requirements, and make corresponding changes to Section 2.709 to specify the Staff's discovery obligations in a subpart G enforcement proceeding. Specifically, NRC proposes to limit the scope of the NRC Staff's disclosures in enforcement proceedings to "all NRC staff documents relevant to disputed issues alleged with particularity in the pleadings." The NRC is also proposing other conforming changes related to privileged documents, the timing of disclosure supplements, and permissible form and type of NRC Staff disclosures.

NEI does not object to the proposed changes. As noted above, we believe that a disclosure period that runs from five business days before the last disclosure update to five business days before the filing of the update is, as a practical matter, insufficient for broad contentions or in proceedings involving a large number of document custodians or contentions.

**Revisions to 10 CFR § 2.802 — (*Petition for Rulemaking*)**

The NRC proposes to revise Section 2.802 to clarify that a petitioner for rulemaking who is a participant in an NRC licensing proceeding (but not necessarily a party to that proceeding) may request a suspension of all or part of that licensing proceeding, pending disposition of the petition for rulemaking. See 76 Fed. Reg. 10,794, 10,803. NEI does not object to this proposed change.

***Part 2, Subpart L — Simplified Hearing Procedures for NRC Adjudications***

**Revisions to 10 CFR Part 2, Subpart L — (*Title*)**

The NRC proposes to revise the title of Part 2, Subpart L from "Informal Hearing Procedures for NRC Adjudications" to "Simplified Hearing Procedures for NRC Adjudications." See 76 Fed. Reg. 10,788, 10,803. This change is designed to reflect the fact that Subpart L proceedings are less formal than the formal Part 2, Subpart G proceedings, but are nevertheless formal, "on-the-record" hearings under the APA. NEI agrees that the procedures in Subpart L satisfy the requirements for an on-the-record proceeding and we therefore support the proposed change to the title of Subpart L.

**Revisions to 10 CFR § 2.1202 — (*Authority and role of NRC staff*)**

The NRC proposes to revise Section 2.1202 to clarify the content of the NRC Staff's "notice to parties" in 10 CFR Part 2, subpart L proceedings regarding the Staff's action on the licensing action in question. Specifically, when the Staff takes its action, its notification to the presiding officer and parties 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. Conforming changes would be made to Section 2.1403. See 76 Fed. Reg. 10,788, 10,794, 10,803. NEI does not object to this proposed clarification.

**Revisions to 10 CFR § 2.1205 — (*Summary disposition*)**
**Revisions to 10 CFR § 2.710 — (*Motions for summary disposition*)**

The NRC proposes to revise Section 2.1205(a) to explicitly require that motions for summary disposition under this provision include "a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." See 76 Fed. Reg. 10, 788, 10,803. This proposed change would correct an inadvertent omission in the 2004

amendments to Part 2, when summary disposition motions requirements were included for Part 2, Subpart L hearings.

As amended, 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. (A conforming change would be made to Section 2.710 so that these provisions will be identical in this regard.) NEI supports these proposed changes as appropriate and consistent with past practice.

**Revisions to 10 CFR § 2.1209 — (*Findings of fact and conclusions of law*)**

The NRC proposes to revise Section 2.1209 by inserting format requirements for proposed findings of fact and conclusions of law in Part 2, Subpart L proceedings. These format requirements will be the same as those in Section 2.712(c), which applies to Part 2, Subpart G proceedings. See 76 Fed. Reg. 10,788, 10,803. NEI does not object to this proposed change.

**Revisions to 10 CFR § 2.1213 — (*Application for a stay*)**

The NRC proposes to add a new Section 2.1213(f) that would exclude from the stay provisions matters limited to whether a "no significant hazards consideration determination" for a power reactor license amendment was proper. See 76 Fed. Reg. 10,788, 10,794, 10,803. The NRC notes that challenges to no significant hazards consideration determinations are not allowed; see 10 CFR 50.58(b)(6).[6] NEI supports this clarification that a stay request involving a no significant hazards consideration determination will not be entertained.

**Revisions to 10 CFR § 2.1300 and 2.1304 — (*Scope of Subpart M*)**

The NRC proposes to revise Section 2.1300 and remove Section 2.1304 to clarify that the generally applicable intervention provisions in Part 2, subpart C, and the specific provisions in Part 2, Subpart M, govern hearing procedures for Subpart M proceedings. See 76 Fed. Reg. 10,788-89, 10,794, 10,803. NEI supports these proposed clarifications regarding the governing procedures for license transfer proceedings.

**Revisions to 10 CFR § 2.1316 — (*Authority and role of NRC staff*)**

The NRC proposes to revise Section 2.1316, which applies to NRC license transfer application hearings under Part 2, Subpart M. Section 2.1316(c) currently allows NRC Staff to submit a simple notification at any point in the proceeding if it wishes to become a party. As amended, this provision would require the NRC Staff, within 15 days after issuance of an order granting

[6] NRC notes that excluding no significant hazards consideration determinations from NRC stay provisions is consistent with case law ruling that these findings are final agency action and therefore 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).

requests for hearing or petitions to intervene and admitting contentions, to notify the presiding officer and parties whether it desires to participate as a party to the proceeding and, if so, to identify the contentions on which the NRC wishes to participate. Requirements relating to the content of the Staff's notice are also addressed. See 76 Fed Reg. 10,789, 10,794, 10,803-04. NEI supports these proposed changes, which will conform the procedures involving NRC Staff participation in Subpart M proceedings to the procedures in other subparts.

**Revisions to 10 CFR § 2.1407 — (*Appeal and Commission Review of initial decision*)**

The NRC proposes to revise Section 2.1407(a) to extend *from 15 to 25 days* the period of time allowed for filing an appeal and a brief in opposition to an appeal under 10 CFR Part 2, Subpart N (expedited proceeding with oral hearings). See 76 Fed. Reg. 10,789, 10,794, 10, 804. NRC cites the same reasons for this proposed change as those mentioned in connection with the changes to Section 2.341. We question whether this change is truly necessary in Subpart N proceedings, which typically are narrow, expedited proceedings. Providing additional time for appellate briefs (which may well be justified in a Subpart G or Subpart L matter) may not be justified here. Alternatively, we suggest that it would be more appropriate to leave such an extension to the discretion of the Commission on a case-by-case basis.

NEI-11

**Revisions to Outdated References in 10 CFR Part 51**

We believe the proposed corrections to outdated references are appropriate.

**Revisions to 10 CFR § 54.27 — (*Hearings*)**

NRC proposes to revise Section 54.27 to reflect the proper 60-day period (rather than 30-day period) to request a hearing on a license renewal application, and to add a reference to Section 2.309. See 76 Fed. Reg. 10,789, 10,794, 10,805. We believe these proposed changes are appropriate.

## II. NEI COMMENTS ON ADDITIONAL ISSUES

**Changes to Mandatory Disclosure Obligations**

The NRC seeks public comment on whether it should revise 10 CFR 2.336 (*General discovery*) to limit and focus the NRC Staff's mandatory disclosure obligations. Currently, Section 2.336(b)(3) requires the NRC staff to disclose "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 is the subject of the proceeding*." NRC is considering modifying this provision to require the NRC Staff to disclose "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.*" See 76 Fed. Reg. 10,790 (emphasis added).

NEI supports this proposed narrowing of the NRC Staff's disclosure obligations under Section 2.336. We defer to the judgment of the NRC that the burden associated with the NRC Staff production of "all documents" is substantial and unnecessary. The proposed rule refers to the burden on the Staff created by disclosure of hundreds or thousands of documents unrelated to any admitted contention. In answer to Question 1(a) at 76 Fed. Reg. 10, 790 concerning this provision, we concur that disclosure of voluminous quantities of discovery material by the Staff also burdens other parties, which must search through "hundreds or thousands of unrelated documents to find the material that is relevant to the issues in dispute." Thus, implementing the amendment to Section 2.336 would aid parties other than the NRC Staff by reducing the scope of documents they must review through the mandatory disclosure process.

NEI-Q1a

In response to Question 1(b), NEI agrees that the broad disclosure obligation imposed on the NRC Staff by the existing Section 2.336(b) does not appear to be warranted, in view of other parties' more limited discovery obligations and parties' ability to find the documents by means of a search on ADAMS. Thus, the proposed change would better align the scope of the NRC Staff's disclosure obligation with that of other parties. 76 Fed. Reg. 10,790.

NEI-Q1b

We also suggest that the Commission take this opportunity to reduce the burden of mandatory disclosures on other parties to NRC proceedings. For example, the regulations could make clear that the parties are not required to disclose documents that are available on ADAMS or that have previously been disclosed by another party. In our view, it is unreasonably burdensome and duplicative to require a party to identify a document that the NRC Staff or another party has already disclosed. Also, if the same relevant e-mail or document exists in multiple locations (*e.g.*, with multiple recipients), each party should be allowed to produce only one copy of that e-mail or document rather than multiple copies of identical documents. (Subsequent e-mails or edits to documents, including hand-written notes, would constitute a different document.) These commonsense changes would result in more efficient and less burdensome discovery for NRC adjudications while still ensuring that all relevant documents are available to the parties.

The proposed rule also seeks stakeholder input on whether use of a "shorter, more relevant privilege log" by the NRC Staff would aid parties to the proceeding. 76 Fed. Reg. 10,790, Question 1(c). On this question, we agree with the points made by the NRC and would have no objection to the NRC Staff's use of a shorter, more relevant privilege log.

NEI-Q1c

Further, the proposed rule seeks stakeholder comment as to whether limiting the NRC Staff's obligation to make mandatory disclosure of documents under the standard set forth in Section 26(a)(1)(A)(ii) of the Federal Rules of Civil Procedure would be the preferred option. 76 Fed. Reg. 10,790, Question 1(d)-(e). With regard to disclosures, this section of the FRCP provides that (except for certain types of proceedings exempted from this requirement), a party must provide to other parties "a copy -- or a description by category and location -- of all documents,

electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses."

On this question, it appears that adoption of the FRCP standard would narrow the NRC Staff's disclosure obligation somewhat by requiring that only that it produce documents under its possession, custody or control *that the Staff may use to support its claims or defenses,* rather than those documents relevant to the party's admitted contentions. Assuming that this would be the intended effect of the amended provision, we would agree that limiting the scope of the Staff's mandatory disclosure obligation consistent with the Federal Rules appears to be the preferred alternative. That approach would likely eliminate ambiguity and reduce significantly the parties' burden in conducting electronic searches.

NEI-Q1e

Moreover, if the Commission pursues this change affecting the NRC Staff, we recommend that it also promulgate analogous amendments similarly reducing the scope of the mandatory disclosure obligation of the other parties to NRC proceedings.

**Alternative Approaches to Interlocutory Appeals**

The NRC also seeks public comment on whether it should revise 10 CFR 2.311 regarding interlocutory review of rulings by a presiding officer granting or denying a request for hearing or petition to intervene, including late-filed requests or petitions. Proposed changes would be designed to "either provide earlier appellate review of contention admissibility or, alternatively, to discourage frivolous appeals." NRC sets forth two options for amending Section 2.311(c) and (d) at 76 Fed. Reg. 10,790-91.

In our view, no changes to the NRC's interlocutory review provisions are necessary. The existing approach, with its attendant advantages and disadvantages, has worked well for the NRC over many years. However, if a change were made, we would support Option 1.

Option 1 would eliminate the thresholds in the current regulations for review of rulings on hearing requests and initial proposed contentions. Option 1 would thus allow any party to immediately appeal a Licensing Board decision on standing or contention admissibility. This option could increase the Commission's case load and could lead to delays in Commission adjudicatory decision-making. On the other hand, this option does offer the potential benefit of more timely decisions on contention admissibility issues, which could be beneficial where a contention is improperly admitted for hearing by an Atomic Safety and Licensing Board. Under Option 1, such an error could be promptly reversed (without the need for an appeal on the admissibility of all contentions admitted for hearing), and the expense of an unnecessary hearing would be avoided. Likewise, if a contention is improperly excluded, the error could be reversed and the hearing could be held promptly – rather than much later in the process and closer in time to critical path to license issuance. Overall, however, the benefits associated with interlocutory review of the entire decision on admissibility may not outweigh the potential for delays associated with the increased appellate workload for the Commission.

NEI-Q2

We do not support Option 2, which would subject appeals of rulings on hearing requests to the existing interlocutory review standards (*i.e.*, the showing required for referrals or certifications). Longstanding NRC case law establishes that interlocutory review would not be available for many appeals on these matters. NRC precedent specifically suggests that admission of a contention does not meet the standard for interlocutory review. We believe that the availability of Commission review of initial decisions on intervention petitions and contention admissibility is important in assuring timely and efficient hearings. In light of the number of Commission appeals that reverse decisions to admit contentions, changing the current approach to eliminate interlocutory review under certain circumstances will result in a significant expansion of the number and type of contentions litigated by Licensing Boards. This would be contrary to the Commission's stated goal of increasing efficiency in the NRC hearing process. Additionally, appeals on contention admissibility also have an important "harmonizing" effect on the scope of hearings, by reducing the differences in the way that one Licensing Board interprets Commission admissibility standards relative to other Licensing Boards.

NEI-Q2

# Blue Ridge Environmental Defense League

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May 16, 2011

Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**RE: Amendments to Adjudicatory Process Rules and Related Requirements**
**Docket No. NRC-2008-0415**

On behalf of the Blue Ridge Environmental Defense League, I submit the following comments on the proposed rules.

**Overview**

The U.S. Nuclear Regulatory Commission is proposing to amend its adjudicatory rules of practice. In the February 28th Federal Register notice, the NRC states these amendments would "improve the fairness, efficiency, and openness of NRC hearings without imposing costs on either the NRC or on participants in NRC adjudicatory proceedings."

**Design Certification Procedure is Fundamentally Flawed**

The Nuclear Regulatory Commission permits a parallel rulemaking process, separating reactor design issues from construction and operation licensing.[1] We and others have detailed the problems with this practice in license interventions before the Nuclear Regulatory Commission in great detail elsewhere.[2] We believe that the Commission's continuing practice violates Atomic Energy Act Section 189a and 10 CFR Part 52.

In sum, to allow Part 52 construction and operating license proceedings without a final nuclear reactor design is a recipe for disaster. The Commission should require the reactor design certification procedures to be completed before the construction licensing process begins. Unless and until this is corrected, the scope of issues which may be adjudicated during a license proceeding is limited, illogical and unfair.

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**Reactor Design Swaps: Procedures Inimical to the Public Interest**

The Nuclear Regulatory Commission's irrational licensing procedure is carried to its illogical extreme when a nuclear power plant applicant completely changes the nuclear reactor technology upon which it based its construction and operating license application. The Nuclear Regulatory Commission is subverting the letter and the intent of federal regulations under 10 CFR Part 52 and depriving the interested public of its rightful

[1] Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 72 Fed. Reg. 20963, April 17, 2008

[2] Texans for a Sound Energy Policy's Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance Pending Completion of Rulemaking on Design Certification Application for Economically Simplified Boiling Water Reactor, November 3, 2008

opportunity to review and comment on licensing proceedings.

The basis for a combined construction and operation license under Part 52 is the certified design of a nuclear reactor. The objectives of the Nuclear Regulatory Commission's adjudicatory process are three: 1) to provide a fair hearing, 2) to avoid unnecessary delay and 3) to produce an informed record which supports sound decision making for the protection of public health and safety and the environment.[3]

There are significant design, engineering, and operating differences between Boiling Water Reactors (BWR's) and Pressurized Water Reactors (PWR's). Yet NRC has allowed Dominion Virginia Power to make such a change at its North Anna power station.[4] And the change occurred after most of the NRC's review and the opportunities for the affected public to participate had passed. The license applicant admitted as much in its letter of request to NRC:[5]

> NRC's review of the North Anna Unit 3 COLA is well-advanced. NRC has completed all four phases of its environmental review and published its Final Supplemental Environmental Impact Statement in February 2010. NRC has completed the first three phases of its six-phase safety review. The Safety Evaluation Report (SER) chapters with open items were issued in August 2009 completing Phase 2. The Advisory Committee on Reactor Safeguards issued its letter report in October 2009 completing Phase 3. NRC and Dominion are now in Phase 4 working to close the remaining open items.

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The company's statement indicates the applicant was seeking a fundamental change in its license application, one neither anticipated nor provided for in Commission regulations. This is contrary to policies and procedures spelled out in the Atomic Energy Act and the National Environmental Policy Act. NRC staff information papers on policy, rulemaking, and adjudicatory matters state *inter alia*:[6]

> The staff, after extensive discussion with the NRC Office of the General Counsel (OGC), has concluded that the plant-specific technical specifications issued with a combined license must be complete, implementable, and provide a basis for the Commission to conclude that the plant will operate in accordance with the relevant requirements.

The guidance continues:

> Under Section 182a of the Atomic Energy Act, technical specifications have the statutory function of allowing the Commission to make its operational safety finding. Section 182a also requires the issued license to include technical

[3] *Hydro Resources Inc.* CLI-01-4, 52 NRC 31, 38 (2001)
[4] Docket Nos. 52-017, In the Matter of Virginia Electric and Power Company d/b/a Dominion Virginia Power North Anna Unit 3 Combined License, June 17, 2010
[5] Letter from Eugene S. Grecheck, Dominion Vice President for Nuclear Development to US Nuclear Regulatory Commission, 18 May 2010, ADAMS Accession No. ML101410207.
[6] SECY-08-0142, September 25, 2008

specifications. Section 185b of the Atomic Energy Act governs the issuance of combined licenses and requires the Commission to find, before issuing the license that "the facility will be constructed and will operate in conformity with the license, the provisions of this Act, and the Commission's rules and regulations.

An applicant for a combined license under part 52 submits the required information in three parts: 1) site suitability, 2) environmental report, financial qualifications and a final safety analysis report and 3) the structures, systems, and components and principal design criteria for the facility.[7] However, submittal of information for part three may not precede or follow by more than 6 months the submittal of the information for part two.[8] Dominion's application was docketed in 2008, years before it changed principal design criteria.

Federal regulations require that the reactor license application describe the design of the plant.[9] The Design Control Document for the substituted PWR had 9,291 pages. In effect, it was a new application which should have required a new licensing process beginning with a notice in the Federal Register and an opportunity for the affected public to intervene. But the Commission failed to do this.

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Licensing of nuclear facilities must be open to the public. Without publication in the federal register, no opportunity is available "to observe and have a limited opportunity to ask questions," and therefore to "become familiar with an application and prepare an adequate request for hearing/petition for intervention."[10] The Commission has the discretion to publish notices of opportunity for hearing in the Federal Register if circumstances indicate that such is desirable. Why has it not done so?

Either the NRC is not requiring nuclear reactor builders and operators to adhere to existing regulations, or the regulations themselves are fundamentally flawed.

Respectfully submitted,

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[7] 10 CFR § 2.101 (2)
[8] *Id.*
[9] 10 CFR § 52.79(a)(4)
[10] 69 Fed. Reg. 2199