POLICY ISSUE
(Notation Vote)

January 20, 2015 SECY-15-0010

FOR: The Commissioners

FROM: Margaret M. Doane
General Counsel

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

PURPOSE:

In response to the Staff Requirements Memorandum (SRM) dated July 19, 2013, on SECY-13-0033, "Allowing Interim Operation Under Title 10 of the Code of Federal Regulations Section 52.103," dated April 4, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML13200A115 and ML12289A928), the Office of the General Counsel (OGC), the Office of Commission Appellate Adjudication (OCAA), and the NRC staff (collectively, "the Staff") have developed procedures for hearings on inspections, tests, analyses, and acceptance criteria (ITAAC). This paper provides the draft final procedures for Commission approval. If approved, the procedures would be published in the *Federal Register*. This paper does not address any new commitments or resource implications.

SUMMARY:

This paper discusses the major legal and policy issues associated with the draft final ITAAC hearing procedures. Enclosures to this paper consist of the following:

- A *Federal Register* notice that announces the final procedures, provides background information on the ITAAC hearing process, describes differences between the proposed and final procedures, and summarizes important aspects of the final procedures.
- Four templates, A through D, for documents that would be issued during the proceeding for a particular facility. Template A is for the notice of intended operation (which announces the hearing request opportunity) and associated procedural orders governing the hearing process before a decision on the hearing request. Templates B through D are for Commission orders imposing procedures after a decision on the hearing request.
- A report summarizing public comments on the proposed procedures and providing NRC responses to these comments (Comment Summary Report).

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This paper addresses the following issues: (1) hearing format selection, (2) choice of presiding officer, (3) steps to streamline and expedite the proceeding, (4) early publication of the notice of intended operation to add schedule margin, and (5) interim operation during an ITAAC hearing.

BACKGROUND:

ITAAC are an essential feature of the combined license process in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52. To issue a combined license, Section 185b. of the Atomic Energy Act of 1954, as amended (AEA), requires the NRC to make a predictive finding that the facility will be constructed and will be operated in accordance with the license, the AEA, and NRC rules and regulations. The ITAAC are included in a combined license to verify prior to operation that the facility has been constructed and will be operated in accordance with these requirements. As required by AEA § 185b., operation cannot commence until the NRC finds that the acceptance criteria in the ITAAC are met. This requirement is reflected in 10 CFR 52.103(g), and the finding that the acceptance criteria are met is commonly called the 52.103(g) finding. The Commission delegated this finding to the NRC staff in the SRM on SECY-13-0033.

To determine whether the acceptance criteria are met, the NRC staff will consider the results of its inspections and information in the licensee's 10 CFR 52.99(c) ITAAC notifications. After an ITAAC is completed, the licensee will submit a 10 CFR 52.99(c)(1) ITAAC closure notification, which must provide sufficient information to demonstrate successful ITAAC completion. Subsequently, if the basis for ITAAC completion is materially altered by new information, 10 CFR 52.99(c)(2) requires the licensee to notify the NRC and to provide sufficient information demonstrating that the ITAAC remains in a successfully completed state. For ITAAC that are not completed as of 225 days before scheduled fuel load, the licensee must submit 10 CFR 52.99(c)(3) uncompleted ITAAC notifications by this date that provide sufficient information to demonstrate that these ITAAC will be completed successfully. The uncompleted ITAAC notifications will constitute a large portion of the ITAAC, and the Staff developed the draft final hearing procedures with this fact in mind.[1] Finally, 10 CFR 52.99(c)(4) requires the licensee to notify the NRC when all ITAAC are complete.

Section 189a.(1)(B) of the AEA provides the public with an opportunity to request a hearing on the licensee's conformance with the acceptance criteria. While NRC regulations address certain aspects of the ITAAC hearing process, they do not provide detailed procedures for ITAAC hearings. The Commission, in its SRM on SECY-13-0033, directed the Staff to develop a range of options for ITAAC hearing formats for Commission review and approval. The Staff published the proposed ITAAC hearing procedures for comment in the *Federal Register* on April 18, 2014 (79 FR 21958). At that time, the Staff reached out to numerous stakeholders, including representatives from the nuclear industry, public interest groups, and government bodies who might be interested in the ITAAC hearing procedures. The Staff also held a public meeting on May 21, 2014, to help inform the public's written comments on the procedures. The comment period closed on July 2, 2014, and the Staff received six comment letters. Two commenters requested an additional public meeting on the procedures, which was held on September 22, 2014. This meeting was transcribed, and statements made at the meeting were treated as comments. Thereafter, the Staff received written comments on September 23, 2014, and October 15, 2014. All comments were from persons affiliated with the nuclear industry except for one person who participated in the September 22, 2014 public meeting and submitted a post-meeting comment. Changes made to the proposed procedures as a result of

[1] Enclosure 7 (*proprietary*) specifically describes the number of uncompleted ITAAC that are anticipated when the hearing process begins.

the comments are described in Section III of the enclosed *Federal Register* notice.

In developing the procedures, the Staff maintained consistency with existing law, regulations, and policy governing ITAAC hearings, the major features of which are as follows.

A. Hearing Requests

At least 180 days before scheduled fuel load, the NRC must publish a notice of intended operation providing 60 days for the filing of hearing requests. AEA § 189a.(1)(B)(i). As noted below, the draft final hearing procedures would have this notice published earlier than the statute requires. Such hearing requests "shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety." AEA § 189a.(1)(B)(ii). This *prima facie* showing requirement is included in the contention admissibility standards at 10 CFR 2.309(f)(1)(vii). Also, 10 CFR 2.309(f)(1)(vii) allows a petitioner to claim that a licensee's 10 CFR 52.99(c) ITAAC notification is incomplete and that this incompleteness prevents the petitioner from making the necessary *prima facie* showing. The Staff termed these claims "claims of incompleteness." These claims do not qualify as "contentions," because, by definition, the *prima facie* requirement for a contention would not yet have been satisfied.

In accordance with 10 CFR 2.309(i), answers to hearing requests are due within 25 days, and replies to answers are not permitted in an ITAAC hearing. The Commission has tasked itself with the decision on whether to grant the hearing request. AEA § 189a.(1)(B)(iii) directs the Commission to make this decision expeditiously.

B. Schedule

An overarching requirement for ITAAC hearings is that a decision on the issues raised by the hearing request must be rendered "to the maximum possible extent" within 180 days of the notice of intended operation or by scheduled fuel load, whichever is later. AEA § 189a.(1)(B)(v). To provide additional time for meeting this goal, the Commission has declared its intent to publish the notice of intended operation 210 days before scheduled fuel load, which is 30 days earlier than the AEA requires. The Staff used this 210-day window to develop the hearing schedule. However, even with this slightly earlier publication of the notice of intended operation, the NRC must complete ITAAC hearings much faster than it completes other hearings. Satisfying the AEA's goal for timely completion of ITAAC hearings has been the primary challenge in developing hearing procedures. With 60 days provided for hearing requests and 25 days provided for answers to hearing requests, the NRC will have 125 days to render a decision on the hearing request, complete all pre-hearing activities, hold the hearing, and issue an initial decision after the hearing.

C. Conduct of the Hearing and Interim Operation

The AEA allows the NRC to establish the procedures for an ITAAC hearing, either formal or informal, but the NRC must give the reasons for its choices. AEA § 189a.(1)(B)(iv). Taking advantage of this flexibility, the Commission has chosen to designate the procedures for an ITAAC hearing on a case-specific basis, as provided by 10 CFR 2.310(j).

In addition to the selection of hearing procedures, the granting of a hearing request triggers the Commission's obligation to determine whether interim operation is appropriate. AEA

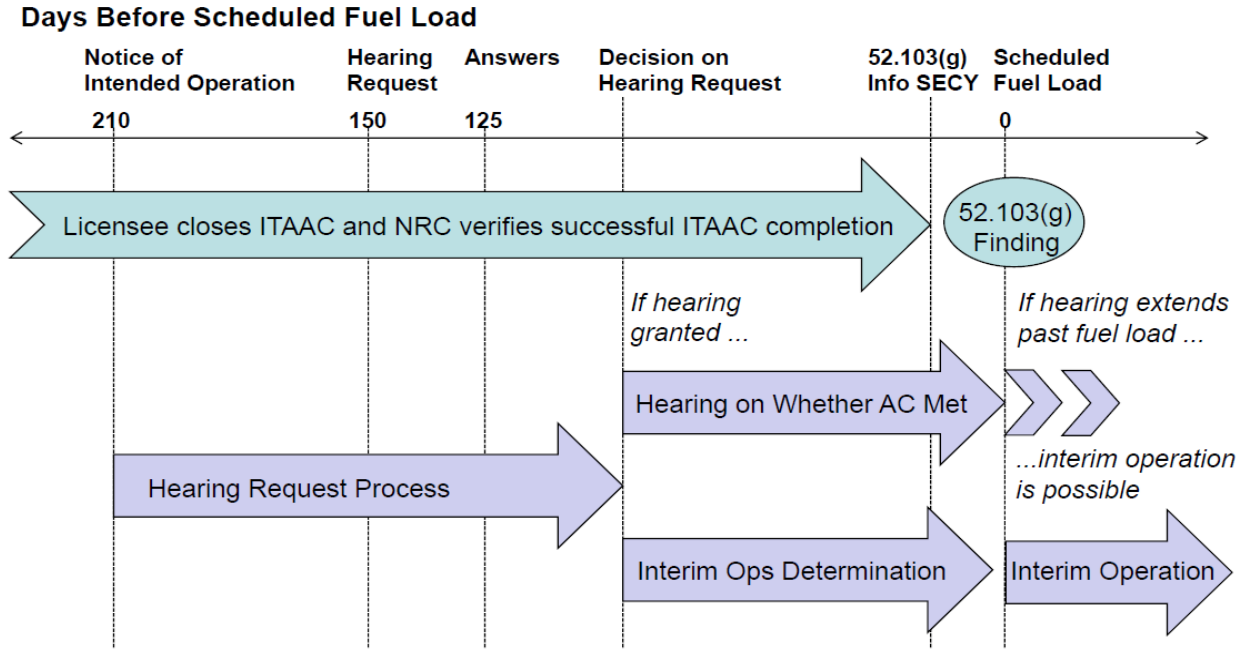
§ 189a.(1)(B)(iii) provides that the Commission shall allow interim operation if it determines, after considering the petitioner's *prima facie* showing and any answers thereto, that there will be reasonable assurance of adequate protection of the public health and safety during a period of interim operation. In accordance with 10 CFR 52.103(c), the Commission will make this adequate protection determination acting as the presiding officer.

In SECY-13-0033, the NRC staff described the circumstances under which interim operation might be allowed. The NRC staff concluded that it must find that all acceptance criteria are met to allow interim operation because AEA § 185b. requires the NRC to find that the acceptance criteria are met prior to operation, which includes interim operation. The NRC staff also concluded, based on the relevant legislative history, that in making the adequate protection determination for interim operation, the Commission was not to make a pre-hearing merits determination that the petitioner's *prima facie* showing is incorrect. Instead, Congress intended interim operation for situations in which the petitioner's *prima facie* showing relates to an asserted adequate protection issue that will not present adequate protection concerns during the interim operation period, or in which mitigation measures can be taken to preclude potential adequate protection issues during the interim operation period. These positions are reflected in the ITAAC hearing procedures.

However, industry commenters on the proposed procedures took exception to these conclusions and argued that interim operation may be allowed even if the NRC staff concludes that the contested acceptance criteria are not met. Industry commenters also argued that the adequate protection determination may be based on a pre-hearing merits determination that the *prima facie* showing is incorrect or likely to be incorrect. The Staff considered these arguments but concluded that the positions articulated in SECY-13-0033 represent the better reading of the statute, as explained in Sections 7.B and 7.C of the Comment Summary Report.

A number of resource-intensive activities will occur in parallel during the last seven months of construction. These parallel processes are represented in Figure 1.

Figure 1 - Parallel Paths (ITAAC Closure/Hearing/Interim Operation)



DISCUSSION:

The Staff designed the ITAAC hearing procedures with the goal of establishing a fair, efficient, and feasible process for developing a sound record for decision in a manner consistent with established law, regulations, and policy. To achieve this objective while ensuring that the hearing issues are resolved by scheduled fuel load to the maximum possible extent, the Staff used the following general approach.

A. Hearing Formats

As a general matter, the procedures employ the existing hearing provisions in 10 CFR Part 2, modified as necessary to conform to the expedited schedule and specialized nature of ITAAC hearings. The existing Part 2 provisions have proven effective, and there is a body of precedent interpreting and applying them. Also, using the existing provisions could make participation in the hearing easier for a participant who is familiar with them.

Contentions involving only legal disputes would be quickly resolved through the submission of briefs. For contentions involving factual disputes, the Staff developed two evidentiary hearing tracks based on 10 CFR Part 2, Subpart L, which is the most widely used hearing track in NRC hearings and which has demonstrated its effectiveness since implementation in its current form in 2004. A Subpart L approach has many benefits. Written testimony and statements of position allow the parties to provide their views with a greater level of clarity and precision, which is important for hearings on technical matters. With the positions of the parties clearly established, oral questions and responses can be used to quickly and efficiently probe the positions of the parties. In addition, the submission of testimony prior to the oral hearing increases its quality because there is more time for the presiding officer to thoughtfully assess the testimony and carefully craft questions that will best elucidate those matters crucial to the presiding officer's decision. Finally, pre-filed written testimony and exhibits can be admitted *en masse* at the beginning of the oral hearing, making it more efficient.

The primary alternative the Staff considered was an oral hearing track based on 10 CFR Part 2, Subpart N, which is intended to be a "fast track" hearing for resolving simple issues. As discussed in Section V.D of the enclosed *Federal Register* notice, the Staff rejected a Subpart N approach for several reasons. Subpart N has never been tested in practice, and using a never-before-employed hearing format would not promote the stability and predictability of the ITAAC hearing process, which is itself a first-of-a-kind endeavor. Also, Subpart N does not enjoy the benefits accruing from written testimony and does not have a schedule advantage over a Subpart L-type approach. While NEI suggested modifications to make a Subpart N-type track shorter, these modifications appear to be unworkable because the presiding officer would be expected to conduct the questioning of witnesses without pre-hearing filings providing (or summarizing) the parties' positions and testimony. While additional processes might remedy this defect, these processes would lengthen the hearing track such that it would enjoy no schedule advantage over the hearing tracks that the Staff developed.

Several commenters recommended that the NRC develop a process for invoking the Administrative Procedure Act (APA) exception in 5 U.S.C. § 554 to avoid holding a hearing where the "decision[] rest[s] solely on inspections, tests, or elections." The commenters suggested that the Commission determine the exception's applicability in its decision on the hearing request. While the NRC has previously stated in the abstract that it may be legally possible to apply the APA exception to some ITAAC in an ITAAC hearing, the Staff does not believe that the commenters' suggestion is practical. If the petitioner does not satisfy the

hearing request requirements, then invoking the APA exception would be unnecessary. However, if the petitioner meets these requirements, including the *prima facie* showing, then the petitioner will have raised questions of sufficiency, and possibly questions of credibility or conflicts, that the relevant case law states normally require a hearing. Nonetheless, it might be possible for the Commission to conclude that the acceptance criteria are not met in light of an overwhelming showing in the petitioner's hearing request and then to invoke the APA exception to avoid a hearing. This possibility is remote, however, and the Staff believes that a licensee should generally have an opportunity to contest the petitioner's claims in a hearing. Although not suggested by the commenters, the Staff also considered the possibility of applying the APA exception prior to the hearing by individually considering all of the ITAAC and all of the possible challenges to ITAAC completion. However, the Staff does not believe that it would be fruitful to engage in such an exercise at this time given the massive resources required, the way most ITAAC are currently written, and the NRC's lack of experience with ITAAC hearings.

B. Choice of Presiding Officer

The Staff's recommendations on which entity will preside over the hearing reflect existing Commission policy, the need for expeditious decision making, and an appropriate division of responsibilities between the Commission and the NRC's administrative judges. In its April 17, 2008 policy statement "Conduct of New Reactor Licensing Proceedings" (73 FR 20963, 20973), the Commission explained that to lend predictability to the ITAAC compliance process, the Commission would serve as the presiding officer with respect to (1) issuing decisions on hearing requests, (2) designating hearing procedures, and (3) making the adequate protection determination for interim operation.

Consistent with this policy rationale, the Staff recommends that the Commission also rule on hearing requests, intervention petitions, new contentions, and claims of incompleteness filed after the deadline. In this way, the Commission would control the introduction of new issues and parties to the proceeding. For amended contentions after the deadline, however, the Staff recommends that the Commission decide on a case-by-case basis whether to rule on the contention or to delegate this function to a licensing board or a single legal judge (assisted as appropriate by technical advisors).[2] A Commission ruling on an amended contention may not be necessary to lend predictability to the hearing process because the Commission will have provided direction on the admissibility of the relevant issues when it ruled on the original contention.

The Staff recommends that a licensing board or a single legal judge (assisted as appropriate by technical advisors) preside over evidentiary hearings because such hearings are highly resource intensive and the Commission has already tasked itself with a number of ITAAC hearing responsibilities. Also, delegating this task to administrative judges would allow the Commission to assign multiple presiding officers in cases where a large number of contentions are admitted. If the Commission does choose to be the presiding officer for evidentiary hearings, then the Commission could consider the use of special masters. For example, a single legal judge could be responsible for addressing all procedural matters in a case, while the Commission would be responsible for conducting the hearing and issuing the decision.

[2] The Staff included the single legal judge option because a single judge may be able to reach and issue a decision more quickly than a panel of judges.

For hearings involving legal contentions, the Staff recommends that the Commission choose on a case-specific basis whether it will serve as the presiding officer or whether it will delegate that function. If the Commission chooses not to be the presiding officer, the Staff recommends as a general matter that a single legal judge (assisted as appropriate by technical advisors) be the presiding officer. The Staff thinks a single legal judge will be able to handle discrete legal issues more efficiently than a traditional three-judge panel. Also, when only legal issues are involved, the considerations in favor of employing a panel are less weighty given that licensing boards generally include only one legal judge, with the other two judges serving as technical experts on factual matters.

C. Streamlining and Expediting the Proceeding

The Staff's recommendations reflect a number of steps to streamline and expedite the proceeding. First, the parties will be expected to prepare their testimony and position statements immediately after a decision granting the hearing request. This should be feasible because ITAAC hearings will be narrowly constrained by the terms of the ITAAC and the required *prima facie* showing and because the parties will have already substantially established their hearing positions and marshalled their supporting evidence in support of their initial filings. Other aspects of the evidentiary hearing schedule have also been accelerated, as described below in Section E.2. Second, the Staff developed detailed templates for the notice of intended operation and procedural orders to ensure quick implementation and to avoid the need for ad hoc decision making. However, the Commission has the flexibility to make case-specific changes and to modify the generic templates based on experience gained in the first hearings.

Third, to add discipline to the hearing schedule, the procedures provide that the Commission would set a strict deadline for issuance of the initial decision after a hearing. This strict deadline may be extended by the presiding officer only upon a showing of unavoidable and extreme circumstances. If the presiding officer extends the strict deadline, then the presiding officer would have to notify the Commission and justify its decision at the earliest practicable opportunity.[3] To meet the statutory goal for timely completion of the hearing, intermediate deadlines must also be adhered to. Therefore, motions for extension of time would also need to satisfy the unavoidable and extreme circumstances standard.

Fourth, the Staff shortened a number of deadlines in the current regulations. For example, motions (other than motions for leave to file new or amended contentions) would be due within 7 days of the event giving rise to the motion, and answers would be due 7 days thereafter. This is less than the 10 days provided for these filings by current regulations. For hearing requests, intervention petitions, new or amended contentions, and claims of incompleteness that are filed after the original deadline, the Staff requested comment on (1) whether the typical deadlines associated with such filings should be retained (30 days for the filing and 25 days for the answers thereto) or (2) whether these typical deadlines should be reduced by as much as 10 days. All commenters on this topic favored reducing the deadlines by even more than 10 days. After balancing the need for expedited filing with the feasibility of making such filings in a shorter

[3] The Staff believes that this process is the most efficient way to extend the strict deadline for issuance of an initial decision while still allowing the Commission time to give direction to the presiding officer regarding the hearing schedule if the Commission desires. As an alternative, the Commission could require the presiding officer to obtain prior Commission permission before extending the strict deadline. However, the time required for Commission action may make it more difficult to respond quickly and flexibly to unforeseen events.

time frame, the Staff recommends that filings after the deadline be due 20 days from the availability of new information, with answers to these filings due 14 days thereafter. Other shortened deadlines include those associated with requests for reconsideration, stay requests, interlocutory appeals, mandatory disclosures, and challenges to NRC staff determinations on access to safeguards information (SGI).

Fifth, the Staff limited or eliminated typical hearing processes that are time-consuming, resource-intensive, and unnecessary under the particular circumstances of an ITAAC proceeding. Because the hearing would be concluded within a few months of the granting of a hearing request, summary disposition motions and contested motions to dismiss would serve little purpose and were eliminated.[4] The Staff also eliminated written motions *in limine* and motions to strike[5] because the parties can make arguments regarding the admissibility and relevance of evidence and arguments in their pre- and post-hearing filings and at the hearing.

The Staff requested comment on whether interlocutory review should be limited to disputes over access to sensitive unclassified non-safeguards information (SUNSI) and SGI or whether interlocutory review should be allowed consistent with the current regulations. All comments favored the restriction of interlocutory review to disputes over access to SUNSI or SGI. The Staff adopted the commenters' position because appeal rights will quickly accrue given the abbreviated ITAAC hearing schedule, and the parties' resources should be dedicated to completing the hearing.

For decisions *granting* access to SUNSI or SGI, the Staff favors allowing interlocutory appeals because a post-hearing appeal opportunity will not cure the harm from an erroneous pre-hearing grant of access to sensitive information. For decisions *denying* access to SUNSI or SGI, the Staff recommends providing a reciprocal interlocutory appeal opportunity, which should lead to quick resolution of disputes over access to sensitive information. Quickly resolving such disputes is important given the effect that an erroneous denial of access might have on the hearing schedule. However, a denial of access does not represent irreparable harm, so appealing a denial of access would not delay the proceeding.

The Staff also requested comment on three options regarding requests for reconsideration: (1) allow reconsideration in accordance with current practice, (2) allow reconsideration only for the initial decision and for appeals of the initial decision, or (3) prohibit reconsideration in its entirety. The commenters were split on this option, with two commenters preferring Option 3 and one commenter preferring Option 1. For several reasons, the Staff recommends Option 2. First, it avoids the diversion of presiding officer and party resources prior to the initial decision. Second, prohibiting reconsideration before the initial decision should not prejudice the parties because appeal rights will quickly accrue. Third, after the initial decision the parties' resources will no longer be consumed by the hearing, so the parties should have the resources to file and respond to requests for reconsideration. Fourth, a request for reconsideration of either the initial decision or a Commission decision on appeal of the initial decision will not prevent these decisions from taking effect. Fifth, initial decisions and Commission decisions on appeal of initial decisions are the most important decisions in the proceeding, so allowing reconsideration

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

[5] Collectively, these are written motions to exclude another party's evidence or arguments.

of these decisions seems prudent.[6]

Finally, the Staff requested comment on whether a petitioner should have to satisfy the reopening standards in 10 CFR 2.326 for hearing requests, intervention petitions, or new or amended contentions filed after the original deadline. The rationale for dispensing with the reopening standards for such filings is that the purposes served by the reopening provisions—to ensure an orderly and timely disposition of the hearing—would be addressed by the existing requirements for hearing requests, intervention petitions, and new or amended contentions filed after the deadline. Specifically, any timeliness concerns would be addressed by the good cause requirement in 10 CFR 2.309(c) and concerns regarding the significance and substantiation of newly raised issues would be addressed by the *prima facie* showing requirement in 10 CFR 2.309(f)(1)(vii).

The commenters on this topic, all from the nuclear industry, opposed this proposal, claiming that the reopening standards impose a higher standard. However, as discussed in Section 6.O of the Comment Summary Report, the Staff does not perceive a significant difference between the reopening standards and the standards for hearing requests, intervention petitions, and new or amended contentions filed after the deadline. Given this and to eliminate unnecessary duplication of effort, the draft final procedures provide that such filings after the deadline need not satisfy the reopening standards.

D. Earlier Publication of the Notice of Intended Operation

As stated above, the procedures were developed with the assumption that the NRC staff will issue the notice of intended operation 210 days before scheduled fuel load. Earlier publication of the notice of intended operation would provide more time to complete the hearing, but there is a practical difficulty with doing this. Namely, the licensee's uncompleted ITAAC notifications are not required until 225 days before scheduled fuel load, and until these notifications are received, the public will not have a basis on which to file contentions with respect to uncompleted ITAAC. Thus, the notice of intended operation cannot be issued until after the receipt and processing of all uncompleted ITAAC notifications. Early publication, therefore, depends on a licensee voluntarily submitting all uncompleted ITAAC notifications earlier than required.

The licensees constructing the Vogtle and V.C. Summer reactors stated in their comments that it is feasible to submit uncompleted ITAAC notifications several months earlier than required. Given this and given the schedule benefits from early publication of the notice of intended operation, the draft final procedures provide that the notice of intended operation may be published up to 75 days earlier than 210 days before scheduled fuel load based on a licensee's voluntary early submission of its uncompleted ITAAC notifications. With early publication, all dates in the hearing schedule would be moved up accordingly. As explained in Section 5.B of the Comment Summary Report, 75 days should mitigate most potential sources of delay in the hearing schedule, including delays associated with valid claims of incompleteness and the need

[6] In a related change, the procedures impose limitations on motions for clarification to prevent them from becoming *de facto* motions for reconsideration. Also, if a presiding officer decision is based on a simple misunderstanding or a clear and material error, the procedures provide that the parties may more informally raise their concerns with the presiding officer by requesting a conference call on the matter. If the presiding officer decides that no conference call is necessary, then the parties and the presiding officer's resources will not have been expended. If a conference call is held, the resource expenditure should be minimal and any error or misunderstanding could be more quickly rectified than through a request for reconsideration.

to conduct SGI background checks.[7]

However, earlier publication of the notice of intended operation comes with a drawback. If the notice is published earlier, there will be more uncompleted ITAAC on which petitioners will be expected to file contentions. Although petitioners should still have sufficient information on which to base their contentions, there would be more subsequent ITAAC closure notifications for petitioners to examine to determine whether there is new information that might give rise to a new or amended contention. Also, with more uncompleted ITAAC there is a greater probability that a new or amended contention would be filed, which would burden all participants. To limit these additional burdens, the NRC would publish the notice of intended operation no more than 75 days earlier. In addition, the Staff will alleviate burdens on petitioners by making it easier for them to cross-reference uncompleted ITAAC notifications with later ITAAC closure notifications. Finally, the uncompleted ITAAC notifications and the ITAAC closure notifications share the same format, which facilitates comparison.

E. Overview of the Procedural Order Templates

1. *Template A – Notice of Intended Operation and Associated Orders*

Template A includes the notice of intended operation, which explains how the public can request a hearing and access relevant information. Template A also includes two related orders: (1) an order setting forth additional procedures specifically pertaining to an ITAAC hearing (Additional Procedures Order); and (2) an order setting forth procedures for requesting access to SUNSI or SGI in the NRC's possession for contention formulation (SUNSI-SGI Access Order).

The Additional Procedures Order includes several provisions to expedite the proceeding. In addition to those described above, the milestone for a Commission decision on the hearing request is 30 days after answers are filed. This aggressive milestone is consistent with the statutory directive that rulings on hearing requests be made expeditiously and is necessary to allow sufficient time for the hearing if the hearing request is granted. If this 30-day milestone is met and the notice of intended operation is published 210 days before scheduled fuel load, then there would be 95 days before scheduled fuel load to hold the hearing and issue an initial decision.

To conserve litigation resources and avoid a potential source of delay, the Staff adopted a commenter's suggestion to require petitioners to request assertedly missing information from the licensee before filing a claim of incompleteness. Successful consultations would eliminate the need to file the claim, and the petitioner could file a contention earlier than would be the case if a claim of incompleteness were filed and the Commission found it to be valid. Also in response to comments, the Staff included provisions for claims of incompleteness requesting access to SUNSI or SGI. Among other things, the NRC staff would be involved in petitioner-licensee consultations on access to security-related SUNSI or SGI. Also, to expedite the proceeding, a petitioner seeking access to SGI would have to initiate the SGI background check process within 5 days of notice from the licensee that the information being sought is SGI. If consultations are not successful, the petitioner would have to satisfy the standards for access to

[7] However, early publication would not mitigate all sources of delay. For instance, if a new contention is based on a problem encountered late in construction, litigation on the contention would be triggered by the availability of the new information and not by publication of the notice of intended operation.

SUNSI or SGI for its claim of incompleteness to be found valid with respect to such information.

The SUNSI-SGI Access Order is included because the ITAAC hearing might involve access to proprietary or security-related SUNSI or SGI. The SUNSI-SGI Access Order in Template A is based on the general template used in other proceedings, with shortened deadlines and other modifications to reflect the expedited time frame and specialized nature of ITAAC hearings. The request for access to SUNSI or SGI would initially go to the NRC staff. If the NRC staff determination is challenged, the Staff recommends that a single legal judge (assisted as appropriate by technical advisors) rule on the challenge. An administrative judge is particularly suited to expeditiously resolving questions of this kind, and a single legal judge may be able to issue a decision on a more expedited basis.

Also, because of the time needed to conduct an SGI background check, the procedures provide a "pre-clearance" process, by which a potential party can initiate the necessary background check in advance of the notice of intended operation. This pre-clearance process is described in the Commission-approved "Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information" (February 29, 2008) (ADAMS Accession No. ML080380626). To enhance the visibility of this process for ITAAC hearings, the Staff would issue a plant-specific *Federal Register* notice announcing the pre-clearance process at least 135 days prior to the expected publication of the notice of intended operation.

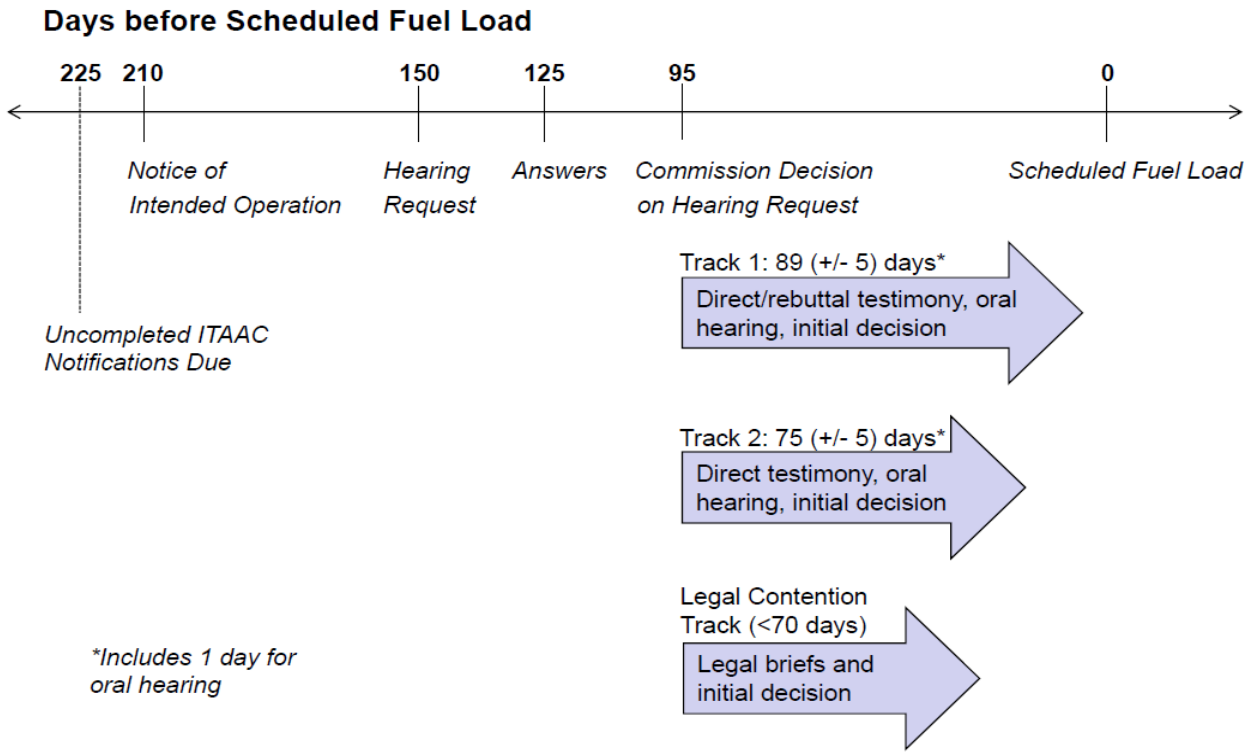
Finally, to commence the hearing process as soon as possible after the NRC receives the licensee's uncompleted ITAAC notifications, the Staff recommends that the Commission authorize the Secretary to issue the notice of intended operation and associated orders. The Secretary has already been delegated authority under 10 CFR 2.307(c) to issue SUNSI-SGI access orders. If the Commission approves Template A, then the Staff believes that the Secretary would have the authority to issue the Additional Procedures Order under 10 CFR 2.346(j), as the order would have no precedential or policy significance.

2. *Template B – Procedures for Hearings Involving Testimony*

Template B includes the procedures for hearings involving testimony. As stated above, Template B is based on Subpart L, with modifications to expedite the proceeding. Two alternative hearing tracks were developed, Track 1 and Track 2, with the only difference between them being whether pre-filed initial and rebuttal testimony are permitted (Track 1) or whether only pre-filed initial testimony is permitted (Track 2). While Track 2 does not allow written rebuttal, it does allow a form of oral rebuttal in that the parties can propose questions to be asked of their own witnesses to respond to the other parties' filings.

The Track 1 schedule takes 89 (+/- 5) days, and the Track 2 schedule takes 75 (+/- 5) days, with both tracks allotting one day for the oral hearing. The Commission may add or subtract up to 5 days for initial testimony depending on the number and complexity of contested issues. Figure 2, on the following page, shows how these tracks fit within the overall schedule and how they compare with each other and with the legal contention track.

Figure 2 - ITAAC Hearing Tracks



Track 1 and Track 2 have different, competing advantages relative to one another. Track 2 is shorter, and written rebuttal might be unnecessary in some cases. On the other hand, Track 1 enjoys the benefits of written rebuttal, including greater assurance that the contested issues will be fully addressed by the parties in writing before the hearing. Public commenters were split on the question of whether the procedures should provide for written rebuttal. Two commenters suggested eliminating the track with written rebuttal to expedite the proceeding. However, one commenter advised that written rebuttal be included in all cases (1) to ensure that the parties have a complete opportunity to respond to new, unexpected issues raised in the other parties' initial testimony; (2) to clarify the evidentiary record; (3) to clarify the contested issues prior to the oral hearing, which should make the oral hearing shorter and more efficient; and (4) to help the presiding officer reach its decision more expeditiously by increasing the likelihood that the topics raised in initial testimony will have been fully addressed before the hearing. Echoing some of these points, the Atomic Safety and Licensing Board Panel (ASLBP), which reviewed the draft final procedures, expressed its concern that while Track 2 is nominally shorter than Track 1, the time saved from eliminating written rebuttal might ultimately be lost during the hearing and post-hearing phases if the presiding officer has an incomplete understanding of the parties' positions prior to the oral hearing. Therefore, the ASLBP suggested that written rebuttal be included in most, if not all, cases.

The Staff is more persuaded by the comments favoring the inclusion of written rebuttal. Therefore, as discussed in Section 5.D of the Comment Summary Report, the Staff recommends that, given the advantages of written rebuttal, the Track 1 procedures be the default hearing track for ITAAC evidentiary hearings. Adopting a default evidentiary hearing track would simplify the process for designating the procedures in each proceeding. Also, the Track 1 schedule should generally accommodate a timely hearing decision for contentions

submitted with the initial hearing request. While the Track 1 schedule might not accommodate issuance of the initial decision by scheduled fuel load in all cases, e.g., if new contentions are admitted, the Staff believes that the benefits of written rebuttal would generally outweigh the minor potential time savings from its elimination. Also, for the reasons given by the ASLBP, the Track 2 procedures might not result in a quicker hearing decision. Nonetheless, the Commission has the authority to eliminate written rebuttal in an individual proceeding. For example, the Commission might eliminate written rebuttal if the contested issues are narrow and simple and the parties' positions in the hearing request and answers thereto are sufficiently established to allow a full response in the parties' initial testimony and position statements. To enhance the Commission's ability to make such a choice in a timely manner, Template B indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

The table on the following page shows the detailed schedule for Tracks 1 and 2. The only difference between the two tracks is highlighted.

3. *Template C – Procedures for Hearings on Legal Contentions*

The Template C procedures for hearings involving legal contentions were taken from Template B with the exception of those procedures involving testimony (and associated filings) and discovery. Template C has no model hearing schedule because the timing and nature of the required briefs would be case-dependent. However, hearings on legal contentions should take significantly less time than evidentiary hearings.

4. *Template D – Procedures for Resolving Claims of Incompleteness*

Template D includes the procedures for resolving valid claims of incompleteness. The Commission would direct the licensee to provide the missing information to the petitioner (normally within 10 days), after which the petitioner would have 20 days to file a contention. Template D includes procedures from the Additional Procedures Order in Template A with changes to reflect the procedural posture for a valid claim of incompleteness.

F. Interim Operation

The draft final procedures include a number of provisions specifically directed at interim operation. Because the adequate protection determination for interim operation is based on the hearing request and answers thereto, the notice of intended operation would specifically request information from participants regarding the time period and modes of operation during which the adequate protection concern arises and any mitigation measures proposed by the licensee. Because the interim operation determination would be a technical finding, a participant's views regarding adequate protection during interim operation would need to be supported with alleged facts or expert opinion, including specific references to supporting documents or other sources.

Ordinarily, the hearing request and answers thereto would be the participants' only opportunity to address adequate protection during interim operation. However, if the hearing request is granted, the Commission may require additional briefing. Also, the NRC staff and the petitioners would be given an opportunity to address adequate protection during interim operation in light of any mitigation measures proposed by the licensee.

Table – Track 1 and Track 2 Schedules

Event	Target Date	Target Date	Target Date Type[8]
	Track 1 (the default)	*Track 2*	
Prehearing Conference	Within 7 days of the grant of the hearing request	Within 7 days of the grant of the hearing request	Milestone
Scheduling Order	Within 3 days of the prehearing conference	Within 3 days of the prehearing conference	Milestone
Document Disclosures; Identification of Witnesses; and NRC Staff Informs the Presiding Officer and Parties of Whether the Staff Will Participate as a Party	15 days after the grant of the hearing request	15 days after the grant of the hearing request	Default Deadline
Pre-filed Initial Testimony	30 (+/- 5) days after the grant of the hearing request	30 (+/- 5) days after the grant of the hearing request	Milestone
Pre-filed Rebuttal Testimony	14 days after initial testimony	No rebuttal	Milestone
Proposed Questions; Motions for Cross-Examination/Cross-Examination Plans	7 days after rebuttal testimony	7 days after initial testimony	Milestone
Answers to Motions for Cross-Examination	5 days after the motion for cross-examination OR oral answer to motion presented just prior to the beginning of the hearing	5 days after the motion for cross-examination OR oral answer to motion presented just prior to the beginning of the hearing	Milestone
Oral Hearing	15 days after rebuttal testimony	15 days after initial testimony	Milestone
Joint Transcript Corrections	7 days after the hearing	7 days after the hearing	Milestone
Findings (if needed)	15 days after the hearing or such other time as the presiding officer directs	15 days after the hearing or such other time as the presiding officer directs	Milestone
Initial Decision	30 days after the hearing	30 days after the hearing	Strict Deadline

[8] "Default deadlines" are requirements but may be modified by the presiding officer for good cause. "Milestones" are not requirements, but the presiding officer would be expected to adhere to them to the best of its ability to complete the hearing in a timely fashion. The initial decision is subject to a strict deadline, which may be extended only upon a showing of unavoidable and extreme circumstances.

The Commission has discretion regarding the timing of the adequate protection determination for interim operation, but the decision should be made no later than scheduled fuel load since the interim operation provision is intended to prevent the hearing from unnecessarily delaying fuel load. Several industry commenters suggest that the adequate protection determination be issued as early as possible to provide the licensee with predictability, aid in planning, avoid delays in fuel loading, and prevent unnecessary costs by allowing the licensee to schedule its resources for fuel loading only if the Commission has made a positive adequate protection determination.

The Staff found these comments unpersuasive. The 52.103(g) finding is also required for interim operation and licensees cannot presume that the NRC staff will make this finding. Therefore, early issuance of the adequate protection determination does not provide assurance that interim operation will be allowed. Also, if the hearing is completed before fuel load, then interim operation becomes moot. Thus, licensees can schedule their resources based on the understanding that the NRC intends to complete the hearing and make required determinations by scheduled fuel load, but there is no guarantee that the licensee will receive favorable decisions.

Also, while the timing of the adequate protection determination is up to the Commission, several factors favor waiting to issue this determination until just before scheduled fuel load. If the hearing decision is issued before scheduled fuel load, there is no need to make an interim operation decision. Further, new information may arise between the granting of the hearing request and scheduled fuel load that is material to interim operation. This could especially be the case for ITAAC that are completed late in the process. The admission of a new or amended contention could also affect the interim operation decision.

The SRM on SECY-13-0033 provides an additional reason to time the issuance of the adequate protection determination close to fuel load. In this SRM, the Commission directed that the ITAAC hearing procedures should ensure that, in practice, the actions of the Commission in determining adequate protection during interim operation cannot be construed as prejudicing the NRC staff's ITAAC closure findings. While the Commission could alleviate this concern by clearly stating that its decision is not based on a merits determination that the contested acceptance are met, the Staff understood the Commission direction as being process-oriented. The only apparent process-oriented response to the Commission's direction is to have the adequate protection determination follow the NRC staff's determination that all acceptance criteria are met. However, the NRC staff will make this determination only shortly before scheduled fuel load.

As stated in SECY-13-0033, the NRC staff will inform the Commission that it has determined that all acceptance criteria are met prior to formally making this finding under 10 CFR 52.103(g). In the interval between this NRC staff notification and the 52.103(g) finding, the Commission could make its adequate protection determination. The Staff recommends that the adequate protection determination precede the 52.103(g) finding because the 40-year terms of the already-issued combined licenses commence when the 52.103(g) finding is made and because certain regulatory and license requirements related to operation are triggered by the 52.103(g) finding. If the Commission approves this recommendation, then at the time of the 52.103(g) finding, the NRC staff could issue an order allowing interim operation with any terms or conditions that were imposed by the Commission in its interim operation decision.

Consistent with the Staff's recommendation, the procedures provide guidance on the relationship between interim operation and the 52.103(g) finding in the following scenarios.

These scenarios assume that the NRC staff is able to make the 52.103(g) finding by scheduled fuel load and that any initial decision after a hearing finds that the acceptance criteria have been met.

1) *The initial decision is issued by scheduled fuel load*: There will be no interim operation by definition, i.e., interim operation is operation during the pendency of the hearing.
2) *The initial decision is not issued by scheduled fuel load*:
   a) Interim operation will be allowed if the NRC staff has made the 52.103(g) finding and the Commission has made a positive adequate protection determination for all admitted contentions.
   b) If the Commission has not made a positive adequate protection determination for all admitted contentions, then the plant would not be allowed to operate even if the 52.103(g) finding is made. For this reason and to avoid triggering operation-related requirements, the NRC staff would wait to issue the 52.103(g) finding until the earlier of (1) the issuance of the initial decision, or (2) the Commission's issuance of a positive adequate protection determination on all admitted contentions. Similarly, if the Commission has made a negative interim operation determination for one or more contentions, then the NRC staff would wait to issue the 52.103(g) finding until the initial decision is issued on those contentions.
3) *There are no admitted contentions*: The NRC staff can make the 52.103(g) finding notwithstanding the pendency of appeals, motions to reopen, stay requests, proposed new or amended contentions, or any other pending pleadings. As a general matter, the mere filing of a pleading does not serve to stay any action. Also, as discussed in Section VI.A.3 of the enclosed *Federal Register* notice, the structure of the combined license provisions in AEA §§ 185b. and 189a.(1)(B) indicates that operation is not automatically stayed if the Commission has not granted a hearing request. Nonetheless, since the interim operation provision does not apply, it makes sense for the general stay provisions to apply, although the irreparable harm factor should focus on reasonable assurance of adequate protection during operation to be consistent with the intent underlying the interim operation provision.

Finally, the procedures provide that if the Commission determines that there is adequate protection during interim operation, a request to stay this decision will not be entertained because the interim operation provision serves the purpose of a stay provision. The procedures also provide that the interim operation decision becomes final agency action once the NRC staff makes the 52.103(g) finding and issues an order allowing interim operation.

G. Implementation

If the Commission approves the draft final procedures, some minor additional actions will be required to implement them. As stated in Section 3.3.3 of the report entitled "Assessment of the Staff's Readiness to Transition Regulatory Oversight and Licensing as New Reactors Proceed from Construction to Operation" (September 9, 2014) (ADAMS Accession No. ML14031A386), the NRC staff will develop internal implementation processes soon after the ITAAC hearing procedures are finalized (e.g., within 6 months). These will include processes for expedited publishing of the notice of intended operation and for processing requests for access to SUNSI or SGI. The Personnel Security Branch of the Office of Administration (ADM) has agreed to prioritize SGI background check processing in ITAAC hearings, but the Office of Personnel Management has the lead in conducting the background investigation. Nevertheless, the Staff believes that SGI background-check determinations can typically be made less than 50 days after the submission of the required forms, although this might take longer in complex cases.

Finally, the Staff will develop additional templates to regularize and expedite the ITAAC hearing process. These templates will include a template for the plant-specific *Federal Register* notice announcing the pre-clearance SGI background check opportunity and generic protective order templates for security-related SUNSI, proprietary SUNSI, and SGI. The Staff plans to develop the protective order templates through a public process involving stakeholder input.

RECOMMENDATION:

The Staff recommends that the Commission approve the publication of the draft final ITAAC hearing procedures enclosed with this paper.

Note:

- The appropriate Congressional committees will be informed.
- A press release will be issued by the Office of Public Affairs once the procedures are published in the *Federal Register*.
- This paper will be made publicly available in ten business days except for Enclosure 7, which contains proprietary information.

COORDINATION:

OGC, OCAA, the Office of New Reactors (NRO), the Office of Nuclear Security and Incident Response (NSIR), and Region II worked together to develop the ITAAC hearing procedures. OCAA, NRO, and NSIR concur in this paper. Region II has no concerns with the procedures.

The Personnel Security Branch of ADM reviewed, and concurs in, those aspects of this paper related to the process for SGI background check reviews.

The ASLBP commented on both the draft proposed procedures and the draft final procedures. The Staff addressed the ASLBP's comments on the proposed procedures, and the ASLBP had one comment on the draft final procedures. This comment has been addressed as described in this paper.

The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

/RA/
Margaret M. Doane
General Counsel

Enclosures:
1. Draft *Federal Register* Notice
2. Template A – Notice of Intended Operation and Associated Orders
3. Template B – Procedures for Hearings Involving Testimony
4. Template C – Procedures for Hearings on Legal Contentions
5. Template D – Procedures for Resolving Claims of Incompleteness
6. Comment Summary Report
7. Number of Uncompleted ITAAC When the Notice of Intended Operation is Published (*proprietary*)

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Original signed by:
Margaret M. Doane
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ADAMS Accession No.: ML14343A747 **ADAMS Package No.:** ML14343A704

**Concurrence by email*

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OFFICE	NRO*	NSIR*	ADM/DFS/PSB*		
NAME	MCheok for GTracy	BMcDermott	LWatson for VKerben		
DATE	1/6/2015	12/29/2014	1/7/2015		

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