Enclosure 6

Comment Summary Report

Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met

[Month] 2015

U.S. Nuclear Regulatory Commission

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List of Abbreviations

ADAMS	Agencywide Documents Access and Management System
AEA	Atomic Energy Act of 1954, as amended
APA	Administrative Procedure Act
ASLB	Atomic Safety and Licensing Board
CFR	Code of Federal Regulations
COL	combined license
EPAct	Energy Policy Act of 1992
FPL	Florida Power and Light Company
FR	Federal Register
ITAAC	inspections, tests, analyses, and acceptance criteria
NEI	Nuclear Energy Institute
NRC	U.S. Nuclear Regulatory Commission
OCAA	Office of Commission Appellate Adjudication
OGC	Office of the General Counsel
RG	regulatory guide
SCE&G	South Carolina Electric & Gas Company
SGI	safeguards information
SNC	Southern Nuclear Operating Company, Inc.
SOC	statement of considerations
SUNSI	sensitive unclassified non-safeguards information
U.S.C.	United States Code
Westinghouse	Westinghouse Electric Company LLC

Preface

This document summarizes comments the U.S. Nuclear Regulatory Commission (NRC) received in response to proposed general procedures for conducting hearings on conformance with the acceptance criteria in the inspections, tests, analyses, and acceptance criteria (ITAAC) included in a combined license (COL) issued under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52. These proposed procedures, entitled "Proposed Procedures for Conducting Hearings on Whether Acceptance Criteria in Combined Licenses Are Met," (Proposed ITAAC Hearing Procedures) were published in the *Federal Register* (FR) on April 18, 2014 (79 FR 21958).

The comment period closed on July 2, 2014. Six comment letters from the following persons and entities were received on the proposed procedures:

- On behalf of the Nuclear Energy Institute (NEI), Ellen C. Ginsberg submitted comments dated July 2, 2014 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14190A012).
- On behalf of South Carolina Electric & Gas Company (SCE&G), April R. Rice submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A013).
- On behalf of Southern Nuclear Operating Company, Inc. (SNC), Brian H. Whitley submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A011).
- On behalf of Westinghouse Electric Company LLC (Westinghouse), Thomas C. Geer submitted comments dated July 1, 2014 (ADAMS Accession No. ML14190A010).
- On behalf of Florida Power and Light Company (FPL), William Maher submitted comments dated July 2, 2014 (ADAMS Accession No. ML14190A009).
- On his own behalf, Mr. Barton Z. Cowan submitted comments dated July 2, 2014 (ADAMS Accession No. ML14195A275).

In response to comments from NEI and SNC, the NRC held a public meeting on September 22, 2014, to discuss seven issues associated with comments on the following three topics: interim operation, consultation on claims of incompleteness, and early publication of the notice of intended operation. Mr. Marvin Lewis and representatives of NEI, SCE&G, SNC, and Westinghouse provided comments at the public meeting. A summary of the public meeting is available at ADAMS Accession Number ML14276A154, and the transcript for the meeting is available at ADAMS Accession Number ML14274A235. On September 23, 2014, Mr. Marvin Lewis submitted correspondence (ADAMS Accession No. ML14272A454) amplifying on a comment he made at the public meeting. On October 15, 2014, Ellen C. Ginsberg submitted correspondence (ADAMS Accession No. ML14289A494) on behalf of NEI, providing written comments on the issues that were discussed at the public meeting. In this letter, NEI stated that it closely coordinated with SNC, SCE&G, FPL, and Westinghouse representatives and that these companies authorized NEI to state that they concur in, and support, NEI's October 15, 2014 comments. Statements made at the public meeting and in subsequent correspondence have been summarized, and corresponding NRC responses have been provided, in this report.

The comment summaries and the NRC's responses thereto are presented below and organized by issue. The comment summaries are presented in regular text while the NRC responses are presented in italicized text. Unless explicitly stated otherwise, a person or organization's comments come from the July 2014 comment letters. In cases where the procedures provided options for comments, the summary of the comments is preceded by a brief discussion of these options in italicized text.

Summary of Comments and NRC Responses Organized By Issue

1. General Comments on the Proposed Procedures and Endorsement of Specific Provisions

NEI: NEI appreciates the considerable efforts by the NRC staff, the Office of the General Counsel (OGC), and the Office of Commission Appellate Adjudication (OCAA) to develop the proposed generic ITAAC hearing procedures. NEI states that the timely development of adjudicatory procedures that can be quickly and easily adapted to the specific features of individual proceedings is needed to enhance the predictability and efficiency of the ITAAC hearing process. NEI also states that the information provided during the May 21, 2014 NRC public meeting enhanced its understanding of the proposed procedures.

With respect to the process for imposing procedures, NEI supports the NRC's proposed use of case-specific Commission orders to establish hearing procedures in individual cases based on a set of general ITAAC hearing procedures. NEI believes that this approach is consistent with both the Atomic Energy Act of 1954, as amended (AEA), and NRC regulations. NEI states that while other approaches are possible (e.g., a Commission policy statement), using case-specific orders is advantageous because it (1) will take less time than rulemaking, (2) is supported by ample Commission precedent, (3) allows the procedures to be tailored to the specific matters in controversy, and (4) allows the NRC to swiftly implement lessons learned from the first ITAAC hearing to future proceedings. NEI agrees with the NRC that the flexibility afforded by case-specific orders is particularly beneficial given that ITAAC hearings are first-of-a-kind in nature.

NEI strongly supports the NRC's goal of establishing an efficient and feasible process that is consistent with existing law and policy and that will allow the presiding officer and the parties a fair opportunity to develop a sound record of decision. NEI also strongly agrees with the NRC that it is important to eliminate from the ITAAC hearing process those procedures that are time-consuming, resource-intensive, and unnecessary under the particular circumstances of an ITAAC proceeding. NEI states that the final ITAAC hearing procedures should instill discipline with respect to meeting the hearing schedule and require adherence to the strict deadline for issuing the initial decision after the hearing. To this end, NEI supports much of what the NRC has proposed.

Specifically, NEI supports the following aspects of the proposed procedures:

- application of heightened requirements to ITAAC hearing requests and proposed contentions;
- disallowing discretionary intervention;
- requiring a *prima facie* showing in the ITAAC hearing request that is in addition to the normal requirements for hearing requests;
- imposing requirements relating to claims of incompleteness;
- precluding contentions on environmental issues;
- applying firm deadlines for answers to hearing requests;
- precluding an opportunity to reply to an answer to a hearing request;
- strict adherence to the requirement that the Commission expeditiously grant or deny the hearing request; and
- disallowing appeals under 10 CFR 2.311 from a Commission ruling granting or denying an ITAAC hearing request.

NEI also supports the deadlines in the proposed procedures for general motions, i.e., motions other than motions for leave to file new or amended contentions or claims of incompleteness after the deadline.

However, NEI does not believe that the NRC's proposal ensures "to the maximum possible extent" that the NRC will issue a decision on issues raised by a hearing request before scheduled fuel load. NEI states that it has proposed numerous suggestions to clarify and revise some aspects of the proposed procedures to make them more expeditious, more predictable, and more efficient for all participants in the process.

NEI also endorses the comments on the ITAAC hearing procedures made by SNC and SCE&G.

Westinghouse: Westinghouse commends the NRC staff for the excellent effort reflected in its proposal. Westinghouse believes that the NRC staff has made significant strides toward providing much needed clarity and predictability in these hearings. However, Westinghouse believes that there are several key areas that require additional clarity and has submitted comments on these issues.

Westinghouse also supports the comments submitted by NEI.

SNC: SNC states that the proposed procedures are thorough, well-developed, and evidence a significant amount of time and careful thought from the NRC staff, OGC, and OCAA. SNC believes that the proposed procedures were carefully thought out and, for the most part, address the unique needs of an ITAAC hearing. SNC states that many aspects of the proposed procedures should be adopted in the final procedures without modification, but SNC provided comments regarding some provisions that it believes will streamline the process and make it practical and efficient. SNC also states that in making its comments, it attempted to approach the complexities of the ITAAC hearing process from a very practical perspective.

SNC believes that the proposed procedures correctly emphasize the importance of schedule adherence, meeting deadlines, and the timely resolution of any ITAAC hearing granted. SNC agrees that to meet the statutory objective for timely completion of the hearing, the NRC must complete the hearing process much faster than is usually achieved in NRC practice for other hearings. To this end, SNC supports the following aspects of the proposed procedures:

- a strict deadline for issuance of the initial decision after a hearing;
- the expectation that deadlines will be strictly adhered to;
- the shortened time frame for filing and answering motions;
- the shortened time frame for filing and answering stay applications;
- the prohibition on requests to stay the effectiveness of the Commission's decision that there is adequate protection during the period of interim operation;
- early issuance of the scheduling order;
- simultaneous filings of pre-filed initial testimony; and
- the separate, more streamlined process for legal contentions.

SNC also endorses the comments NEI made on the proposed procedures.

SCE&G: SCE&G fully supports the NRC's preparation of the ITAAC hearing procedures at this time because SCE&G believes that process predictability is important to all stakeholders.

SCE&G also states that it recognizes the tremendous effort and thought expended by the NRC staff, OGC, and OCAA in developing the procedures, and thanks the NRC staff for holding the May 21, 2014 public meeting to discuss the procedures and for the opportunity to submit comments.

SCE&G supports many aspects of the proposed procedures, particularly efforts to expedite the ITAAC hearing process and to eliminate procedures from the hearing process that are time-consuming, resource-intensive, and unnecessary under the particular circumstances of an ITAAC proceeding. SCE&G states that it provided comments in response to the NRC's specific requests for comment and made other comments with the goal of improving the predictability and certainty of the procedures and providing added certainty that ITAAC hearings will be completed in a timely fashion prior to scheduled fuel load.

SCE&G also endorses NEI's comments on the proposed procedures.

FPL: FPL commends the NRC for proactively and thoroughly addressing the issue of ITAAC hearing procedures and for seeking input from interested stakeholders. FPL states that developing these procedures now will help to ensure that the agency is able to meet the expeditious ITAAC hearing schedule set forth in the AEA.

FPL also endorses NEI's comments on the proposed procedures.

NRC Response: To the extent that the comments endorse the general approach of the proposed procedures or specific provisions in the proposed procedures, no response is necessary because the approaches and procedures endorsed by the commenters are being included in the final procedures without modification. The NRC acknowledges that commenters had many suggestions on how to improve the proposed procedures, and these suggestions are discussed in the remaining sections of this document. NEI does not believe that the proposed procedures ensure "to the maximum possible extent" that the NRC will issue a decision on issues raised by a hearing request before scheduled fuel load. In response to comments, the NRC has made a number of improvements to the proposed procedures, as described throughout this document, and the final procedures do satisfy the requirement in AEA § 189a.(1)(B)(v) for the NRC to complete the hearing "to the maximum possible extent" in a certain time. In meeting this requirement, the NRC has had to balance the goal of timely completing the hearing with the goals of establishing a feasible process that complies with the law and that allows the presiding officer and the parties a fair opportunity to develop a sound record for decision. The NRC believes that Congress acknowledged these additional goals in its decision to include the "to the maximum possible extent" language. It is possible in some cases that satisfying these other goals might result in the hearing extending beyond scheduled fuel load; however, even under those circumstances, the NRC will continue to make an effort to complete the hearing in a timely manner.

No changes were made to the procedures in response to these comments.

2. <u>Time Frame for Developing the Final Procedures and Request for Public Meeting</u>

NEI: NEI states that it is important for the NRC to issue final ITAAC hearing procedures as soon as is reasonably possible because it will likely need these procedures to authorize operation for the four reactors currently under construction. NEI states that finalizing these procedures in the near-term will allow stakeholders (and the NRC) sufficient time to prepare for

the first ITAAC hearings. However, to the extent additional discussion of some of the questions raised in the proposed procedures might facilitate their resolution, NEI would support additional NRC public meetings on the ITAAC hearing procedures. Particularly, NEI requests that the NRC consider holding an additional public meeting on the topic of interim operation, preferably during the next several months, given the number of novel and complex regulatory concepts raised and the number of stakeholder comments on the important issue of interim operation.

SNC: SNC believes that the final procedures should be issued as soon as is reasonably practical to provide all stakeholders adequate time to prepare and to support the NRC staff's resource planning needs. However, SNC believes that a second public meeting regarding the proposed procedures would be beneficial because some of the issues raised are novel and complex, and because an open forum for discussion will provide a useful opportunity to clarify and consider these issues.

SCE&G: SCE&G urges the NRC staff to expeditiously revise the procedures in response to comments and send them to the Commission for consideration.

NRC Response: *As urged by the commenters, the NRC has finalized the ITAAC hearing procedures as expeditiously as possible so that the NRC and all stakeholders can plan and prepare for the upcoming ITAAC hearings. In addition, the NRC held a public meeting on September 22, 2014, to discuss seven issues associated with comments on the following three topics: interim operation, consultation on claims of incompleteness, and early publication of the notice of intended operation. A summary of the public meeting is available at ADAMS Accession Number ML14276A154, and the transcript for the meeting is available at ADAMS Accession Number ML14274A235. On September 23, 2014, Mr. Marvin Lewis, a participant in the September 22, 2014 public meeting, submitted email correspondence (ADAMS Accession No. ML14272A454) amplifying on a comment he made at the public meeting. On October 15, 2014, Ellen C. Ginsberg submitted correspondence (ADAMS Accession No. ML14289A494) on behalf of NEI providing written comments on the issues that were discussed at the public meeting. Statements made at the public meeting and in subsequent correspondence have been summarized, and corresponding NRC responses have been provided, in this report.*

3. General Matters

A. Filing of Documents and Time Computation

NEI: With one exception, NEI agrees with each of the NRC's proposals to modify document filing requirements and time computation requirements for ITAAC hearings. The exception is that NEI does not believe filing documents by "hand delivery" to the NRC should be permitted. NEI believes that filing time-sensitive documents by hand delivery to the agency is inefficient and is an unreasonable burden on the NRC staff. In the context of filing requests on access to sensitive unclassified non-safeguards information (SUNSI) or safeguards information (SGI), NEI states that delivering such access requests by hand is impractical for everyone involved, particularly given the ongoing process of irradiating all paper documents received by the NRC, and in any event is simply unnecessary.

NRC Response: *The NRC adopts the commenter's suggestion. The NRC has determined that hand delivery to the NRC is impractical because it would require a contact being available to receive the document at the time it is delivered, which would impose undue burdens on the recipients, especially if the document were delivered later in the evening. For the same reason,*

hand delivery could be impractical for other organizations. Further, hand delivery is, in any event, unlikely to be an option selected by a hearing participant.

The procedures have been modified to eliminate hand delivery as a means for submitting, filing, or serving documents.

B. Motions for Extension of Time

OPTIONS FOR COMMENT: In the proposed procedures, the NRC included the following proposal for motions for extension of time.

> *Motions for extension of time will be allowed, but good cause must be shown for the requested extension of time based on an event occurring before the deadline. To meet the statutory mandate for the timely completion of the hearing, deadlines must be adhered to strictly and only exceptional circumstances should give rise to delay. Therefore, in determining whether there is good cause for an extension, the factors in 10 CFR 2.334 will be considered, but "good cause" will be interpreted strictly, and a showing of "unavoidable and extreme circumstances" will be required for more than very minor extensions.*
> *. . .*
> *Motions for extension of time shall be filed as soon as possible, and, absent exceptional circumstances, motions for extension of time will not be entertained if they are filed more than two business days after the moving party discovers the event that gives rise to the motion. The Staff selected an event-based trigger for the filing of an extension request because meritorious motions will likely be based on events outside the party's control given the strict interpretation of good cause.*

79 FR at 21968 (footnote omitted). However, the NRC specifically requested comment on whether "very minor extensions" should be defined in a more objective manner or whether a showing of unavoidable and extreme circumstances should be required for all extension requests, no matter how minor. The NRC also requested comment on whether a deadline-based trigger (e.g., "motions for extension of time shall be filed as soon as possible, but no later than 3 days before the deadline") should be used in lieu of, or in combination with, an event-based trigger.

NEI: NEI believes that the NRC should adopt a firmer stance disallowing any extensions of time in all but the most compelling situations. With respect to the NRC's request for comments on whether "very minor extensions" should be defined in a more objective manner or whether a showing of "unavoidable and extreme circumstances" should be required for all extension requests, no matter how minor, NEI's view is that a showing of "unavoidable and extreme circumstances" should be required for all extension requests, no matter how minor. NEI believes that this more stringent standard is necessary given the abbreviated schedule for completing ITAAC hearings before scheduled fuel load. Additionally, NEI states that creating two standards for extension requests adds further unnecessary complexity to the hearing process and would not appear to serve a useful purpose. However, if the NRC adopts the "very minor extensions" standard, then NEI suggests that the term should be defined in a more objective manner as an extension of 1-2 days.

NEI agrees with the proposed procedures that motions for extension of time must be filed as soon as possible, normally not more than two business days after the moving party discovers

the event that gives rise to the motion. With respect to the NRC's request for comment on whether the deadline for filing an extension request be triggered by an event, by the deadline from which the extension is requested, or by a combination of the two, NEI suggests that the procedures include both an event-based trigger and a deadline-based trigger. Further, NEI suggests that the NRC require the movant to submit the motion by the earlier of the two deadlines. NEI believes that the use of a deadline-based trigger is beneficial for those circumstances in which the event giving rise to the need for the extension does not have a clear origin.

SNC: For the reasons also given by NEI, SNC suggests that unavoidable and extreme circumstances be required for all extension requests, no matter how minor. SNC also states that a one-day extension could easily cause a subsequent deadline to fall on a Saturday, such that it then rolls to Monday; thus, the one-day extension causes three days of impact. In addition, SNC asserts that even one day of delay in initial fuel load is serious for the licensee and can result in a sizeable commercial loss. To the extent that the final procedures do retain the concept of a "very minor extension," SNC suggests that it be defined as one calendar day or less. Given the schedule ramifications of delays in an ITAAC hearing and given that all parties are on notice of the importance of schedule adherence, SNC believes that extensions should rarely be granted.

In response to whether a deadline- or event-based trigger is appropriate for extension requests, SNC generally agrees with the use of an event-based trigger, particularly in combination with a high standard for extension requests. SNC states that practically speaking, when last-minute extension requests are needed and will meet the required showing, it will usually be due to an unforeseen, sudden event (e.g., inclement weather that shuts down the city where the party is located). SNC asserts that a deadline-based trigger likely will not adequately provide coverage for those events.

SCE&G: For the reasons also given by NEI, SCE&G suggests that a showing of unavoidable and extreme circumstances be required for all extension requests, no matter how minor, but if the NRC retains the "very minor extensions" standard, then SCE&G suggests that it be defined in a more objective manner as an extension of at most 1 to 2 days. In addition, for the reasons also given by NEI, SCE&G recommends that the procedures should include both an event-based trigger and a deadline-based trigger to satisfy the good cause requirements for extension requests, and that the movant should be required to submit the motion by the earlier of the two deadlines.

NRC Response: The NRC is adopting, in part, the suggestions made in the comments. The NRC is eliminating the "very minor extensions" language because the NRC agrees that (1) the ITAAC hearing schedule does not allow for any delay unless such delay is absolutely necessary, (2) employing one standard instead of two makes application simpler and avoids litigation over which standard should apply, and (3) it is possible for participants to meet the unavoidable and extreme circumstances standard for very minor extension requests (e.g., a one-day extension request based on an unforeseen, sudden event occurring on the filing due date that prevented the participant from meeting the deadline). Therefore, the unavoidable and extreme circumstances standard will apply to all extension requests, no matter how minor.

With respect to the question of whether a deadline-based trigger, an event-based trigger, or a combination thereof should be used for determining when the extension request must be filed: The NRC agrees with SNC that when last-minute extension requests are needed and will meet the required showing, it will usually be due to an unforeseen, sudden event that is not

adequately covered by a deadline-based trigger, such as a city-wide power outage on the filing deadline that prevents the petitioner from making the filing until the following morning. However, the NRC also acknowledges that, as NEI and SCE&G point out, the event giving rise to an extension request might not have "a clear origin," which the NRC takes to mean that the event (or series of events) might occur over time, making it difficult to identify the specific date that would trigger the obligation to file the extension request. Given this, the NRC has chosen to employ a combination of a deadline-based trigger and an event-based trigger.

With respect to how a deadline-based trigger and an event-based trigger should be combined, the NRC disagrees with NEI and SCE&G that the petitioner should be required to file by the earlier date. To be useful, a deadline-based trigger must require the filing of the request several days before the deadline, but prohibiting the filing of extension requests after this date would not provide coverage for unforeseen and sudden events occurring at the last minute. However, the NRC does believe that a petitioner requesting an extension after the deadline-based trigger should be required to file its request as soon as possible after the deadline-based trigger to avoid delay. The NRC also believes that such a requirement would, to some extent, obviate questions over when the last-minute event (or series of events) can be said to have occurred because, notwithstanding the answer to this question, the petitioner will be required to file its extension request as soon as possible after the deadline-based trigger if it was unable to file by that date. In justifying the petitioner's inability to comply with the deadline-based trigger, the NRC believes it appropriate to use the same standard—"unavoidable and extreme circumstances"—that will be applied to the extension request itself. With respect to the deadline-based trigger, the NRC believes that 3 days before the deadline is reasonable and appropriate, as stated in the option discussed in the proposed procedures.

Given the above discussion, the procedures have been modified to provide that motions for extension of time will be allowed, but good cause must be shown for the requested extension of time based on an event occurring before the deadline. To meet the statutory mandate for the timely completion of the hearing, deadlines must be adhered to strictly and only exceptional circumstances should give rise to delay. Therefore, in determining whether there is good cause for an extension, the factors in 10 CFR 2.334 will be considered, but "good cause" will be interpreted strictly, and a showing of "unavoidable and extreme circumstances" will be required for any extension, no matter how minor. Motions for extension of time shall be filed as soon as possible, but no later than 3 days before the deadline, with one limited exception. If the petitioner is unable to file an extension request by 3 days before the deadline, then the petitioner must (1) file its request as soon as possible thereafter, (2) demonstrate that unavoidable and extreme circumstances prevented the petitioner from filing its extension request by 3 days before the deadline, and (3) demonstrate that the petitioner filed its extension request as soon as possible thereafter.

C. Limited Appearance Statements

SCE&G: To avoid prolonging the oral hearing, SCE&G suggests that the procedures be revised to allow only written limited appearance statements. SCE&G asserts that eliminating oral limited appearance statements is important given the short ITAAC hearing time frame and to prevent unnecessary complication at the oral hearing. SCE&G states that this proposal is also consistent with practice during some recent Subpart L evidentiary hearings, which have allowed only written limited appearance statements.

NRC Response: The NRC declines to adopt the suggestion made in the comment and is retaining without modification the provisions on limited appearance statements that are in the

proposed procedures. Consistent with the proposed procedures, the NRC believes that it can rely on the discretion and judgment of the presiding officer to determine, in cases where an oral hearing is held, whether oral limited appearance statements should be allowed.[1] The NRC also believes that it is best to have this decision made on a case-specific basis in light of the overall hearing schedule and other relevant circumstances.

No changes were made to the procedures as a result of this comment.

4. Hearing Requests and Filings After the Deadline

A. Notification of Plans to Submit Hearing Requests

NEI and SCE&G: NEI and SCE&G suggest that the NRC require any person who plans to submit an ITAAC hearing request to notify the NRC staff and the affected licensee within 30 days after the notice of intended operation, and identify the ITAAC that will be the subject of the hearing request. SCE&G further suggests that the potential petitioner be required to provide a brief basis for the position that the ITAAC have not been or will not be satisfied. In support of early notification, the following benefits are cited by NEI and/or SCE&G: (1) the affected entities would have more time to collect relevant information and execute any necessary non-disclosure agreements, (2) potential contentions or claims of incompleteness might be settled, and (3) hearing participants could prepare for hearing earlier, thereby reducing the risk of a delay in fuel load. Both NEI and SCE&G point out that ITAAC hearing requests will be filed when licensee and NRC staff personnel will be involved in intensive ITAAC closure and verification efforts, and that many of these same personnel would also be involved in the hearing process. Therefore, NEI and SCE&G suggest that early notification will assist the licensee and the NRC staff with resource planning. NEI also cites "the condensed time period allowed to respond to hearing requests" as support for its proposal.

NRC Response: The NRC declines to adopt the proposal suggested in the comments because it would impose additional burdens on petitioners that outweigh any benefits from advance notice to the other parties. This proposal would also likely engender litigation on whether a petitioner provided adequate notice or on whether the petitioner is allowed to change its mind as to which ITAAC it will file contentions on, when the fundamental question should be whether the petitioner made the required prima facie showing for a hearing request. However, as discussed in Section 4.E, below, the NRC is promoting the possible settlement of claims of incompleteness by requiring petitioners to consult with the licensee regarding the purportedly missing information prior to filing the claim.

No changes were made to the procedures in response to these comments.

B. Bifurcated Decision on Hearing Request

SCE&G: SCE&G suggests that it should be possible for the Commission to bifurcate its decision on the hearing request if the Commission is not able to issue a full decision in a timely manner. The first part of the decision would address any portion of the hearing request that is granted, which would allow the hearing phase to expeditiously begin on those topics. The

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[1] *When an oral hearing is not held, the proposed procedures provide that oral limited appearance statements will not be allowed.*

remainder of the decision could then be issued in due course. SCE&G states that issuing a bifurcated decision on a hearing request is already available to presiding officers in other adjudicatory proceedings, and that this option should be discussed in the ITAAC hearing procedures. SCE&G asserts that the use of bifurcated decisions alone could save weeks on the schedule and help prevent delays in fuel load.

NRC Response: The NRC agrees that the Commission has the option of issuing a bifurcated decision on the hearing request (or on any other matter before the Commission), but the NRC declines to adopt the suggestion of making this option explicit in the hearing procedures. The Commission is aware of this option and may use it if appropriate, but this option is inherent in the powers of a presiding officer and need not be explicitly addressed in the hearing procedures.

No changes were made to the procedures as a result of this comment.

C. *Prima Facie* Showing and Signed Expert Declarations

NEI: NEI supports the NRC proposal that any declaration of an eyewitness or expert witness offered in support of contention admissibility must be signed by the eyewitness or expert witness in accordance with 10 CFR 2.304(d). However, NEI believes that this requirement is undercut by the NRC proposal that the content of unsigned declarations would still be considered, notwithstanding the fact that they will not be accorded the weight of an eyewitness or an expert witness. NEI asserts that the suggestion that the unsigned declaration will be considered but given less weight dilutes the overall purpose of the provision and sends the message that the NRC does not mean what it says. NEI also asserts that potential petitioners will likely be encouraged to submit unsigned declarations if the only penalty for doing so is an ambiguous warning that their declaration will not be accorded the weight of an eyewitness or an expert witness.

NRC Response: *The NRC declines to adopt the suggestion made in the comment. The purpose of the signing provision is to ensure that a position that is purportedly supported by an expert witness or an eyewitness is actually supported by that witness. An unsigned declaration will not be accorded the weight of an eyewitness or an expert witness, but the NRC believes that the contents of the declaration should still be considered, albeit without attribution to the purported author. For example, an unsigned declaration may be considered to the extent that the contents are true on their face (e.g., the declaration accurately cites statements made in the licensee's ITAAC notifications, accurately quotes NRC regulations or guidance documents, or draws logical inferences from these documents that can be assessed on their face and for which no expertise is required). The NRC does not agree with the prediction that this provision would encourage petitioners to avoid completing a simple administrative task when failing to complete this task would cause the NRC to accord less weight to their submitted declarations.*

No changes were made to the procedures as a result of this comment.

D. Eliminating Claims of Incompleteness

SCE&G: SCE&G asserts that the AEA does not require or allow the NRC to consider claims of incompleteness. Instead, SCE&G believes that the only valid contention under AEA § 189a.(1)(B)(ii) is a claim that one or more of the acceptance criteria in the COL have not been, or will not be, met. SCE&G states that claims of incompleteness do not exist in 10 CFR Part 50 operating license proceedings, and in such proceedings a licensee is not required to submit any

results of its inspections and tests (or provide a description of the procedures for inspections and tests beyond that contained in the final safety analysis report). SCE&G suggests that since claims of incompleteness are not cognizable in operating license proceedings, they should not be permitted in ITAAC hearings.

NRC Response: *The NRC declines to adopt the suggestion made in the comment because it is contrary to NRC regulations, is not required by the AEA, would potentially prevent a petitioner from having a fair opportunity to make the required prima facie showing, and is not supported by an analogy between ITAAC hearings and operating license hearings. As an initial matter, the NRC wishes to clarify that claims of incompleteness are not considered contentions in the ITAAC hearing procedures but are instead claims that the licensee has not provided the information required by 10 CFR 52.99(c) and that for this reason the petitioner cannot meet the prima facie showing requirement in the contention admissibility standards. More fundamentally, claims of incompleteness are explicitly provided for by 10 CFR 2.309(f)(1)(vii) and have been since 2007. The 10 CFR 52.99(c) requirements to describe the method of performing the ITAAC and the results of ITAAC performance have also been in the NRC's regulations since 2007.*

In addition, the NRC does not find SCE&G's legal and policy arguments to be persuasive. First, while SCE&G asserts that the NRC does not have legal authority to provide for claims of incompleteness, AEA § 189a.(1)(B)(iv) explicitly allows the NRC to designate the ITAAC hearing procedures of its choosing, whether formal or informal, so long as the NRC states the reasons for those procedures. See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1979) (stating as a general proposition that agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties") (internal quotations omitted). Thus, the NRC has ample authority to prescribe the procedures for ITAAC hearings, including procedures for claims of incompleteness. Second, ensuring that petitioners have a meaningful hearing opportunity is one of the purposes for requiring licensees to provide information on ITAAC completion and is the purpose for allowing petitioners to file claims of incompleteness. As the Commission stated when promulgating 10 CFR 52.99(c), a petitioner's opportunity to request an ITAAC hearing "would be, as a practical matter, illusory" if the petitioner is not provided "access to information about the licensee's supporting documentation or bases." Comment Summary Report; Final Rule for 10 CFR Part 52 Licenses, Certifications, and Approvals for Nuclear Power Plants, at 147-48 (July 2007) (ADAMS Accession No. ML063450216) (2007 Part 52 Rule Comment Summary Report). Third, while the petitioner correctly states that operating license hearings do not provide for claims of incompleteness, operating licensing hearings do not involve ITAAC or require a prima facie showing. ITAAC hearing requests are statutorily required to include a prima facie showing, so any claim that there is insufficient information to meet this standard cannot be cognizable as a contention but must be cognizable as a request for information to meet the statutorily required standard. Operating license hearings do not require a prima facie showing for contention admissibility, but they do allow contentions to be filed alleging that the required information is missing from the application. See 10 CFR 2.309(f)(1)(vi). Therefore, while operating license hearings operate under somewhat different standards and mechanisms than are used in ITAAC hearings, both types of proceedings allow petitioners to claim that the applicant/licensee has not provided required information.

No changes were made to the procedures as a result of this comment.

E. Consultation on Claims of Incompleteness

SNC: SNC suggests the addition of a consultation requirement for claims of incompleteness that is similar to the one for motions in 10 CFR 2.323. SNC believes that many claims of incompleteness may be able to be addressed simply and efficiently by relying on the licensee and potential parties to resolve claims of incompleteness where appropriate, rather than presuming that all claims of incompleteness must be addressed by the Commission initially. SNC states that this would allow for early resolution of issues where possible and ensure that claims of incompleteness that are filed would actually require the Commission's attention. In some situations, SNC believes that the licensee may agree to make some or all of the requested information available to the potential petitioner for review, regardless of whether the licensee agrees that the ITAAC closure notification is actually incomplete.

SNC suggests that potential petitioners be required to contact the licensee and make an effort to resolve the claimed incompleteness within 21 days of the notice of intended operation. If the licensee and the potential petitioner reach an agreement and the licensee provides the additional information within 10 days of the parties' consultations, SNC suggests that any contention based on that additional information be due 60 days from the notice of intended operation. SNC also suggests that if the licensee and the potential petitioner reach agreement and the licensee provides the additional information, then any additional claim of incompleteness as to that ITAAC would be treated as per se invalid. If the licensee and the potential petitioner do not reach agreement, then SNC suggests that the claim of incompleteness be due 60 days from the notice of intended operation, as provided for in the proposed procedures.

SNC states that its proposal will not only potentially eliminate delay, it will allow the Commission to consider the contentions together and efficiently issue only one order instead of having to issue separate orders on new or amended contentions filed after a valid claim of incompleteness.

SNC (September 22, 2014 Public Meeting Comments): SNC believes that the consultation process is a very good way to potentially resolve some claims of incompleteness without the need for litigation. According to SNC, these same reasons also justify applying the consultation process to claims of incompleteness after the original deadline. However, SNC states that consultation would need to begin much earlier for claims of incompleteness after the original deadline given the time and the schedule of the proceeding in which such claims would occur. SNC suggests that consultation be initiated as early as a couple of days after petitioners become aware of a potential claim of incompleteness. (Transcript at 49, 51-52).

NEI (September 22, 2014 Public Meeting Comments): NEI supports SNC's proposal on consultation for claims of incompleteness because claims of incompleteness are a potential challenge to the ITAAC hearing schedule and a consultation process may help move things forward. Also, if claims of incompleteness after the original deadline are allowed, then NEI supports applying the consultation process to such claims. NEI recommends that petitioners be required to initiate consultation for claims of incompleteness after the original deadline within 2 business days of the information giving rise to the claim. NEI also states that the consultation process would not toll the time for filing claims of incompleteness. (Transcript at 49-50, 52).

SCE&G (September 22, 2014 Public Meeting Comments): SCE&G also supports the consultation proposal as a way of preventing unnecessary litigation and states that this

consultation proposal also fits with SCE&G's suggestion of a process for early resolution of claims of incompleteness. (Transcript at 50-51).

NEI (October 15, 2014 Written Comments at 7): NEI's October 15, 2014 written comments on this topic repeat NEI's comments at the public meeting.

NRC Response: The NRC adopts SNC's proposal to require consultation before the submission of claims of incompleteness, but does not adopt every aspect of SNC and other commenters' recommendations for this proposal. The NRC agrees with SNC that consultation may obviate the need for petitioners to file, or the Commission to rule on, claims of incompleteness. Consultation would, therefore, potentially shorten the hearing schedule and conserve participants and the Commission's resources. If agreement is not reached before the hearing request is due, then the NRC agrees with SNC and NEI that the claim of incompleteness should be filed with the hearing request because the consultation process should not extend the deadline for filing, consistent with NRC practice on analogous matters.

The NRC also agrees with SNC that petitioners intending to file a claim of incompleteness should be required to initiate consultation 21 days after publication of the notice of intended operation. Initiating consultation by this date is reasonable since the petitioner would not be required to prepare a filing satisfying regulatory requirements, but would only need to initiate discussions with the licensee on access to the allegedly missing information. In addition, a significant number of ITAAC notifications should be available well before the notice of intended operation is published, and the NRC expects petitioners to examine such notifications before the notice of intended operation is published as part of their preparations for the ITAAC hearing process. Further, initiating consultation 21 days after publication of the notice of intended operation is early enough such that, if the petitioner and licensee reach agreement in a reasonable period of time, then any subsequent contention should be able to be filed with the initial hearing request or shortly thereafter.[2]

The NRC declines to adopt SNC's specific suggestions on when licensees should provide information and when contentions should be filed thereafter. Inter-party consultation is a fluid process, and the NRC does not believe it desirable to impose specific deadlines on when such consultations ought to be completed or when information should be provided. However, the petitioner must make a sincere effort to timely initiate and meaningfully engage in consultation with the licensee, and the licensee must make a sincere effort to listen to and respond to the petitioner. Both the petitioner and the licensee must make sincere efforts to resolve the petitioner's request and must complete consultations (and any delivery of documents) with due dispatch. Similar to the requirements of 10 CFR 2.323(b), the NRC is also adding a certification requirement for the petitioner and the licensee regarding their having met their consultation obligations should consultations fail and the claim of incompleteness be filed. In ruling on claims of incompleteness, the Commission will consider whether the participants have discharged their consultation obligations in good faith.

The NRC also declines to adopt SNC's suggestion that if the licensee and the petitioner reach agreement and the licensee provides the additional information, then any additional claim of

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[2] *While SCE&G suggests integrating a consultation requirement with its suggestion of requiring early filing of claims of incompleteness, the NRC does not adopt this recommendation, as explained in Section 4.F of this report.*

incompleteness as to that ITAAC would be treated as "per se invalid." While the NRC hopes that additional information provided by the licensee will obviate the need for a claim of incompleteness, this may not always be the case. However, in determining whether such claims of incompleteness are valid, the NRC will consider all of the information available to the petitioner, including the information provided by the licensee.

With respect to the deadline for filing contentions based on the additional information provided, the NRC is adopting an approach based on the one used in the SUNSI-SGI Access Order to determine the filing deadlines for contentions after receipt of the requested SUNSI or SGI. To wit, a contention based on additional information provided to the petitioner by the licensee will be due within 20 days of the petitioner's receipt of the additional information, unless more than 20 days remains between the receipt of the additional information and the deadline for the hearing request, in which case the contention will be due by the later hearing request deadline.

In addition to the issues specifically raised by SNC in its written comments, an additional issue related to consultation on claims of incompleteness was discussed in the September 22, 2014 public meeting. Namely, the proposal in SNC's written comments only addresses consultation for ITAAC notifications available when the notice of intended operation is published and does not address consultation for ITAAC notifications available at a later time, such as those that might give rise to claims of incompleteness after the original deadline. The NRC agrees with SNC and NEI that the consultation process should be required for all claims of incompleteness, no matter when they are filed, to expedite the proceeding and potentially avoid unnecessary litigation. However, the NRC believes that a petitioner should have longer than 2 days, or 2 business days, to initiate consultation. Therefore, for ITAAC notifications submitted after the notice of intended operation is published, the final ITAAC hearing procedures provide that the petitioner must initiate consultation regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public, except that consultation need not be commenced earlier than 21 days after publication of the notice of intended operation.[3] The NRC believes that a 7-day period is reasonable because the volume of new ITAAC notifications to be examined by the petitioner after the notice of intended operation is published will be substantially less than the volume of ITAAC notifications covered by the initial hearing request, and the 7-day deadline is only for the initiation of consultations, not the filing of a formal request. In addition, a 7-day deadline will allow sufficient time to complete consultations before the deadline for filing claims of incompleteness.

Given the above discussion, the procedures have been modified to provide the following:

- *In order to file a claim of incompleteness, petitioners must initiate consultation with the licensee regarding access to the purportedly missing information. The petitioner must make a sincere effort to timely initiate and meaningfully engage in consultation with the licensee, and the licensee must make a sincere effort to listen to and respond to the petitioner. Both the petitioner and the licensee must make sincere efforts to resolve*

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[3] *The proposed procedures did not specifically indicate whether the time for filing a claim of incompleteness after the deadline was calculated based on the date of submission of the subject ITAAC notification or the date on which it became publicly available. The final procedures specify that the filing deadline for a claim of incompleteness filed after the deadline is calculated from the date that the notification (or a redacted version thereof) becomes available to the public. This approach is also being used to define the consultation deadline for claims of incompleteness.*

the petitioner's request and must complete consultations (and any delivery of documents) with due dispatch.

- *Petitioners must initiate consultation with the licensee regarding any claims of incompleteness within 21 days of the notice of intended operation for all ITAAC notifications that were publicly available (or for which a redacted version was publicly available) by the date the notice of intended operation was published.*
- *If the ITAAC notification (or a redacted version thereof) becomes publicly available after the notice of intended operation is published, then the petitioner must initiate consultation with the licensee regarding any claims of incompleteness on such notifications within 7 days of the notification (or a redacted version thereof) becoming available to the public, except that consultation need not be commenced earlier than 21 days after publication of the notice of intended operation.*
- *If agreement is not reached before the deadline for filing the claim of incompleteness, then the petitioner must file the claim of incompleteness by the required deadline.*
- *If a claim of incompleteness is filed, the petitioner must include with its claim of incompleteness a certification by the attorney or representative of the petitioner that the petitioner (1) complied with the timeliness requirements for consultation and (2) made a sincere effort to meaningfully engage in consultation with the licensee on access to the purportedly missing information prior to filing the claim of incompleteness. This certification may include any additional discussion the petitioner believes is necessary to explain the situation.*
- *An answer to a claim of incompleteness by the licensee must include a certification by the attorney or representative of the licensee that the licensee (1) complied with the timeliness requirements for consultation and (2) made a sincere effort to listen to and respond to the petitioner and to resolve the petitioner's request prior to the filing of the claim of incompleteness. This certification may include any additional discussion the licensee believes is necessary to explain the situation.*
- *In determining whether a claim of incompleteness is valid, the Commission will consider all of the information available to the petitioner, including any information provided by the licensee. The Commission will also consider whether the participants have discharged their consultation obligations in good faith.*
- *A contention based on additional information provided to the petitioner by the licensee through consultation on claims of incompleteness will be due within 20 days of the petitioner's access to the additional information, unless more than 20 days remains between the petitioner's access to the additional information and the deadline for the hearing request, in which case the contention will be due by the later hearing request deadline.*

F. Timing of Claims of Incompleteness

NEI: NEI states that claims of incompleteness could present a substantial risk of delay in completion of the hearing. As NEI understands the proposed procedures, the granting of a claim of incompleteness would apparently result in a delay because submission of the proposed contention would not occur until after the initial deadline. To prevent or mitigate such delay, NEI recommends that the final hearing procedures require claims of incompleteness to be submitted shortly after the notice of intended operation, and that claimants propose a mechanism for resolution of such claims. Specifically, NEI suggests that the Commission require claimants to file claims of incompleteness within 30 days after the notice of intended operation in conjunction with their notice of intended participation, which NEI proposes also be required of petitioners. NEI also suggests that the Commission make it clear that a claim of incompleteness does not

toll a petitioner's obligation to make a timely *prima facie* showing: in other words, if a claim of incompleteness is rejected, the petitioner will be given no additional time to challenge the ITAAC.

SCE&G: SCE&G agrees with NEI that claims of incompleteness present a substantial risk of delay in ITAAC hearings, and that any claims of incompleteness should be required to be submitted shortly after the notice of intended operation. SCE&G suggests the following revised schedule for claims of incompleteness:

- A petitioner submits any claim of incompleteness within 10 days after the notice of intended operation; the claim of incompleteness would be required to identify with specificity the information that is allegedly missing.
- The licensee responds to the claim of incompleteness within 5 days.
- The Commission rules on claims of incompleteness within 10 days after the licensee's answer.
- The licensee would provide any additional information to address a valid claim of incompleteness within 5 days.
- If, based upon the additional information, the petitioner believes that the acceptance criteria have not been, or will not be, met, then the petitioner would still have 30 days to submit a proposed contention, which would correspond with the original deadline of 60 days after the notice of intended operation for proposed contentions.

SCE&G also suggests that later claims of incompleteness should be disallowed because a petitioner should have sufficient information between the already submitted ITAAC notifications to determine at the time of the notice of intended operation whether any notification is incomplete as defined in 10 CFR 2.309(f)(1)(vii).

NRC Response: The NRC declines to adopt the proposal to require submission of claims of incompleteness before the hearing request is due. The regulation on claims of incompleteness (10 CFR 2.309(f)(1)(vii)) appears with the contention admissibility standards, which implies that claims of incompleteness are to be submitted at the time contentions are due. Had the NRC contemplated a different submission time for claims of incompleteness, 10 CFR 2.309 would have specified a different submission time. While the ITAAC hearing procedures involve case-specific modifications of 10 CFR Part 2 procedures applicable to all hearings, the regulatory provision on claims of incompleteness exclusively applies to ITAAC hearings. As stated in the proposed procedures (79 FR at 21962), the general ITAAC hearing procedures were developed to be consistent with existing law and policy on ITAAC hearings. In addition, the NRC believes that any generic change to a regulatory provision exclusively applying to ITAAC hearings should be done by rulemaking. For this reason, the commenters' proposal to require the submission of claims of incompleteness before the hearing request deadline is outside the scope of the NRC's development of general ITAAC hearing procedures. The NRC takes no position on the policy merits of requiring early submission of claims of incompleteness.

The NRC agrees with NEI that the procedures should explicitly state that a claim of incompleteness does not toll a petitioner's obligation to make a timely prima facie showing. This position is already implied by the proposed procedures, but the NRC is adding additional language to clarify this point. If the petitioner is unsure whether to file a contention or a claim of incompleteness on an ITAAC notification, the petitioner can submit both a contention and a claim of incompleteness at the same time, arguing in the alternative that if the contention is not admissible, then the claim of incompleteness is valid.

The NRC declines to adopt SCE&G's suggestion that claims of incompleteness filed after the deadline be categorically rejected. SCE&G's proposal overlooks the possibility that there may be cases where a newly submitted ITAAC notification gives rise to a valid claim of incompleteness that could not have been submitted before the issuance of that notification. For example, an ITAAC post-closure notification submitted after the hearing request deadline could give rise to a valid claim of incompleteness, as could an ITAAC closure notification submitted after the hearing request deadline that describes (perhaps inadequately) the performance of an ITAAC that is materially different from the method stated in the uncompleted ITAAC notification.

In summary, the procedures have been modified to explicitly state that a claim of incompleteness does not toll a petitioner's obligation to make a timely prima facie showing. If the petitioner is unsure whether to file a contention or a claim of incompleteness on an ITAAC notification, the petitioner can submit both a contention and a claim of incompleteness at the same time, arguing in the alternative that if the contention is not admissible, then the claim of incompleteness is valid. No other changes have been made in response to these comments.

G. Standards for Claims of Incompleteness

NEI: NEI suggests that the ITAAC hearing procedures establish more specific criteria against which claims of incompleteness would be evaluated. NEI believes that this is needed because the Commission will be attempting to adjudicate claims of incompleteness on an extremely tight time frame without the benefit of precedent interpreting the standard. NEI states that further clarification would benefit all of the parties and could speed decision making.

NEI states that a valid claim of incompleteness should explain what information is not included, why it should be included under 10 CFR 52.99, and how the absence of that information prevents the petitioner from making the *prima facie* showing necessary for a contention. Given that the purpose of curing any incompleteness is to potentially allow for a *prima facie* showing, NEI suggests that the petitioner be required to show that (a) due to the deficiency, the petitioner cannot make the *prima facie* showing and (b) the notice, after the inclusion of the missing information, will likely be materially different than the notice as submitted. NEI also suggests that claims of incompleteness requesting more detail on objective test results should be rejected because the report including the additional information will likely not be materially different than the report as submitted (for example, if the notice states "all results between 1.2% and 1.7%," a claim that each individual result should be listed should be rejected). NEI further suggests that claims of incompleteness should be rejected if they attack the veracity of the ITAAC notification or compliance by the licensee without support.

In providing further guidance on when ITAAC notifications should be considered incomplete, NEI strongly suggests that the NRC rely on the guidance and the ITAAC notification templates and examples in NEI 08-01, "Industry Guideline for the ITAAC Closure Process Under 10 CFR Part 52." Previous revisions of NEI 08-01 have been endorsed by the NRC, and NEI believes that the NRC may endorse the current version of NEI 08-01 in the near future. NEI states that the NRC staff, nuclear industry, and members of the public have participated in multiple meetings on the ITAAC closure process in the past several years, in part resulting in NEI-08-01. NEI proposes that this extensive effort be applied when assessing the validity of claims of incompleteness rather than being disregarded.

NEI suggests that NEI 08-01 be used as a guidepost for determining the sufficiency of a claim of incompleteness. If an ITAAC closure notification or uncompleted ITAAC notification meets the

standard in the guidance, then NEI suggests that the claim of incompleteness be denied outright. NEI suggests that the Commission's initial case-specific order in each proceeding incorporate and endorse NEI 08-01, which would then establish binding standards governing claims of incompleteness. As precedent for this suggestion, NEI cites to *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-3, 59 NRC 10, 21-24 (2004) (LES), in which decision NEI states that the Commission established applicable substantive requirements in an order providing the public with an opportunity to intervene.

SNC: SNC agrees with the process for claims of incompleteness as described in the proposed procedures, but states that the proposed procedures lack the necessary level of detail and guidance. Because the process for claims of incompleteness is untested, there is no existing NRC precedent to aid potential hearing participants in preparing to submit or respond to such claims. SNC points out that because a claim of incompleteness must assert that an ITAAC notification does not contain the information required by 10 CFR 52.99(c), then in order for a potential petitioner to assess whether or not a claim is potentially valid, the petitioner must have a basic understanding of what 10 CFR 52.99(c) requires for a notice to be considered compliant. However, SNC believes that Commission statements on content expectations for ITAAC notifications in the final rule entitled "Licenses, Certifications, and Approvals for Nuclear Power Plants" (72 FR 49352, 49366; Aug. 28, 2007) (2007 Part 52 Rule) are general and open-ended. SNC understands the Commission's stated intention in the 2007 rulemaking to prepare guidance on how the "sufficient information" requirement could functionally be met as an acknowledgement that the rulemaking itself did not provide such guidance.

SNC points out that the NRC staff has engaged with stakeholders to develop comprehensive guidance on ITAAC closure and maintenance, and that NEI 08-01 is at the core of this work. SNC states that the NRC's staff's review of NEI 08-01 has been a transparent, public process, and that NEI 08-01 represents the most practical, functional understanding of what 10 CFR 52.99(c) requires, including examples that can be easily compared with actual ITAAC closure notifications. Therefore, SNC suggests that the final procedures specify that Regulatory Guide (RG) 1.215 and NEI 08-01 will be given significant weight in assessing whether an ITAAC closure notification or an uncompleted ITAAC notification is, in fact, incomplete for purposes of a claim of incompleteness.

SNC also suggests that the final procedures clarify that, in most cases, in order for a claim of incompleteness to be valid, the petitioner will need to show that the allegedly missing information is material to a potential *prima facie* showing. Stated differently, the allegedly missing information must be reasonably calculated to support a *prima facie* showing. SNC also suggests that since the *prima facie* showing requirement is a stringent standard, a claim of incompleteness, founded on an assertion that such a *prima facie* showing cannot be made, must be subject to a similarly stringent standard. Therefore, SNC concludes that a valid claim of incompleteness cannot be based on mere suspicion, the intent to double-check the licensee, or on an unfounded belief that the additional information may show an error or deficiency. Rather, SNC asserts that the claim must articulate that the petitioner has a reasonable foundation for believing that a *prima facie* showing could be made and the missing information must be material to that showing.

SNC further states that a claim of incompleteness requesting more detail on objective test results generally should not be considered valid, since the information provides only more details confirming the existing content of the ITAAC closure notification; put another way, the additional information is not reasonably calculated to support a *prima facie* showing. As an example, SNC states that if an ITAAC closure notification states that "all results were between

1.2% and 1.7%," then a claim that each individual result should be listed would not be reasonably calculated to support a *prima facie* showing because any *prima facie* showing regarding the test results was possible based on the already-known range. Rather, SNC believes that the request for all of the individual results is an attempt to double-check the representations of the licensee. SNC also states that a claim of incompleteness that attacks the veracity of licensee statements without support should not be found valid. For example, if the claim maintains that additional information must be provided to prove the licensee's statement that an inspection was performed, without any reasonable foundation for challenging the truth of the statement, then SNC concludes that the proponent of the claim would not have a reasonable foundation for believing a *prima facie* showing could be made and that the requested proof would not be material to any proposed *prima facie* showing.

Westinghouse: Westinghouse suggests that the NRC clarify the standard for claims of incompleteness. Westinghouse asserts that other than restating the existing regulatory language, the proposed procedures provide no further guidance on how to adjudge claims of incompleteness. Westinghouse believes that the lack of an articulated standard could lead to an open-ended process by which initial operation could be indefinitely delayed. For this reason, Westinghouse suggests that NEI 08-01 be viewed as establishing the standard for sufficient information in an ITAAC notification, especially since the NEI guidance is intended to satisfy NRC expectations on ITAAC notification content, including that the notification provide sufficient information to members of the public to allow them to meet the *prima facie* showing requirement for ITAAC hearing requests. In addition, because RG 1.215, the NRC's vehicle for endorsing NEI 08-01, is published for comment with each revision of the RG, the public will have had an opportunity to challenge the endorsement of NEI 08-01 as an acceptable standard for "sufficient information."

SCE&G: SCE&G suggests that the standard for a claim of incompleteness should be clarified through reliance on NEI 08-01. SCE&G states that if an ITAAC closure notification or uncompleted ITAAC notification complies with NEI 08-01, then the notification should be considered complete and the licensee should not have to submit any additional information.

NRC Response: The NRC understands the desire for greater specificity with respect to the standards for claims of incompleteness, but the NRC does not believe it appropriate as part of hearing procedure development to provide overly specific guidance on the standards for claims of incompleteness. The general practice in NRC proceedings with respect to contentions has been to establish high level requirements that are flexible enough to accommodate the many different types of factual claims and scenarios that might arise in practice. As the NRC gains experience with application of the general standard, it may be appropriate in the future to provide additional guidance. At this initial stage of implementation, however, the proposed general standard, with the slight modifications discussed below, provides an adequate level of detail to control the hearing process.

With respect to the specific suggestions and assertions made in the comments:

- *As an initial matter, the NRC points out that the proposed procedures did give guidance on filing claims of incompleteness beyond restating the rule language. Additional guidance was given on pages 9-10 of Draft Template A in the proposed procedures, and this guidance is being included in the final procedures. Specifically, Template A states that a petitioner must give an adequately supported explanation of why a purported deficiency in the licensee's ITAAC notification prevents the petitioner from making the prima facie showing. In addition, Template A states that a petitioner filing a claim of*

incompleteness must still satisfy the standing requirements and, to the extent it can, satisfy the contention admissibility requirements, and Template A gives guidance on what this means.

- *With respect to reliance on NEI 08-01, the NRC declines to adopt the commenters' suggestion to treat NEI 08-01 as a binding standard. NRC case law gives weight to NRC-approved guidance, but it does not give that guidance dispositive weight. NEI cites the LES order (CLI-04-3) as an example where the Commission established substantive requirements in an order providing the public with an opportunity to intervene. However, the substantive requirements established in the LES order were either substantive regulatory requirements for licensees or the NRC staff's environmental review or requirements on purely procedural matters such as the designation of, and access to, classified information. The LES order did not include substantive hearing request standards for petitioners. The NRC also does not believe it is necessary to specifically reference NEI 08-01 in the ITAAC hearing procedures. Guidance can change over time, and the lack of a specific reference to NEI 08-01 will not prevent licensees in their answers to ITAAC hearing requests from citing to NEI 08-01 and citing to NRC case law on the weight to be accorded to NRC-endorsed guidance.*
- *Several commenters provide general statements about what should be required for a claim of incompleteness that are consistent with, or implied by, statements already included in the NRC's regulations or the proposed procedures. For example, consistent with the NRC's regulations and the proposed procedures, a valid claim of incompleteness must explain what information is not included, why it must be included under 10 CFR 52.99, and how the absence of that information prevents the petitioner from making the prima facie showing necessary for a contention. With two exceptions, there is no need to modify the proposed procedures because the proposed procedures, and the regulation on which it is based, already say this. However, SNC's suggestion that the allegedly missing information be reasonably calculated to support a prima facie showing is implied by the regulation but not explicitly stated in the proposed procedures. The NRC, therefore, is adding this statement in the final procedures. In addition, the proposed procedures did not explicitly address how the petitioner would show that the licensee's 10 CFR 52.99(c) ITAAC notification does not contain the required information. Therefore, consistent with the direction in the proposed procedures on adequate support for the petitioner's explanation of why a purported deficiency prevents the petitioner from making the prima facie showing, the final procedures provide that the petitioner must provide an adequately supported showing that the 10 CFR 52.99(c) notification fails to include information required by 10 CFR 52.99(c).*
- *Several commenters suggest more specific standards (including those based on hypothetical examples) for claims of incompleteness, but the NRC is declining to establish such specific standards or examples in the ITAAC hearing procedures because the NRC believes these to be too specific for inclusion in general procedures. The NRC is not thereby taking a position on the validity of the commenters' arguments or the examples provided, and licensees are free to make such arguments in their answers to claims of incompleteness in specific proceedings.*

In summary, the procedures have been clarified to state that claims of incompleteness are required to include a demonstration that the allegedly missing information is reasonably calculated to support a prima facie showing. In addition, the procedures have been modified to require the petitioner to provide an adequately supported showing that the 10 CFR 52.99(c) notification fails to include information required by 10 CFR 52.99(c). No other changes have been made in response to these comments.

H. Information Provided in Response to Valid Claims of Incompleteness

NEI: NEI suggests that if a claim of incompleteness is found valid, the licensee should be required to provide documents that are relevant to the specific portion of the Section 52.99(c) notification cited.

SNC: In agreement with NEI, SNC suggests that if a claim of incompleteness is found to be valid, then the information the licensee is required to provide should be limited to documents that are relevant to the specific portion of the 10 CFR 52.99(c) notification that is cited. SNC suggests that the ITAAC hearing procedures explain that information relevant to the specific portion of the 10 CFR 52.99(c) notification that is cited by the petition includes documents in the ITAAC completion package (and documents directly referenced therein) that support the specific portion of the 10 CFR 52.99(c) report cited in the claim. SNC states that this further clarification of what information the licensee will be expected to provide will help the licensee to timely provide such information in the event of a valid claim and will aid petitioners in drafting their claims to obtain the correct information. SNC asserts that a general guideline would help the Commission address most claims of incompleteness efficiently in the short time frame provided, but recognizes that the Commission would retain discretion in unusual circumstances to order the licensee to provide additional or different information.

NRC Response: The NRC agrees with the comments regarding the general principle that a valid claim of incompleteness will only result in the licensee providing information relevant to the specific portions of the 10 CFR 52.99(c) notification that were the subject of the claim of incompleteness. This is already implied by the regulation, and NRC is adding a statement to this effect in the final ITAAC hearing procedures. The NRC, however, disagrees with SNC's suggestion that the information to be provided should be limited to the list of references in the licensee's ITAAC notification. The NRC believes that a determination on the information to be provided is fact-specific, and given the lack of NRC experience with claims of incompleteness, it is impossible at this time to state a generally applicable guideline. However, the Commission will consider the list of references in the licensee's ITAAC notification, in addition to other pertinent information, when determining what information should be provided to a petitioner who has filed a valid claim of incompleteness. The NRC also believes that the required consultation for claims of incompleteness should help the participants clarify the issues such that the Commission can more easily determine the specific documents and information that must be provided.

In summary, the procedures have been modified to state that a valid claim of incompleteness will only result in the licensee providing information relevant to the specific portions of the 10 CFR 52.99(c) notification that were the subject of the claim of incompleteness. No other changes have been made in response to these comments.

I. Claims of Incompleteness and Sensitive Information

Westinghouse: Westinghouse asserts that there are several areas regarding the relevance of, and access to, proprietary information in the context of claims of incompleteness that require additional clarity. Westinghouse suggests that petitioners should not be permitted to argue that ITAAC closure notifications are incomplete merely because the technical basis for ITAAC closure might have relied in part on underlying proprietary information without some further demonstration of the relevance of such information. Westinghouse states that NEI 08-01, Revision 5, instructs licensees to the extent possible, to exclude from ITAAC closure notifications sensitive or proprietary information that would otherwise be withheld under 10 CFR

2.390. Westinghouse further states that the practice to date has been to ensure that the ITAAC closure notification itself contains enough information to sufficiently explain how the acceptance criteria are met for a particular ITAAC. Therefore, Westinghouse concludes that a petitioner's claim that access to proprietary information is necessary as part of a claim of incompleteness should be subjected to a high level of scrutiny.

As a result of the extensive work that has been done regarding the expected information content of ITAAC closure notifications, Westinghouse does not believe that access to proprietary information would be necessary for a petitioner to make a *prima facie* showing. However, to the extent that additional, non-public references are associated with the ITAAC closure notification, Westinghouse states that these documents are clearly identified in the "List of References" section of the ITAAC closure notification. Therefore, Westinghouse suggests that a petitioner who believes that it needs access to proprietary information to make a *prima facie* case should be expected to take all necessary steps in advance of the hearing to obtain such access following the NRC's established processes for obtaining access to proprietary information in adjudicatory proceedings. When evaluating a claim of incompleteness that involves access to any SUNSI or SGI, Westinghouse advises the NRC to take into consideration a petitioner's failure to exercise due diligence and avail itself of available processes.

Also, Westinghouse states that the proposed procedures do not address how the NRC would evaluate a request for access to SUNSI if such information is determined to be relevant to a claim of incompleteness. Although the NRC has outlined a process to obtain access to such information in advance of a hearing request, Westinghouse points out that this process does not extend to how such requests will be dealt with as part of a claim of incompleteness. Westinghouse also states that the proposed procedures do not provide a process regarding how access to SUNSI might be provided (assuming that such information is needed for the petitioner to make the required *prima facie* showing). Westinghouse states that the failure to clearly outline a process could have a substantial impact on the hearing schedule because there will be little time once the hearings commence to resolve such issues on an ad hoc basis.

Westinghouse (September 22, 2014 Public Meeting Comments): Westinghouse reiterates its recommendation that there should be a presumption that SUNSI or SGI is not necessary to make a *prima facie* case given the extensive work that has been performed with respect to the completeness of ITAAC closure notifications and the presumption that proprietary information or SGI should not be part of these notifications. Westinghouse also states that there should be a presumption that petitioners are taking advantage of available processes, such as the pre-clearance SGI background check process, as these processes are made available. (Transcript at 53-54).

With respect to claims of incompleteness seeking access to SUNSI or SGI, Westinghouse believes that the consultation process for claims of incompleteness is a place to start in terms of narrowing down the issues that would require access to SUNSI or SGI. Westinghouse states that if the consultation process is used in conjunction with other processes, such as the pre-clearance process for access to SGI and the process for protective orders and non-disclosure agreements, the consultation process could focus on what information is, or is not, needed as part of the *prima facie* case. (Transcript at 53-54).

NEI (September 22, 2014 Public Meeting Comments): NEI agrees with the comments that Westinghouse made on access to SUNSI and SGI through the consultation process. NEI believes that a consultation process could be helpful in some scenarios, particularly with respect to SUNSI, but NEI states that a simple lack of access to SUNSI or SGI is not sufficient, in and of

itself, to support a claim of incompleteness. In fact, NEI believes that SUNSI and SGI should not be required to articulate a *prima facie* case in the vast majority of cases, if not in all cases. NEI does not believe that a consultation process would be useful for access to SGI because the proper place to raise that issue is through the pre-clearance process. For disputes over need to know for SGI, NEI states that the NRC has a standard process for making such determinations on a timely basis. NEI also does not object to the NRC staff being involved in consultations on access to security-related SUNSI and SGI, and states that this is consistent with the pre-clearance process, where the NRC staff is involved. If consultations are unsuccessful and a claim of incompleteness seeking access to SUNSI or SGI is filed, then NEI recommends applying the access standards in the SUNSI-SGI Access Order because the consultation process should not change the standards for access. Finally, NEI states that the consultation process should not, and cannot, serve as a substitute for the SGI pre-clearance process, but the consultation process can help in very limited circumstances. (Transcript at 55-56, 61-66).

SNC (September 22, 2014 Public Meeting Comments): On the topic of consultation on claims of incompleteness and access to sensitive information, SNC states that it is practical for the licensee to determine fairly early in the consultation process the extent to which the requested information might be SUNSI or SGI. SNC also states that it would not be a problem to involve the NRC staff in consultations where the petitioner seeks access to security-related SUNSI or SGI. However, SNC believes that it is not feasible to initiate the background check for SGI as part of the consultation process. Instead, SNC thinks that the background check should be initiated as part of the pre-clearance process so that any later consultations on access to SGI can focus on the need to know determination. Otherwise, SNC believes that there is going to be substantial delay. (Transcript at 61-62, 63-64).

SCE&G (September 22, 2014 Public Meeting Comments): With respect to consultations on access to SUNSI or SGI, SCE&G agrees with the comments that NEI and Westinghouse made on this topic at the public meeting, but adds that the question may depend on when claims of incompleteness are required. SCE&G reminds the NRC of the proposal in its written comments for requiring early submission of claims of incompleteness. Under this proposal, SCE&G states that if there is a claim of incompleteness based on SUNSI information, then there will be an opportunity for the licensee to voluntarily disclose that, and that this would not fit within the same time frame that is in the proposed procedures. However, SCE&G does not necessarily think that this is a problem because the issue of access to SUNSI comes up in the context of other types of proceedings. (Transcript at 59-60).

Mr. Lewis (September 22, 2014 Public Meeting Comments): According to Mr. Lewis, the revised 10 CFR 2.333 gives the hearing officer very strong powers over the entire proceeding, including witnesses and briefing. Mr. Lewis claims that presiding officers use 10 CFR 2.333 to close down hearings on intervenors when they try to add material to the record. Mr. Lewis also asserts that by the time the intervenor appeals, the reactor is running two years later. Mr. Lewis feels that the emphasis is not on promoting the public health and safety; instead, the emphasis is on protecting an assault on credibility by any means available. According to Mr. Lewis, the whole process is totally inappropriate and unfair, and Mr. Lewis specifically mentioned the cost of the background check as a reason for this. (Transcript at 57, 60, 66).

Mr. Lewis states that the last time he had a background check performed, it cost $4,500. Mr. Lewis also states that intervenors do not have access to people who have already been cleared and that the clearance process takes months and months. Mr. Lewis claims that the NRC is setting up a process by which it can object to just about any intervenor personnel being allowed to see the materials that they need to see. Mr. Lewis also believes that the NRC is not going to

say that this process is unfair because it helps the licensee operate the plant and start another Three Mile Island. In response to an NRC staff explanation of the reasons for the SGI access requirements, Mr. Lewis said that these good reasons are to keep intervenors out and that the result of this was Three Mile Island. (Transcript at 66-68).

NEI (October 15, 2014 Written Comments at 7-8): NEI's October 15, 2014 written comments largely repeat NEI's comments at the public meeting, but NEI adds that it sees no reason why the NRC staff would not be involved in the consultation process, particularly when SGI is involved since a determination on need to know may be required. NEI endorses Westinghouse's view that petitioners should not be able to argue that an ITAAC closure notification is incomplete simply because it relies in part on SUNSI or SGI. NEI also agrees with Westinghouse that petitioners must avail themselves of the opportunity to obtain pre-clearance for access to SGI rather than waiting until they are evaluating claims of incompleteness to begin the SGI clearance process.

NRC Response: The NRC adopts the commenters' suggestions in part. To date, the NRC is not aware of situations in which ITAAC notifications have needed to include SUNSI or SGI to meet the requirements of 10 CFR 52.99(c), but the NRC is not prepared to categorically conclude that SUNSI and SGI never need to be included in an ITAAC notification. The NRC agrees with commenters that there should be a process for providing SUNSI and SGI to intervenors in the context of claims of incompleteness. The NRC further agrees that such a process should be integrated with the consultation process for claims of incompleteness.

For information that might be provided through the consultation process, the NRC has a duty to ensure that security-related SUNSI and SGI are only provided to those individuals who have satisfied the standards for access. Given this, the NRC staff would need to be involved in consultations regarding access to security-related SUNSI and SGI. For access to SGI, some commenters believe that consultation would occur too late in the hearing process to allow for the initiation of a background check. These commenters believe that the proper time to initiate an SGI background check is when the pre-clearance notice is published. While the NRC agrees that petitioners should take advantage of the pre-clearance process to avoid delay, the NRC does not agree that the consultation process for claims of incompleteness is necessarily too late to begin the processing of a background check. The consultation process will ordinarily begin 21 days after the notice of intended operation, which is only 11 days after the deadline for submitting the background check forms and fee under the SUNSI-SGI Access Order. If the SGI background check forms and fee are submitted soon after the initiation of consultations, then the SGI background check process could be completed less than 50 days after the materials are submitted. Thus, if a claim of incompleteness seeking access to SGI were ultimately to be filed, the SGI background check would ordinarily be completed before a Commission ruling on the claim of incompleteness.

However, to ensure that questions regarding access to SUNSI and SGI are promptly resolved and do not result in delay, the licensee must give prompt notice to the petitioner if it seeks access to SUNSI or SGI and must give prompt notice to the NRC staff if the petitioner seeks access to security-related SUNSI or SGI. Giving notice to the petitioner that SUNSI or SGI are involved will also put the petitioner on notice that it must meet the standards for access to SUNSI or SGI, as applicable, if it decides to file a claim of incompleteness. Also, the SGI background check process needs to be promptly initiated once it is determined that the petitioner is seeking access to SGI. Deadlines for these activities are described below. Further, in response to other comments, the NRC will generate, outside of the procedure development process, standard protective order templates for SUNSI and SGI to speed the

production of SUNSI and SGI to petitioners after a positive determination on access has been made.

If a claim of incompleteness is ultimately filed with respect to SUNSI or SGI, the Commission will need to know which of the requested information is SUNSI and/or SGI to rule on the claim. Therefore, the petitioner, in its claim of incompleteness, and the licensee, in its answer to a claim of incompleteness, must specifically identify the extent to which the petitioner or the licensee believes that any of the requested information might be SUNSI or SGI. Also, the NRC agrees with NEI that the claim must meet the relevant access standards in the SUNSI-SGI Access Order since the standards for access should not depend on the method of pursuing the information.[4] Thus, the claim of incompleteness would need to include a showing of need for the information (for access to SUNSI) or need to know (for access to SGI). In addition, the NRC would have to determine that persons seeking access to SGI (1) are trustworthy and reliable based on the results of a background check, and (2) will provide sufficient security measures for any SGI in their possession. To address the situation in which the Commission concludes that a claim of incompleteness is valid and directs the licensee to provide SUNSI and/or SGI to the petitioner, Template D, which governs the process for resolving valid claims of incompleteness, has been revised to reference the relevant provisions from the SUNSI-SGI Access Order.

The NRC does not agree with Mr. Lewis' concerns regarding the standards and processes for access to SUNSI and SGI. These standards and processes are well-established and are necessary to ensure that sensitive information is not inappropriately distributed and that persons can only access SGI if they have a need to know the SGI and are trustworthy and reliable. In particular, SGI is highly sensitive security information that must be appropriately protected, as required by AEA § 147. While Mr. Lewis' comment suggests that the current cost of an SGI background check is greater than $4500, the SGI background check currently costs less than $350. Mr. Lewis also objects to the time needed to conduct the background check and states that intervenors do not have access to persons who have already been cleared for access to SGI. However, SGI background checks now take less time than before, and the NRC has developed a pre-clearance SGI background check process so that petitioners' participation in the hearing process will not be adversely affected by the time needed to conduct a background check.[5]

Finally, the NRC agrees with Westinghouse's suggestion that petitioners should be required to take advantage of other processes to seek access to SUNSI or SGI and that their failure to do so should be taken into account by the NRC. The NRC is adding a statement to this effect in the final procedures. There are two such alternative processes. First, the SUNSI-SGI Access Order that would be applied to each proceeding provides an avenue by which petitioners may seek access to SUNSI or SGI in the possession of the NRC. Second, the consultation process for claims of incompleteness will allow petitioners to seek access to SUNSI or SGI in the possession of the licensee that the petitioner asserts must be included in the 10 CFR 52.99(c) ITAAC notification. However, the NRC disagrees with the commenters who suggest that use of

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[4] *For this reason, the NRC does not adopt Westinghouse's suggestion to establish additional standards for access to SUNSI or SGI in the context of claims of incompleteness beyond those set forth in the SUNSI-SGI Access Order and NRC regulations.*

[5] *In addition, Mr. Lewis' implication that presiding officers abuse their authority to shut down intervenors is incorrect, as is his claim that the appeals process does not begin until two years after operation has commenced.*

the pre-clearance SGI background process should be required. The NRC has made this process available to petitioners so that their participation in the hearing process will not be adversely affected by delays in processing SGI background checks, but the NRC does not see a compelling reason to make this pre-clearance process compulsory.

In summary, the procedures have been modified as follows:

- *The final procedures state that petitioners are required to take advantage of other processes to seek access to SUNSI or SGI and that their failure to do so will be taken into account by the NRC. These processes are the SUNSI-SGI Access Order (for SUNSI or SGI in the possession of the NRC) and consultations on claims of incompleteness (for SUNSI or SGI in the possession of the licensee that the petitioner asserts must be included in the 10 CFR 52.99(c) ITAAC notification).*
- *Within one day of the licensee discovering that consultation on a claim of incompleteness involves SUNSI or SGI, the licensee must inform the petitioner of this fact. Within one day of the licensee discovering that security-related SUNSI or SGI is involved, the licensee must also inform the NRC staff with a brief explanation of the situation.*
- *If consultation on a claim of incompleteness involves security-related SUNSI or SGI, then the licensee shall not provide the security-related SUNSI or SGI unless and until the NRC has determined that such access is appropriate. A petitioner seeking access to security-related SUNSI or SGI through the consultation process must meet the standards for access to such information that are set out in the SUNSI-SGI Access Order.*
- *If SGI is involved and the petitioner would like to continue to seek access, then the petitioner must complete and submit to the NRC the forms and fee necessary for the performance of a background check within 5 days of notice from the licensee that SGI is involved. The petitioner will be expected to have forms completed prior to this date to allow for expeditious submission of the required forms and fee.[6]*
- *The petitioner, in its claim of incompleteness, must specifically identify the extent to which the petitioner believes that any of the requested information might be SUNSI or SGI. A claim of incompleteness involving SUNSI or SGI must include a showing of the need for the information (for access to SUNSI) or need to know (for access to SGI). A claim of incompleteness involving SGI must also state that the required forms and fee for the background check have been submitted to the NRC.*
- *The licensee, in its answer to a claim of incompleteness, must specifically identify the extent to which the licensee believes that any of the requested information might be SUNSI or SGI.*
- *Other provisions regarding access to SUNSI or SGI in the context of claims of incompleteness are set forth in the final procedures and have been adapted from the process set forth in the SUNSI-SGI Access Order.*

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[6] *While 5 days is a short period of time, the petitioner may already know that the requested information is SGI because the ITAAC notification reveals the document as containing SGI. In any event, the NRC expects petitioners to have the relevant forms completed ahead of time so that they will be ready to submit the forms on an expedited basis should SGI come into play. The NRC considers such preparation to be a necessary, albeit minor, administrative burden to ensure that the hearing is completed within the expedited schedule mandated by the AEA.*

Also, in response to other comments, the NRC will generate, outside of the procedure development process, standard protective order templates for SUNSI and SGI to speed the production of SUNSI and SGI to petitioners after a positive determination on access has been made.

J. Deadlines Involving Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness Filed After the Deadline

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21967), the NRC included the following options for comment on the time given for filing hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness after the deadline, and the time given for filing answers to these filings: (1) The petitioner is given 30 days from the new information to make its filing and the other parties have 25 days to answer. (2) The petitioner is given 20 days from the new information to make its filing and the other parties have 15 days to answer. (3) The petitioner is given [some period between 20 and 30 days] from the new information to make its filing and the other parties have [some period between 15 and 25 days] to answer.

NEI: Of the options provided by the NRC for comment, NEI supports the option in which the filing after the initial deadline must be made within 20 days of the availability of the information on which the new proposed contention is based, and in which the other parties will have 15 days to answer. NEI believes that 20 days from the time new information becomes available is ample time in which to prepare and file a new proposed contention. Ideally, NEI would prefer that the NRC reduce these filing periods further, with 10 days to make the filing and 7 days to answer it. NEI believes that this proposal accounts for the need to expeditiously complete the ITAAC hearing, the narrow focus of the ITAAC hearing, and the specificity of any new information, which NEI believes should not require significant time or effort to address. NEI believes that in some situations, adoption of this shorter deadline could obviate the need for a decision on interim operation.

NEI also recommends that the final ITAAC hearing procedures be clarified to state that it may not be possible to apply the same time frames for answers to, and decisions on, new or amended contentions as the time frames applied in the case of originally filed contentions. NEI states that this will depend on when during the hearing process the new or amended contention is filed. NEI suggests that to ensure that an initial decision on a new or an amended contention is issued within the statutory time frame, it is likely that other portions of the hearing process regarding that contention will need to be compressed.

SNC: SNC believes that 14 days from the availability of new information is adequate in most cases for a petitioner to submit a contention based on new information, and the answer to such a new contention should be due 7 days after its filing. SNC asserts that setting a shorter expectation for submission of contentions filed after the deadline achieves two key benefits: (1) it encourages petitioners to be as efficient as possible, and (2) it encourages early dialogue between the hearing participants. SNC states that in the unlikely case where the petitioner cannot, for some reason, meet the 14-day timeliness requirement, the petitioner can consult with counsel for the other parties, explain the situation, and possibly secure agreement for an extension, or, if no agreement is reached, the petitioner can file a request for an extension with the presiding officer. SNC states that this will give the licensee and NRC staff the benefit of earlier knowledge that a new contention will be filed, so that they can prepare and allocate resources, while still allowing the petitioner additional time where appropriate. If the final procedures retain one of the options outlined in the proposed procedures for the timeliness of

filings after the initial deadline, SNC suggests the option giving the petitioner 20 days from the new information to make its filing and the other parties 15 days to answer be adopted.

SCE&G: To minimize the impact of hearing activities on the overall hearing schedule, SCE&G recommends that the ITAAC hearing procedures require that any filings after the initial deadline (including hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline) be made within 10 days after new information is available and require that a response be made 7 days thereafter. SCE&G believes that these deadlines should provide sufficient time to prepare and submit the filings, given the narrow focus of the ITAAC hearing and the late filings. SCE&G states that a filing after the initial deadline would be based on very specific new information, and as such should not require significant time or effort to prepare and submit. A shorter deadline is also supported by the statutory mandate to complete the hearing by scheduled fuel load "to the maximum possible extent."

NEI (September 22, 2014 Public Meeting Comments): Upon consideration of the process for consultations on claims of incompleteness after the original deadline, NEI suggests that such claims be filed within 20 days of the information giving rise to the need for the claim. (Transcript at 52).

NRC Response: While the NRC does not adopt any of the commenter's preferences exactly as stated, the NRC agrees with the comments that given the ITAAC hearing schedule, deadlines for filings after the original deadline should be as short as is reasonably possible, and the NRC has adopted deadlines in the final procedures accordingly. For hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness after the deadline, the NRC adopts a deadline for such filings of 20 days after the event giving rise to the need for the filing.[7] The NRC believes that this deadline is feasible but that the shorter deadlines recommended in the comments would not necessarily be feasible in the ordinary case.

For example, the filing of a new or amended contention will most likely result from new information in a licensee's ITAAC notification. In such cases, the filing of the new or amended contention will require the petitioner to (1) examine the licensee's ITAAC notifications to determine whether they present new information, (2) determine the significance of this new information, and (3) prepare a contention making the prima facie showing with respect both to the purported nonconformance with the acceptance criteria and to the operational safety consequences of this nonconformance being contrary to reasonable assurance of adequate protection of the public health and safety. The NRC expects that step (1) can be completed relatively quickly. For step (1), the pertinent licensee ITAAC notifications will be either ITAAC post-closure notifications or ITAAC closure notifications for ITAAC for which an uncompleted ITAAC notification has previously been submitted. The time needed to initially assess ITAAC post-closure notifications should be short because ITAAC post-closure notifications are expected to be few in number and narrow in scope. There will be a much greater number of ITAAC closure notifications submitted after the notice of intended operation is published, but an initial assessment of these notifications for new information should also not take much time.

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[7] As stated above, the event giving rise to the potential need for a claim of incompleteness after the deadline is the date that the ITAAC notification (or a redacted version thereof) becomes available to the public.

This is because ITAAC closure notifications will use the same format as uncompleted ITAAC notifications to the point that the language in both notifications should be almost identical if the licensee performs the ITAAC in the same manner described in the uncompleted ITAAC notification; thus any new information should be readily apparent.

While step (1) can be completed relatively quickly and can significantly narrow the information that might possibly give rise to a new or amended contention, steps (2) and (3) will generally require expert advice, the gathering of relevant supporting evidence, and the preparation of expert declarations in support of contention admissibility. The procedures also ask the parties to address the effect of the proposed contention on interim operation. The NRC believes that 20 days will ordinarily be needed to complete these tasks even if the petitioner diligently completes its obligations.

Claims of incompleteness are somewhat different from contentions, but the NRC believes a 20-day deadline for claims of incompleteness filed after the deadline is also appropriate. The ITAAC hearing procedures direct the petitioner to satisfy the contention admissibility criteria to the extent possible, so the NRC expects that a claim of incompleteness will involve a filing that partially satisfies the contention admissibility criteria and that also identifies a purported incompleteness in the ITAAC notification and explains, with adequate support, why the prima facie showing (or a portion thereof) could not be made. Given this, and given the need to allow the petitioner and the licensee time to consult on the purported incompleteness, which may entirely obviate the need for the claim, the NRC believes a deadline of 20 days is appropriate. In addition, because a petitioner might file both a contention and a claim of incompleteness on the same ITAAC, it would ordinarily be clearer and simpler if these related claims are filed at the same time.

With respect to answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline, the NRC adopts a deadline of 14 days, which is slightly shorter than the 15 to 25 day range the NRC sought comment on. All of the comments received on this question suggested deadlines even shorter than 14 days, but the NRC believes that it would be difficult to meet a shorter deadline because answers to new or amended contentions need to address a number of issues. Specifically, answers must address the contention admissibility standards, including the regulatory judgment on reasonable assurance of adequate protection, and should address the question of whether there is reasonable assurance of adequate protection during a period of interim operation. In addressing this latter question, the procedures contemplate that expert declarations might be prepared, which also take time. The NRC believes that these tasks can ordinarily be completed in 14 days and does not believe it appropriate to adopt a shorter deadline. One benefit of using a 14-day deadline rather than a 15-day deadline is that a 14-day deadline should ordinarily avoid delays resulting from a deadline falling on a weekend. Answering a claim of incompleteness should generally take about the same time as answering a new or amended contention, in part because the claim of incompleteness must satisfy the contention admissibility requirements to the extent possible. Even if it were possible to file answers to claims of incompleteness in a slightly shorter time period than 14 days, unnecessary complexity from segmented filings would result if the petitioner files both a contention and a claim of incompleteness. In addition, segmented filings would not support a quicker Commission decision on the contention and claim of incompleteness, which the Commission would likely want to resolve together in one order.

Notwithstanding the deadlines described above, the NRC encourages the parties to file as soon as possible before these deadlines if it is possible for them to do so.

Further, the NRC disagrees with NEI's suggestion that the NRC shorten time frames for answers to, and decisions on, new or amended contentions depending on when the new or amended contention is filed. The NRC has already adopted aggressive time frames for accomplishing these tasks and believes that these time frames are appropriate as a general matter. If the parties are able to file answers before the deadline, the NRC encourages them to do so, and the presiding officer should issue its decision before the 30-day milestone if this is feasible, but the NRC will not further contract these deadlines and milestones in response to NEI's comment. Finally, the NRC disagrees with NEI's comment that other portions of the hearing on new or amended contentions must be compressed to ensure that the initial decision is issued by scheduled fuel load. While the NRC will attempt to complete the hearing and issue a decision by scheduled fuel load "to the maximum possible extent," the NRC must at the same time ensure that the hearing procedures are fair, reasonable, and likely to produce an accurate result.

In summary, the procedures have been modified to provide that hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the deadline will be due 20 days after the event giving rise to the need for the filing. Answers to these filings will be due in 14 days. The procedures also state that the NRC encourages participants to file as soon as possible before these deadlines if it is possible for them to do so.

K. Good Cause Standard for Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness After the Deadline

NEI, SNC, and SCE&G: NEI, SNC, and SCE&G request that the NRC clarify the requirement that new or amended contentions be based on "new" information in the context of ITAAC closure notifications. NEI and SNC state that the closure of a previously completed ITAAC is not "new" information unless the ITAAC closure notification contains a materially different methodology, results, etc., from the previously submitted uncompleted ITAAC notification. In this regard, NEI believes that a petitioner should not be allowed to file a contention after the deadline with respect to an ITAAC closure notification filed more than 20 days previously (or such shorter period as the NRC may select). In addition, NEI and SCE&G recommend that new contentions be allowed only for ITAAC that were not completed at the time of the NRC's notice of intended operation, and then only if the new contention 1) pertains to the subsequent completion of the ITAAC and 2) does not involve any allegations of deficiencies in the procedures and analytical methods discussed in the uncompleted ITAAC notification. NEI and SCE&G further recommend that amended contentions not be allowed, except to address a licensee's ITAAC closure notifications or ITAAC maintenance notifications that invalidate a completed ITAAC.

As support for these restrictions, NEI states that allowing contentions after the deadline on ITAAC closure notifications presents a substantial potential for delayed operation. SCE&G agrees that contentions after the deadline represent a schedule risk and states that the proposed procedures address this risk by requiring that the deadline for an initial decision on an amended contention be the same date as the deadline for an initial decision on the original contention. However, SCE&G states that it may not be possible to meet the initial decision deadline with the proposed procedures. To address this schedule risk, SCE&G recommends that filings after the deadline be allowed only in very narrow circumstances.

NRC Response: The NRC does not agree with comments suggesting that there is a need for clarification of the "new information" standard in the context of filings after the deadline. The 10 CFR 2.309(c) standards are sufficiently clear, especially in light of the body of case law interpreting these standards, and these standards have been successfully applied in more complex proceedings than ITAAC hearings. The NRC also disagrees with comments suggesting that the NRC circumscribe "new information" such that "new information" can only be said to arise from a licensee ITAAC notification. In fact, relevant new information might arise, for instance, from NRC inspection reports, licensee documents or correspondence other than ITAAC notifications, or eyewitness accounts. The NRC understands that new or amended contentions and other filings after the deadline represent a schedule risk, but if a proceeding is in existence and the stringent standards for such filings are satisfied, then the NRC believes that the petitioner's claim should be heard.

While the NRC is not making the changes suggested by the commenters, the NRC would like to clarify three issues. First, if a new contention is admitted by the Commission (including a contention submitted with a hearing request or intervention petition after the deadline), then the Commission will set the hearing schedule for the new contention. Second, if an amended contention is admitted by the Commission, then the Commission may revise the existing hearing schedule as appropriate. Third, if the Commission delegates a ruling on an amended contention to an Atomic Safety and Licensing Board (ASLB) or single legal judge and the presiding officer admits the amended contention, then the strict deadline for the original contention remains the same because only the Commission can set the strict deadline and because an amendment to a contention will not necessarily require an extension of the strict deadline. In such cases, the presiding officer should strive to meet the strict deadline, but if unavoidable and extreme circumstances require an extension of the strict deadline, then the presiding officer may extend that deadline in accordance with the procedures set forth in the case-specific order governing the proceeding.

No changes were made to the procedures in response to these comments, but the procedures have been clarified to reflect the discussion of schedules for hearings on new or amended contentions in the previous paragraph.

L. Presiding Officer for Rulings on Hearing Requests, Intervention Petitions, and Motions for Leave to File New or Amended Contentions or Claims of Incompleteness That Are Filed After the Original Deadline

NEI: NEI concurs with the suggestion that the Commission should ordinarily rule on all hearing requests, intervention petitions, and motions to file new or amended contentions or claims of incompleteness filed after the original deadline. NEI believes that this will add predictability to the ITAAC hearing process. NEI also cites provisions in the proposed procedures providing that the Commission would designate the hearing procedures for any newly admitted contentions, determine whether there will be adequate protection during the period of interim operation with respect to those contentions, and retain the option of delegating rulings on amended contentions to an ASLB.

NRC Response: NEI supports the provisions in the proposed procedures regarding which entity will rule on hearing requests, intervention petitions, new or amended contentions, or claims of incompleteness filed after the original deadline and regarding which entity will designate hearing procedures and make interim operation determinations. The provisions in the proposed procedures are being included in the final hearing procedures, so no further response is necessary except to clarify that the procedures for presiding officer selection are not exactly as

NEI describes them. Specifically, the Commission will rule on all hearing requests, intervention petitions, new contentions, and claims of incompleteness filed after the original deadline. For amended contentions filed after the deadline, the Commission may rule on the amended contention itself or may delegate a ruling to an ASLB or single legal judge.

No changes were made to the procedures as a result of this comment.

M. Legal Contentions

NEI: NEI recommends that the final ITAAC hearing procedures include additional, specific guidance as to how the NRC defines a contention on a legal issue. NEI states that the definition of legal contention in the proposed procedures might be broadened to include any contention that does not involve a dispute of fact. NEI also suggests that the Commission avoid admitting legal contentions where it is possible to resolve the underlying legal issues as part of the Commission's contention admissibility order. To facilitate this, NEI recommends that the final ITAAC procedures direct parties to fully brief legal issues in their contention admissibility filings. NEI states that although the proposed procedures cite CLI-09-14 as support for including procedures dealing with legal contentions, the cited NRC high-level waste proceeding is far more complex and far broader in scope than ITAAC hearings.

SCE&G: SCE&G suggests that the ITAAC hearing procedures broadly define legal contentions to include any contention that does not involve a dispute of fact.

NRC Response: The NRC adopts the suggestions made in the comments. Because hearings will involve either questions of law, questions of fact, or mixed questions of law or fact, a contention that does not involve any questions of fact must involve only questions of law. Therefore, a legal contention is one that does not involve a dispute of fact. While this was already implicit in the proposed procedures, the NRC will make this explicit in the final procedures. In addition, the Commission does intend to resolve legal issues in its decision on the hearing request to the extent possible, and the NRC agrees with NEI that this would be facilitated by full briefing on the relevant legal issues. Therefore, the final procedures state that the parties should fully brief the relevant legal issues in their filings.

In summary, the procedures have been modified to define a legal contention as any contention that does not involve a dispute of fact. The procedures have also been modified to direct parties to fully brief all relevant legal issues in their filings, including (1) hearing requests filed by the original deadline; (2) hearing requests, intervention petitions, and motions for leave to file new or amended contentions or claims of incompleteness filed after the original deadline; and (3) answers to the aforementioned filings.

N. Licensee Hearing Requests

NEI: NEI concurs with the NRC that it is not necessary to develop separate hearing provisions for the unusual scenario of hearings on disputes between the licensee and the NRC staff on whether the acceptance criteria are met. NEI generally agrees that if a licensee-initiated ITAAC hearing is held, many of the hearing procedures described in the proposed procedures could be adapted, with little change, to serve the purpose of a hearing requested by the licensee. However, NEI believes that it is unclear whether the NRC believes that the licensee would need to satisfy other standards for obtaining a hearing, such as the 10 CFR 2.309(f) contention admissibility standards. NEI states that a dispute over satisfaction of acceptance criteria would

automatically provide an adequate basis for a hearing, and recommends that the procedures clarify that a licensee need only request a hearing for it to be granted.

NEI states that such an approach would be similar to an applicant's right to demand a hearing under 10 CFR 2.103(b) under certain circumstances, and would reduce the burden and time required for any licensee hearing requests and expedite resolution of any disputes. Unlike 10 CFR 2.103(b), however, NEI points out that there would be no notice of proposed denial or notice of denial of an application that would initiate the right of the licensee to request a hearing. Therefore, NEI suggests that the licensee have 20 days from the date that the staff determines that an ITAAC has not been satisfied to request a hearing.

SCE&G: In agreement with NEI, SCE&G believes that the proposed procedures need to be clarified with respect to the standards for licensee hearing requests, and SCE&G proposes the same procedural modifications that have been suggested by NEI.

NRC Response: The proposed procedures did not state that licensee hearing requests must satisfy 10 CFR 2.309(f) nor did the NRC intend that licensees be required to address the 10 CFR 2.309(f) standards. Given the apparent confusion on this question, however, the NRC will clarify this in the final procedures. On a related matter, a licensee's hearing request need not satisfy 10 CFR 2.309(d) because the licensee's interest in the proceeding is established by the fact that its authority to operate the facility depends on its compliance with the ITAAC. The NRC does, however, disagree with NEI and SCE&G that a licensee hearing request need only request a hearing for it to be granted. As stated in the proposed (and final) procedures, a licensee hearing request must also specifically identify the ITAAC whose successful completion is being disputed by the NRC staff and identify the specific issues that are being contested. This information is necessary to help define the scope of the hearing.

With respect to comments on the time in which licensees are to file hearing requests, it is not entirely clear to the NRC what the intended scope of NEI and SCE&G's proposal is. As stated in the proposed procedures, licensees would need to file their requests for hearing within 60 days of the NRC publishing the notice of intended operation (the same period provided for petitioners to file their hearing requests). The 20-day period advocated by NEI and SCE&G appears to be motivated by a lack of a trigger for a licensee hearing request, but the proposed procedures provided a trigger in the form of the notice of intended operation. NEI and SCE&G's proposal might only be intended for licensee hearing requests after this initial deadline (in which case the procedures do not provide a clear trigger), or the proposal might also be intended to entirely disassociate a licensee hearing request from publication of the notice of intended operation (e.g., hearing requests by the licensee might be submitted years before the notice of intended operation is published).

While the intended scope of NEI and SCE&G's proposal on the timing of licensee hearing requests is not entirely clear to the NRC, the NRC has considered the possible permutations of this proposal and decided the following:

- *There may be situations before (perhaps well before) the notice of intended operation is published in which the licensee might desire a hearing because of a dispute between the licensee and the NRC staff over successful completion of the ITAAC. Such situations are outside the scope of these general procedures, which are intended to govern the ITAAC hearing process triggered by publication of the notice of intended operation. The NRC believes that such hearing requests should be handled on a case-specific basis, and the NRC does not wish to establish a pre-notice of intended operation deadline for*

filing such hearing requests because a licensee might feel compelled to file a hearing request in order to meet a deadline when it would be more efficient for the licensee and the NRC staff to continue discussions on the disputed matter.

- *Consistent with the proposed procedures and with 10 CFR 2.105(d), which allows an applicant to request a hearing within the time frame provided by 10 CFR 2.309(b), the final procedures provide that a licensee has 60 days from the notice of intended operation in which to request a hearing. A licensee need not take the entire 60 days, and because the licensee has every interest in expediting the resolution of disputes regarding ITAAC completion, the NRC expects that a licensee would expeditiously file a hearing request once it has decided to seek a hearing.*
- *Based on the NEI and SCE&G recommendation, licensee hearing requests after this 60-day deadline must be filed within 20 days of formal correspondence from the NRC staff communicating its position that a particular ITAAC has not been successfully completed. The NRC believes that 20 days is an appropriate period of time, not only because this is the time generally allowed for hearing requests on denials of applications, but also to allow the NRC staff and the licensee time to discuss the NRC staff's position and potentially obviate the need for the licensee to file the hearing request.*

Neither the comments nor the proposed procedures addressed answers to licensee hearing requests. Because the dispute giving rise to a licensee hearing request is between the NRC staff and the licensee, the procedures will provide that the NRC staff has the right to answer a licensee hearing request. Because answering such hearing requests should be less burdensome than answering new or amended contentions, and because any NRC staff-licensee discussions will have likely concluded by the filing of the licensee's hearing request, the NRC believes that a 10-day deadline from service of the hearing request is appropriate.

In summary, the procedures have been modified:

- *to explicitly state that a licensee hearing request need not satisfy the standards in 10 CFR 2.309(d) or (f),*
- *to state that licensee hearing requests before the notice of intended operation are outside the scope of the hearing procedures and will be handled on a case-specific basis,*
- *to provide that licensee hearing requests after the original deadline must be filed within 20 days of formal correspondence from the NRC staff communicating its position that a particular ITAAC has not been successfully completed, and*
- *to provide that the NRC staff may file an answer to the hearing request within 10 days of service of the hearing request.*

5. <u>Hearing Tracks and Schedules</u>

A. <u>Publication of the Notice of Intended Operation if Uncompleted ITAAC Notifications are Submitted 225 Days Before Scheduled Fuel Load</u>

NEI: NEI asserts that it should be feasible for the NRC to publish the notice of intended operation somewhat sooner than 15 days after the uncompleted ITAAC notifications are received, e.g., between 220 days and 210 days before scheduled fuel load if the uncompleted ITAAC notifications are received 225 days before scheduled fuel load.

NRC Response: While the NRC intends to publish the notice of intended operation as early as possible in the situation described in the comment, the NRC has determined that the 15 days provided in the proposed procedures are needed (1) to administratively process several hundred uncompleted ITAAC notifications, (2) to perform SUNSI reviews on these notifications, (3) to make the non-sensitive uncompleted ITAAC notifications publicly available in ADAMS, (4) to finalize the notice of intended operation and transmit it to the Office of the Federal Register, and (5) to allow for the time taken by the Office of the Federal Register to process and publish the notice of intended operation.

No changes were made to the procedures as a result of this comment.

B. Early Publication of the Notice of Intended Operation if Uncompleted ITAAC Notifications are Submitted Earlier Than Required

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21964), the NRC stated that it was exploring the possibility of publishing the notice of intended operation somewhat earlier than 210 days before scheduled fuel load based on a licensee's voluntary early submission of uncompleted ITAAC notifications. The NRC requested comment on the pros and cons of this approach and on how early the NRC might reasonably issue the notice of intended operation.

NEI: NEI states that publishing the notice of intended operation 210 days before scheduled fuel load is workable because considerable information on ITAAC status and closure will be publicly available well before that notice. However, to build additional margin into the schedule, NEI supports earlier publication of the notice of intended operation based on early submission of the licensee's uncompleted ITAAC notifications. NEI understands that a licensee might be able to submit the uncompleted ITAAC notifications up to several months prior to the 225-day deadline. NEI believes that this proposal would not adversely affect participants' hearing rights because the uncompleted ITAAC notification would describe how the ITAAC will be completed, and early submission of this notification would make information available on uncompleted ITAAC earlier than would otherwise be the case.

However, NEI states that early submission of the uncompleted ITAAC notifications should be at the option of the licensee and that early submission of these notifications only makes sense if it automatically accelerates publication of the notice of intended operation. NEI believes that the notice of intended operation should be published as soon as possible after receipt of the uncompleted ITAAC notifications "or within approximately 15 days of the first ITAAC covered by the [uncompleted ITAAC notification]." NEI also suggests that the hearing procedures explain how deadlines are to be computed if the notice of intended operation is published early and explicitly state that a deadline triggered by a prior filing or action should be adjusted in parallel if the triggering event occurs before the deadline.

SNC: For the reasons also given by NEI, SNC supports early publication of the notice of intended operation based on voluntary early submission of the licensee's uncompleted ITAAC notifications. SNC also states that having more ITAAC covered by uncompleted ITAAC notifications should not prejudice a petitioner's hearing rights because the uncompleted ITAAC notifications are designed to provide information to petitioners that they would need to participate in an ITAAC hearing. SNC states that the notice of intended operation could reasonably be published as much as 3 to 4 months prior to 210 days before scheduled fuel load.

SNC suggests that clarity would be enhanced if uncompleted ITAAC notifications submitted more than 255 days before scheduled fuel load "specify the ITAAC closure period covered by [the uncompleted ITAAC notification] with all other ITAAC not covered by the [uncompleted ITAAC notification] period continuing to be closed per the normal [ITAAC closure notification] process." SNC illustrates its proposal with the following example: If uncompleted ITAAC notifications submitted 345 days before scheduled fuel load state that they cover ITAAC completed in the last 315 days before scheduled fuel load, then ITAAC completed between 345 days and 315 days before scheduled fuel load would not be covered by the uncompleted ITAAC notifications but would be the subject of ITAAC closure notifications when they are completed. With respect to publication of the notice of intended operation, SNC suggests that the NRC publish this notice as soon as possible, and in the above example, SNC states that this would be approximately 300 days before scheduled fuel load.

SNC states that its proposal would avoid the situation in which the licensee submits an uncompleted ITAAC notification for an ITAAC and then, within a few days, submits an ITAAC closure notification for the same ITAAC. SNC believes that this overlap would be confusing to the public and represent an inefficient duplication of resources for the licensee and the NRC staff. SNC also believes that its proposal would provide the NRC staff with time to review the uncompleted ITAAC notifications while also devoting resources to the review of contemporaneously submitted ITAAC closure notifications.

SCE&G: For the reasons also given by NEI, SCE&G supports early publication of the notice of intended operation based on voluntary early submission of the licensee's uncompleted ITAAC notifications. SCE&G believes that any potential downsides are manageable and mentions two possible downsides not mentioned by the other commenters. First, SCE&G acknowledges that early submission of the uncompleted ITAAC notifications provide additional opportunities for the submission of hearing requests and new or amended contentions filed after the deadline based on new information, but SCE&G asserts that this risk exists anyway and that early submission of uncompleted ITAAC notifications would actually provide earlier access to the licensee's ITAAC closure plans. Second, SCE&G states that there is a risk that any hearing may expand to fill the additional time, but this concern is ameliorated by the use of target dates in the procedures and a strict deadline for the initial decision.

With respect to timing, SCE&G states that while this would be at the option of the licensee, it would be reasonable for a licensee to submit the uncompleted ITAAC notifications earlier than required by a few months or more. After these notifications are received, SCE&G suggests that the notice of intended operation be published earlier by an amount of time at least equal to the amount of the time that the licensee submitted its uncompleted ITAAC notifications early.

ADDITIONAL OPTIONS FOR COMMENT: After receiving written comments, the NRC held a public meeting on September 22, 2014, to discuss seven issues associated with the proposed procedures, including early publication of the notice of intended operation. At the public meeting, the NRC explored the effects from an increase in the number of uncompleted ITAAC notifications if the notice of intended operation were to be published earlier than 210 days before scheduled fuel load. While the uncompleted ITAAC notifications would provide sufficient information on the licensee's plans for completing the ITAAC to provide a basis for contentions, petitioners would shoulder an increased burden from early publication because there would be a greater number of later ITAAC closure notifications to examine for new information that would be materially different from previously available information and might give rise to a new or amended contention. In the public meeting agenda, the NRC staff suggested three ways by which this increase in burden might be reduced. Specifically, the later ITAAC closure

notification (1) could include a specific citation to the corresponding uncompleted ITAAC notification, (2) could physically include the corresponding uncompleted ITAAC notification as an attachment, or (3) could include a redline-strikeout version as an attachment that shows changes between the earlier uncompleted ITAAC notification and the later completed ITAAC notification. The NRC staff also welcomed suggestions from meeting attendees on other possible solutions.

NEI (September 22, 2014 Public Meeting Comments): NEI stated that its public meeting comments on the issue raised by the NRC staff would be preliminary given the lack of time for preparation before the meeting. With that said, NEI agrees that the ITAAC closure and hearing process should not result in undue burden on any participant, and NEI is open to discussing options for minimizing burdens that are inherent in the ITAAC process. However, it is not clear to NEI that the options suggested by the NRC staff would meaningfully reduce burdens because the uncompleted ITAAC notifications will already be publicly available and organized by a specific ITAAC number, which is the same ITAAC number associated with the later ITAAC closure notification. According to NEI, it would be relatively straightforward for the public to cross-reference the ITAAC closure notifications with the uncompleted ITAAC notifications. Nonetheless, NEI is open to additional ways of enhancing clarity, such as the first option suggested by the NRC staff. However, NEI does not believe that the ITAAC hearing procedures should create a wholly new filing requirement, such as a redline-strikeout document. Also, NEI states that there are burdens that are inherent to the process and that apply to all participants, including the licensee and the NRC. Further, NEI believes that because the later ITAAC closure notification is likely to be very similar to the earlier uncompleted ITAAC notification, the issue being raised by the NRC staff could be of little significance. Moreover, NEI believes that this issue is not as related to the ITAAC hearing procedures as the other issues discussed at the public meeting. NEI has concerns about using the hearing procedures to modify the current ITAAC closure guidance and suggests that it might be more appropriate to address the issue raised by the NRC staff in the context of the NRC's consideration of NEI 08-01, Revision 5, for regulatory endorsement. (Transcript at 71-73, 75-76, 80-81).

SNC (September 22, 2014 Public Meeting Comments): SNC wholly supports NEI's comments and specifically highlights the ability to use ITAAC numbers to cross-reference uncompleted ITAAC notifications and ITAAC closure notifications. SNC is open to methods to mitigate potential burdens, but SNC believes that it is unnecessary to change the guidance in NEI 08-01, which was developed in a number of public meetings over an extended time period. SNC also claims that the burden on petitioners is the same whether or not the uncompleted ITAAC notifications are submitted early. (Transcript at 73-74, 76-77).

Westinghouse (September 22, 2014 Public Meeting Comments): Westinghouse believes that the first option identified by the NRC staff is relatively straightforward and simple to implement, but the second option results in redundant documentation and adds burden across the board to licensees. Westinghouse also believes that the third option adds an administrative burden to licensees without necessarily relieving any burden on the NRC staff and petitioners because Westinghouse expects the NRC staff and petitioners to compare the two documents without taking the licensee's redline-strikeout version at face value. Westinghouse states that there should be no surprise at the number of uncompleted ITAAC notifications because ITAAC verify that the plant has been built in accordance with the license and this cannot be verified until the plant is built. (Transcript at 81-82).

NEI (October 15, 2014 Written Comments at 8-10): NEI's written comments repeat several of the thoughts it offered at the public meeting, but NEI adds a number of additional points. NEI

states that any additional burden from early publication of the notice of intended operation would not come from all ITAAC closure notifications, but only those ITAAC closure notifications that are submitted between the "normal" and early submission time frames for the uncompleted ITAAC notifications. Also, NEI states that early submission of the uncompleted ITAAC notifications would provide petitioners with an earlier explanation of how ITAAC will be completed and allow more time to complete the ITAAC hearing prior to fuel load.

NEI claims that the NRC staff's proposal prematurely proposes solutions for a problem that may not arise. At this time, NEI does not anticipate a large number of ITAAC for which the uncompleted ITAAC notification would differ significantly from the subsequent ITAAC closure notification. NEI states that since this situation might not arise for many ITAAC, the potential burden on petitioners might be minimal and would not warrant the additional burden on licensees that would result from some of the options proposed by the NRC staff.

NEI feels that it is unnecessary to impose further measures at this time to address the problem perceived by the NRC staff. However, NEI does not object to less burdensome solutions, such as proposed Option 1, which involves including a specific citation to the corresponding uncompleted ITAAC notification. NEI claims that Options 2 and 3 would provide little benefit while imposing new burdens on licensees. NEI questions whether Option 2 would reduce the burden to petitioners because petitioners can cross-reference ITAAC closure notifications and uncompleted ITAAC notifications since they both use the same ITAAC number. Regarding proposed Option 3, NEI states that the burden imposed on licensees to create redline versions is disproportionate to any benefit provided because the redline versions would often show little more than editorial and date-related changes. NEI also states that a redline version is not used by the NRC staff in its review and is not required by 10 CFR 52.99 or the NRC's hearing regulations.

NEI suggests that the NRC could address any concerns about the petitioner's ability to cross-reference documents by enhancing the plant-specific ITAAC closure notification review status reports that are available on the NRC's website. Finally, NEI recommends that the NRC staff address its concerns through the ITAAC closure guidance in RG 1.215, which is the vehicle for endorsing NEI 08-01. NEI states that imposing additional requirements through the ITAAC hearing procedures could impact (and may have unintended consequences on) the agreed-upon guidance in NEI 08-01.

NRC Response: The NRC adopts in part the suggestions made in the comments. The NRC agrees that early submission of the uncompleted ITAAC notifications is voluntary because the NRC's regulations currently allow them to be submitted up to 225 days before scheduled fuel load. The NRC also agrees that if the uncompleted ITAAC notifications cover a period beginning earlier than 225 days before scheduled fuel load, then it would be reasonable for the NRC to correspondingly issue the notice of intended operation earlier than 210 days before scheduled fuel load. Specifically, the NRC could issue the notice of intended operation within 15 days of the receipt of the last uncompleted ITAAC notification, assuming that uncompleted ITAAC notifications have been submitted for all ITAAC that were not yet completed by the earlier date. In addition, because the purpose of early publication is to build margin into the hearing schedule, early publication should not serve to elongate or otherwise modify the milestones or deadlines in the ITAAC hearing schedule; instead, all dates in the hearing schedule would be moved up accordingly.

With respect to how early the notice of intended operation should be published, the NRC believes that the notice of intended operation should not be published earlier than 285 days

before scheduled fuel load. The NRC has chosen this 285-day date to balance the advantages and disadvantages of early publication. The principal advantage of early publication is that it might mitigate many of the potential types of delays that could occur in an ITAAC hearing, specifically, delays accruing from (1) SGI background check reviews, (2) valid claims of incompleteness submitted with the initial hearing request,[8] (3) temporary unavailability of counsel or witnesses due to illness, (4) delays from the issuance of adjudicatory decisions, and (5) other minor delays that might relate to the adjudicatory process (e.g., the time needed for a prehearing conference or additional briefing to consider the effect of new information related to an admitted contention). Early publication would not, however, mitigate certain potential sources of delay. For instance, if a new contention is based on some new substantive information, such as a problem encountered late in construction, then litigation on the new contention (including any subsequent hearing) would ultimately be triggered by the availability of the new information and not by the publication of the notice of intended operation.

With respect to the five types of delays that might be mitigated by early publication of the notice of intended operation, delays from valid claims of incompleteness submitted with the hearing request would ordinarily result in the longest delay.[9] Specifically, if a valid claim of incompleteness is submitted with the hearing request, then the licensee would ordinarily be required to provide the additional information within 10 days of the Commission order finding that the claim of incompleteness is valid. A new contention based on this new information would be due in 20 days, the answers thereto would be due 14 days thereafter, and the Commission decision on the new contention would ordinarily be issued within 30 days of the answers. Therefore, if the Commission admits the new contention, this decision would ordinarily be issued 74 days (10 + 20 + 14 + 30) after the Commission decision on the hearing request, thereby resulting in 74 days of delay in the commencement of the hearing on the contention. While delays of more than 74 days are conceivable, we think these are unlikely to occur. Therefore, publishing the notice of intended operation 75 days earlier than 210 days before scheduled fuel load (i.e., 285 days before scheduled fuel load) should account for most potential sources of delay that could be mitigated by early publication of the notice of intended operation. The Commission could publish the notice of intended operation 285 days before scheduled fuel load if the NRC has received uncompleted ITAAC notifications at least 300 days before scheduled fuel load for all ITAAC that have not been completed by that date.

The disadvantages of early publication of the notice of intended operation stem from the fact that there will be more uncompleted ITAAC on which petitioners are expected to file contentions with their initial hearing request. This fact does not prejudice a petitioner's right to request a hearing because the uncompleted ITAAC notifications must provide sufficient information to

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[8] The potential delay due to a valid claim of incompleteness depends on when the claim is filed. However, because there will be either an ITAAC closure notification or an uncompleted ITAAC notification available for each ITAAC before the notice of intended operation is published, a valid claim of incompleteness will most likely be filed with the initial hearing request.

[9] While SGI background check reviews might have been the source of greatest delay in the past, the recent average time taken to complete SGI background check reviews suggests that in the average case, the SGI background check process will result in a delay of about two months (including the time taken for submitting and processing the required forms). An SGI background check might take longer in some cases than others, but seeking access to SGI to participate in hearings is already a very rare occurrence (and would, if anything, be even less likely to occur in an ITAAC hearing). Thus, it makes sense to focus on the average time frame anticipated for SGI access than on extreme scenarios.

demonstrate that the uncompleted inspections, tests, and analyses will be performed and the corresponding acceptance criteria will be met. 10 CFR 52.99(c)(3). This sufficient information must include the specific procedures and analytical methods to be used to perform the ITAAC. Id. In fact, the content requirements for uncompleted ITAAC notifications were designed to provide information to a prospective petitioner to allow it to make the statutorily required prima facie showing. 2007 Part 52 Rule, 72 FR at 49367. In addition, the Commission has stated that it "expects that any contentions submitted by prospective parties regarding uncompleted ITAAC would focus on any inadequacies of the specific procedures and analytical methods described by the licensee" in its uncompleted ITAAC notification. Id. Therefore, petitioners are not prejudiced by the requirement to file contentions on uncompleted ITAAC.

Notwithstanding this, the NRC recognizes that petitioners would bear an additional resource burden in determining whether to file new or amended contentions after the deadline because, if the hearing request is submitted at a time when there are a greater number of uncompleted ITAAC, then the petitioner will have to examine a greater number of subsequent ITAAC closure notifications for these uncompleted ITAAC to determine if there is new information that would give rise to a new or amended contention. NEI claims that this additional burden should be minimal because there should not be a large number of ITAAC for which the uncompleted ITAAC notification would differ significantly from the subsequent ITAAC closure notification. While the NRC expects that significant differences will be few in number, a petitioner would still bear the burden of examining all of the subsequent ITAAC closure notifications if it wants to identify which of the subsequent ITAAC closure notifications do significantly differ from the earlier uncompleted ITAAC notifications.

Although the NRC recognizes that petitioners would bear an additional resource burden from early publication, the NRC considers this additional burden to be manageable for several reasons. Because the uncompleted ITAAC notifications and the ITAAC closure notifications share the same format, they should ordinarily be almost identical unless there is a significant change in the methodology for performing the ITAAC. Thus, any discrepancies would be apparent upon a comparison of the uncompleted ITAAC notification and the ITAAC closure notification. Further, the additional resource burden will only pertain to ITAAC completed in a relatively narrow time frame (between 300 days and 225 days before scheduled fuel load). While a significant number of ITAAC might be completed in this time frame, the narrow scope of the time frame should lessen the additional burden. Moreover, the NRC agrees with the commenters that petitioners can use ITAAC numbers to quickly cross-reference uncompleted ITAAC notifications and subsequent ITAAC closure notifications. To enhance a petitioner's ability to compare these two notifications, the NRC is taking several steps. First, the NRC has made enhancements to the ITAAC closure status report on the NRC website to allow petitioners to quickly find all of the ITAAC notifications associated with a particular ITAAC sequence number. Second, the NRC is updating its ITAAC closure guidance to ensure that ITAAC sequence numbers are consistently used in ITAAC notifications in an easily identifiable manner. Third, the NRC has included guidance in the notice of intended operation template to assist petitioners in cross-referencing the uncompleted ITAAC notifications and the ITAAC closure notifications. Given this discussion, the NRC does not deem it necessary to impose additional requirements on subsequent ITAAC closure notifications, such as the attachment of the earlier uncompleted ITAAC notification or the creation of a redline-strikeout version to show differences between the two documents.

An additional burden on all participants would arise if the petitioner were to file a new or amended contention after the deadline based on the subsequent ITAAC closure notification. While the NRC agrees with SCE&G that this possibility exists anyway, there is a somewhat

greater probability of it occurring if there are a greater number of ITAAC that have not been completed when the hearing request is submitted. However, the NRC concludes that this increased risk of consuming additional resources is also manageable, especially in light of the fact that the increased risk is due to ITAAC completed in the relatively narrow time frame described in the previous paragraph.

Weighing the advantages and disadvantages, the NRC believes that it is appropriate to publish the notice of intended operation up to 285 days before scheduled fuel load. The NRC places great weight on the schedule advantages accruing from early publication because of the statutory directive to issue the hearing decision before scheduled fuel load "to the maximum possible extent." AEA § 189a.(1)(B)(v). Early publication does increase resource burdens somewhat, but these should be manageable. In addition, the NRC's proposed approach attempts to limit the disadvantages from early publication by moving up the notice of intended operation by no more than 75 days.

With respect to practical implementation of this approach, the NRC agrees with SNC that clarity would be enhanced if the uncompleted ITAAC notifications specify their period of coverage (i.e., "intended to cover all ITAAC not completed by [X] days before scheduled fuel load"). In fact, the NRC believes that this information is practically necessary to support early publication of the notice of intended operation because, otherwise, the period of time covered by the uncompleted ITAAC would be unknown and the NRC would find it difficult to determine whether the uncompleted ITAAC notifications cover all the uncompleted ITAAC in the intended coverage period.[10] Such information should also be helpful to petitioners. The NRC also agrees with SNC that any ITAAC completed more than "[X] days before scheduled fuel load" would be the subject of an ITAAC closure notification rather than an uncompleted ITAAC notification.

The NRC, however, disagrees with SNC that only uncompleted ITAAC notifications submitted more than 255 days before scheduled fuel load would need to specify the coverage period of the uncompleted ITAAC notifications. The NRC disagrees with SNC that the time of submission is the determinative factor for specifying a coverage period. Instead, the determinative factor should be the licensee's intended coverage period for the uncompleted ITAAC. As a default, 10 CFR 52.99(c)(3) specifies a coverage period of 225 days before schedule fuel load. If the licensee intends an expanded coverage period to support early publication of the notice of intended operation, this earlier coverage period should be communicated in the uncompleted ITAAC notifications. This should be the case even if the coverage period begins 235 or 245 days before scheduled fuel load. In such cases, this information would assist the NRC in determining whether the uncompleted ITAAC notifications represent a complete set that would allow the NRC to publish the notice of intended operation earlier than 210 days before scheduled fuel load.

SNC also asserts that its proposal would avoid an overlap where ITAAC closure notifications would be submitted shortly after uncompleted ITAAC notifications. This assertion may be based on an implied recommendation that uncompleted ITAAC notifications be submitted 30 days

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[10] In the default case, the coverage period begins 225 days before scheduled fuel load, as specified by 10 CFR 52.99(c)(3), so the uncompleted ITAAC notifications do not need to specify a coverage period in the default case. However, early publication of the notice of intended operation requires a different coverage period that the licensee needs to identify and communicate to the NRC. If the licensee does not identify an alternative coverage period, the NRC will assume that the coverage period begins at 225 days before scheduled fuel load as provided by 10 CFR 52.99(c)(3).

before the beginning of the coverage period of the uncompleted ITAAC notifications.[11] However, the NRC does not deem it necessary to impose such a requirement. Also, based on interactions with the nuclear industry, the NRC understands that the licensees will submit a large number of ITAAC closure notifications on a rolling basis during the last year before scheduled fuel load. Therefore, it is unavoidable that a significant number of ITAAC closure notifications will be submitted during the 60-day period for filing hearing requests that will cover ITAAC that were not completed as of a short time before. However, the NRC does believe that specifying the coverage period for uncompleted ITAAC notifications will assist the NRC in performing its administrative review of the uncompleted ITAAC notifications and will provide useful information to potential petitioners.

Another implementation issue concerns the NRC's knowledge of the licensee's scheduled fuel load date. While not addressed by the commenters, for the NRC to issue the notice of intended operation 285 days before scheduled fuel load, the NRC will need to know at that time what the scheduled fuel load date is. However, 10 CFR 52.103(a) only requires the licensee to submit its fuel load schedule to the NRC at least 270 days before scheduled fuel load. Therefore, in addition to voluntary early submission of the uncompleted ITAAC notifications, a licensee intending to take advantage of early publication of the notice of intended operation will need to informally apprise the NRC of its fuel load schedule well enough in advance to give the NRC time to prepare to publish the notice of intended operation. In addition, the NRC intends to publish the notice of intended operation only after receiving a formal notification under 10 CFR 52.103(a) of the licensee's fuel load schedule. Therefore, if the licensee intends to take advantage of early publication of the notice of intended operation, then the licensee should submit its 10 CFR 52.103(a) schedule with its last uncompleted ITAAC notification if the licensee has not already done so.

In summary, the procedures have been modified to state that the NRC agrees to publish the notice of intended operation earlier than 210 days before scheduled fuel load subject to the following conditions:

- *Early publication is dependent on voluntary early submission of the uncompleted ITAAC notifications.*
- *In addition to meeting the requirements of 10 CFR 52.103(a), the licensee will need to informally apprise the NRC of the licensee's fuel load schedule well enough in advance to allow the NRC to prepare to issue the notice of intended operation on a more expedited basis.*
- *The NRC will not publish the notice of intended operation until the licensee has submitted a 10 CFR 52.103(a) fuel load schedule. Therefore, the licensee should submit this 10 CFR 52.103(a) schedule with its last uncompleted ITAAC notification if the licensee has not already done so.*
- *The uncompleted ITAAC notifications will need to specify the coverage period of the uncompleted ITAAC notifications (i.e., "intended to cover all ITAAC not completed by [X] days before scheduled fuel load."). If a coverage period is not specified, the NRC will assume that the coverage period begins 225 days before scheduled fuel load as specified by 10 CFR 52.99(c)(3).*

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[11] SNC is not clear on this point, but the examples given by SNC all appear to assume a 30-day period between the submission of the uncompleted ITAAC notifications and the beginning of the coverage period of the uncompleted ITAAC notifications.

- *ITAAC completed before the specified coverage period will not be the subject of an uncompleted ITAAC notification but will be the subject of an ITAAC closure notification.*
- *The NRC will attempt to publish the notice of intended operation 15 days after it has received uncompleted ITAAC notifications covering all ITAAC that have not yet been completed.*
- *The NRC will not publish the notice of intended operation more than 285 days before scheduled fuel load.*
- *Early publication of the notice of intended operation would not serve to elongate or otherwise modify the milestones or deadlines in the ITAAC hearing schedule; instead, all dates in the hearing schedule would be moved up accordingly.*

The NRC has also included guidance in the notice of intended operation template to assist petitioners in cross-referencing the uncompleted ITAAC notifications and the ITAAC closure notifications.

C. Overall Schedule Comments

NEI: NEI asserts that the proposed procedures "provide no margin whatsoever" to ensure timely completion of the hearing before scheduled fuel load. NEI states that delays might occur for unforeseen reasons or because an earlier deadline falls on a weekend or holiday thereby pushing out subsequent deadlines. Therefore, NEI suggests several modifications to further streamline ITAAC hearings and to build margin into the schedule to avoid potential delays to operation from delays in the hearing process. NEI asserts that a hearing schedule lacking such margin is inconsistent with the statutory mandate for timely completion of the hearing. Specifically, NEI suggests the following modifications to the schedule in the proposed procedures:

- Answers to the hearing request should be due within 20 days of the hearing request rather than 25 days.
- The time allotted for the Commission's decision on the hearing request should be 21 days from the answers instead of 30 days.
- Written initial testimony should be due within 25 days of the granting of the hearing request rather than 35 days.
- Written rebuttal testimony, if allowed, should be due 7 days after initial testimony rather than 15 days.[12]
- Answers to motions for cross-examination should be required 3 days after the motion rather than 5 days.
- The oral hearing should be held 10 days after the last pre-filed testimony rather than 15 days.

With respect to the schedule for preparing initial testimony, NEI asserts that parties can begin preparing testimony once the hearing request is filed, and that petitioners can do so even earlier. NEI states that this possibility should be recognized.

SNC: SNC agrees with the proposed procedures that the time frame for completing an ITAAC hearing is challenging. Rather than recommending more abbreviated deadlines, SNC suggests that the final procedures clarify how deadlines are computed by providing that any deadline

[12] In a different portion of NEI's comments, however, it recommends 10 days rather than 7 days.

triggered by a prior action should be adjusted in parallel if the triggering action is completed earlier than required. SNC believes that this will provide the parties with the flexibility to reduce time frames when reduction makes sense. SNC also states that this rule should apply regardless of the presiding officer's scheduling order and should apply to the strict deadline for the initial decision itself, i.e., if the initial decision is due 30 days after the oral hearing but the oral hearing is completed earlier than anticipated, then the initial decision would be due 30 days after the accelerated oral hearing.

SCE&G: In agreement with NEI, SCE&G suggests shorter deadlines for hearing process activities because the schedule in the proposed procedures does not allow for any delays that typically arise in litigation. SCE&G also states that the schedule in the proposed procedures does not provide for the time needed to administratively authorize fuel load after an initial decision, which SCE&G states could take up to 10 days given the language in 10 CFR 2.340(j). SCE&G makes specific recommendations regarding the time allotted for answers to hearing requests, decisions on hearing requests, initial and rebuttal testimony, and the time at which the oral hearing should be held after the filing of testimony that are identical to the recommendations of NEI. In addition, SCE&G suggests that replies to licensee proposed mitigation measures for assuring adequate protection during interim operation be reduced from 20 days to 10 days.

SCE&G also states that the procedures should acknowledge the possibility that the oral hearing will last more than one day. SCE&G believes that the hearing may take longer than one day if there are multiple contentions for hearing, or a single contention raises factually complex issues with multiple witnesses by each party. Although SCE&G acknowledges that ITAAC contentions may be narrower in scope than other contentions that have gone to hearing under Subpart L-type procedures, SCE&G states that Subpart L hearings typically involve one day or more of oral hearing for each contention. Given this possibility, SCE&G recommends that a longer oral hearing should be explicitly acknowledged by the procedures, and the procedures should allow for changes to the overall schedule to ensure that the initial decision can still be issued by scheduled fuel load.

NRC Response: The NRC adopts in part the suggestions made in the comments. To begin with, because the NRC has agreed to publish the notice of intended operation up to 285 days before scheduled fuel load, licensees will have the opportunity to add at least 75 days of margin to the hearing schedule if they voluntarily submit uncompleted ITAAC notifications earlier than required. In addition, the hearing procedures have been streamlined in a number of ways, and the date for the initial decision after hearing will be a strict deadline that can only be extended upon a showing of unavoidable and extreme circumstances. Given this, the hearing procedures already have a number of features to support issuance of the decision after hearing by scheduled fuel load. In addition, the NRC does not believe it is wise to so severely truncate the hearing schedule that it threatens the ability of the presiding officer and the parties to have a fair opportunity to develop a sound record for decision. Rather, the NRC has considered the commenters' specific recommendations in light of all of the competing objectives that the ITAAC hearing process must satisfy.

With respect to the commenters' suggested modifications to the hearing schedule:

- *The NRC is retaining the 25-day period for answering initial hearing requests. The NRC believes that a 25-day period is appropriate because the scope of the initial hearing request encompasses all of the ITAAC in the license. A large number of contentions might be submitted, and answers are expected not only to address the contention*

admissibility standards, but also to address reasonable assurance of adequate protection during interim operation. Addressing interim operation issues could also include the submission of expert declarations, which take time to prepare. Given this, the NRC declines to shorten the 25-day period for answering hearing requests.

- *The NRC is retaining the 30-day milestone for Commission decisions on the hearing request. Given the number of issues that the Commission must address, including the selection of hearing procedures should contentions be admitted, the NRC does not believe that the 21-day milestone suggested by some of the commenters will generally be feasible.*
- *The NRC disagrees with NEI's suggestion that parties be expected to prepare testimony before a decision on the hearing request. While parties must be prepared to engage in hearing activities immediately after a decision on the hearing request, it would not be reasonable to expect them to prepare testimony on proposed, but not admitted, contentions, and to rely upon this expectation to establish truncated hearing schedules. Preparing testimony on proposed contentions could involve a substantial expenditure of resources for no purpose if the contentions are not admitted.*
- *With respect to the due date for initial written testimony and position statements, relevant considerations include the time needed to prepare written testimony, to collect exhibits, and then to prepare the initial statement of position (which must summarize the testimony just completed and integrate this with the relevant legal authorities and arguments). These activities would be conducted at the same time that the parties are preparing their mandatory disclosures and engaging with the presiding officer and the other parties to set the hearing schedule. In addition, the preparation of initial testimony and position statements would be informed by consideration of the other parties' initial disclosures, which are due 15 days after the hearing request is granted. Given this, the NRC agrees that in some situations initial testimony could be filed 25 days after the decision on the hearing request, such as when there are only one or two simple issues in dispute. However, if the hearing involves numerous admitted contentions with complex issues, 35 days might be needed. For cases in between these two extremes, 30 days would be an appropriate time period in which to complete initial testimony. Therefore, the final procedures are being modified to make 30 days the default time period for the filing of initial testimony, but the Commission has the option of adding or subtracting 5 days based on the Commission's assessment of the number of contested issues and their complexity.*
- *With respect to the due date for written rebuttal filings, the NRC declines to adopt the commenters' suggestions as stated, but is reducing the time period for rebuttal from 15 days to 14 days. The NRC believes that 14 days will ordinarily be needed to allow the parties time to consider and assess the other parties' initial filings, prepare rebuttal testimony and exhibits, and then complete the rebuttal statement of position. A 14-day period will also ordinarily avoid delays resulting from a deadline falling on a weekend.*
- *The NRC declines to adopt the suggestion that the oral hearing be held 10 days after the last pre-filed testimony rather than 15 days. To ensure that the oral hearing provides the presiding officer with all of the information needed to reach a decision, the presiding officer must have sufficient time after the last pre-filed testimony to carefully consider all of the testimony and evidence, identify the issues requiring further exploration, and prepare focused questions to best elicit the necessary information. In the NRC's judgment, achieving these objectives will ordinarily require that the oral hearing be held about 15 days after the last pre-filed testimony.*
- *Given the decision in the previous bullet, there is no schedule advantage from truncating the time for answers to motions for cross-examination. Therefore, the NRC declines to*

adopt the recommendation that answers to motions for cross-examination be due within 3 days of the motion.

- *The NRC declines to adopt SCE&G's suggestion regarding the time for petitioner and NRC staff responses to licensee proposed mitigation measures addressing adequate protection during interim operation that are contained in the licensee's answer to a hearing request, intervention petition, or motion for leave to file a new or amended contention after the deadline. SCE&G proposes to reduce the response time from 20 days to 10 days. However, responding to newly proposed mitigation measures from the licensee will ordinarily require the preparation of engineering analyses documented in expert declarations. Because the NRC believes that 20 days will ordinarily be required to prepare such analyses, the NRC declines to adopt SCE&G's suggestion.*

Given the above decisions, the Track 1 hearing schedule will ordinarily take 89 days (which provides 6 days of margin in the model schedule), but may take as many as 94 days or as few as 84 days. The Track 2 hearing schedule will ordinarily take 75 days, but may take as many as 80 days or as few as 70 days.

With respect to schedule margin, SCE&G asserts that it will take up to 10 days to administratively authorize fuel load after an initial decision, and that the NRC's hearing schedule does not provide for this. The NRC does agree that 10 CFR 2.340(j) provides up to 10 days after the initial decision to make the 10 CFR 52.103(g) finding if the NRC staff is otherwise able to determine that the acceptance criteria are met. This rule, however, does not require the NRC staff to take the full 10 days, and the NRC has a history of taking expeditious action after a hearing. For example, in the V.C. Summer Units 2 and 3 proceeding, the NRC issued the COLs the same day that the Commission issued a decision on the uncontested portion of the hearing. Once it is able to do so, the NRC staff intends to expeditiously make the 10 CFR 52.103(g) finding after an initial decision finding that the contested acceptance criteria have been met, and any delays in doing so would ordinarily not be connected to the hearing (e.g., delays in the completion of the uncontested ITAAC prevent the NRC from making the 10 CFR 52.103(g) finding immediately after the initial decision is issued). In any event, the NRC does not agree that it is obligated to issue a hearing decision at some set time prior to scheduled fuel load—in accordance with AEA § 189a.(1)(B)(v), the hearing decision will be considered timely if issued by scheduled fuel load.

The NRC agrees with SNC that any deadline triggered by a prior action will be moved up if the triggering action is completed earlier than required. However, a clarification in this regard is not needed because it is already explicitly provided for in the procedures (e.g., if a motion is filed three days after the event rather than seven days after the event, answers to the motion will be due seven days after the motion (ten days after the event) because the deadline for answers is tied to the filing of the motion). The NRC disagrees with SNC that its suggested principle should apply to the strict deadline. While the model schedule provides that the strict deadline will be 30 days after the hearing, this is intended to inform the Commission's decision on a calendar date for the strict deadline (e.g., "July 24") in an individual proceeding. Therefore, in actual practice, the strict deadline will not be triggered by any prior action but will be a specified calendar date.

The NRC adopts SCE&G's suggestion that the final procedures explicitly acknowledge the possibility that the oral hearing might last longer than one day. The NRC also adopts SCE&G's suggestion that the final procedures explicitly allow for changes to the overall schedule in light of this possibility, which the NRC believes was implicitly permitted by the proposed procedures given the strict deadline for issuing the initial decision. The NRC expects the presiding officer to consider and discuss such adjustments in the prehearing conference. However, whereas

SCE&G identifies scheduled fuel load as the main objective to be considered when adjusting the hearing schedule, the main objective in both the proposed and the final procedures is the strict deadline for the initial decision. This strict deadline will be informed by the licensee's fuel load schedule but will usually be earlier than the scheduled fuel load date.

As for NEI's concern that delays might occur because an earlier deadline falls on a weekend or holiday, thereby pushing out subsequent deadlines, the NRC recognizes that minor delays might be caused in this manner. However, this concern should be ameliorated somewhat because the NRC expects that the presiding officer will take these potential delays into account when setting the hearing schedule. For example, if the Commission establishes a 30-day milestone for the submission of initial testimony, but the 30th day falls on a Saturday, then the Commission would expect the presiding officer to make a minor adjustment (change the deadline to the 29th day so that it falls on a Friday) to avoid a delay in the hearing schedule. The presiding officer has the authority to make such an adjustment to this milestone date because, while the presiding officer is expected to adhere to Commission-established milestones to the best of its ability, the presiding officer may revise the milestones in its discretion, with input from the parties, keeping in mind the strict deadline for the overall proceeding. To clarify the application of this power, the procedures have been modified to include, as an example, the authority to make minor adjustments to milestones to avoid delays that might accrue from a milestone falling on a holiday or weekend.

In summary, the procedures have been modified as follows:

- *The default time for filing initial testimony will be 30 days from the grant of the hearing request, but the Commission may add or subtract 5 days based on the Commission's assessment of the number of contested issues and their complexity. A 25-day period might be appropriate when there are only one or two simple issues in dispute. A 35-day period might be needed if the hearing involves numerous admitted contentions with complex issues.*
- *The time period for rebuttal in the Track 1 procedures has been reduced to 14 days from 15 days.*
- *The final procedures explicitly acknowledge the possibility that the oral hearing might last longer than one day, and explicitly allow for changes to the overall schedule in light of this possibility to ensure that the initial decision is issued by the strict deadline. The NRC expects the presiding officer to consider and discuss such adjustments during the prehearing conference.*
- *The final procedures add, as an example of the presiding officer's authority to make minor modifications to Commission-established milestones, the ability of the presiding officer to make a minor adjustment to the milestone to avoid delay that would occur if the milestone fell on a weekend or holiday (e.g., reduce the due date for initial testimony from 30 days to 29 days because the 30th day falls on a Saturday). The final procedures also state that the Commission expects the presiding officer to make such adjustments, as necessary, to avoid delay.*

D. Criteria for Deciding Between the Track 1 and Track 2 Procedures

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21970), the NRC requested comment on the factors the Commission should consider in choosing between Track 1 procedures (which include both written initial and rebuttal testimony) and Track 2 procedures (which include written initial testimony but not written rebuttal testimony) in an individual

proceeding. The proposed procedures explained that while Track 2 has a schedule advantage in that it is shorter than Track 1, the Track 1 procedures enjoy the advantages that come from written rebuttal, including greater assurance that the contested issues will be fully fleshed out in writing before the hearing. Id.

NEI: NEI supports the use of the Track 2 evidentiary hearing procedures as opposed to the Track 1 procedures because Track 1 allows no margin for delays and relies on accelerating certain key activities, such as publishing the notice of intended operation 210 days before scheduled fuel load. NEI states that meeting this ambitious schedule could present significant challenges, especially given the lack of experience with ITAAC hearings. NEI also states that some deadlines will need to be shortened in any event because of delays from deadlines that fall on weekends or holidays. NEI further adds that even if the Track 2 hearing is completed on schedule, it does not allow sufficient time to administratively authorize fuel load after the initial decision.

NEI also disagrees with the suggestion in the proposed procedures that if the Track 2 procedures are selected, the time savings (15 days) from using Track 2 might be allotted to adjudicatory decisions. NEI believes it is more prudent to leave these 15 days as a cushion to accommodate unforeseen, and possibly unavoidable, delays during the hearing. Further, NEI asserts that there is no basis to allow more time for a decision in Track 2 versus Track 1. If written rebuttal is allowed, however, NEI states that the time given for rebuttal should be reduced from 15 days to 10 days.[13]

NEI notes that the proposed procedures state that the absence of written rebuttal testimony might, in some cases, not allow the presiding officer to gain a complete understanding of the party's positions prior to the oral hearing. However, NEI does not believe that this is a sufficient basis to build in additional time for written rebuttal testimony. Instead, NEI states that even if the Track 2 procedures are selected, the presiding officer possesses sufficiently broad authority to provide for written rebuttal testimony or additional briefing if it is necessary to develop an adequate record.

SNC: In agreement with NEI, SNC prefers the Track 2 procedures, but SNC states that both tracks appropriately provide for early issuance of the scheduling order and simultaneous filings of written initial testimony. SNC also states that even though Track 1 should be eliminated, the presiding officer should explicitly be granted the authority to order rebuttal either as a result of discussions at the prehearing conference or based upon its examination of the written initial testimony. In this latter case, an order directing the filing of rebuttal testimony would be due 5 days after the initial testimony is filed. If rebuttal is provided for in these situations, then SNC states that the deadline for rebuttal should be 7 days after either the initial written testimony or the order directing additional rebuttal, whichever is later.

SNC believes that an advantage of its approach is the elimination of the need for a decision as part of the Commission's process for deciding on the hearing request and issuing procedures. SNC also believes that the presiding officer for the hearing will be in the best position to determine whether rebuttal is necessary. SNC also suggests that providing explicit time periods

[13] In other portions of its comments, and as stated above, NEI recommends that only 7 days be provided for written rebuttal testimony.

for orders directing rebuttal and the subsequent filing of rebuttal will mitigate the possibility for delay accruing from the presiding officer's increased flexibility.

SCE&G: SCE&G prefers that the Track 1 procedures, with written rebuttal, be used in all ITAAC hearings because rebuttal testimony is the only way to ensure that participants have a complete opportunity to respond to new, unexpected issues raised in initial testimony by other participants. SCE&G also states that written rebuttal has the following additional potential benefits: clarifying the evidentiary record; helping the presiding officer reach its decision more expeditiously because the topics raised in initial testimony are more likely to have been fully addressed before the hearing; and clarifying the issues for oral hearing, which should make the hearing shorter and more focused and efficient.

SCE&G asserts that it is not possible to identify good criteria for choosing between Track 1 and Track 2 because it is not possible for the Commission to know ahead of time whether new or unexpected issues will be raised in the initial testimony. In addition, SCE&G claims that having the Commission make a decision between Track 1 and Track 2 adds some uncertainty and unnecessary complexity to the hearing process. While preferring that rebuttal be allowed in all cases, SCE&G believes that the deadline for rebuttal should be reduced from 15 days to 7 days to mitigate the potential for delay. SCE&G also believes that 7 days is appropriate given the narrow scope of rebuttal testimony.

NRC Response: The NRC agrees with SCE&G that written rebuttal has several advantages, namely that it helps clarify the record, helps expedite the oral hearing by clarifying the issues for hearing, and helps expedite the presiding officer's decision by ensuring that contested issues are fully addressed prior to the hearing. The NRC also agrees that written rebuttal is the most effective way for parties to address new, unexpected issues raised in initial testimony by the other parties, although it should be acknowledged that the hearing track without written rebuttal allows the parties to propose questions for their own witnesses as a form of oral rebuttal. The NRC further agrees with SCE&G that requiring the Commission to make a choice of hearing track in each proceeding would add complexity to the Commission's process for designating hearing procedures. As for the time period for filing rebuttal, the NRC believes that 14 days is appropriate, for the reasons given in response to the previous set of comments.

The NRC does not agree with NEI and SNC that the possibility that the presiding officer might direct rebuttal filings or additional briefing at some point during the hearing is a practical substitute for the Track 1 procedures. If the Track 2 procedures were selected, the Commission would select a strict deadline for the initial decision that assumes no rebuttal filings or additional briefing. This strict deadline would be a calendar date, meaning that an additional filing would need to be somehow inserted into an already abbreviated schedule. Also, the practical difficulties would increase after the oral hearing date is set since that is another date that is very difficult to move once set. Thus, while the NRC acknowledges the authority of the presiding officer to provide for additional filings so long as the strict deadline is maintained, the NRC does not believe that this would be a practical substitute for the Track 1 procedures.

The NRC agrees with NEI and SNC that the possible schedule benefits of foregoing written rebuttal should be considered. However, as modified in the final procedures, the Track 1 schedule ordinarily provides for the issuance of the hearing decision 6 days before scheduled fuel load if the notice of intended operation is issued 210 days before scheduled fuel load. While this does not provide significant schedule margin, it does provide time to administratively make the 10 CFR 52.103(g) finding after the initial decision if the NRC staff has determined that the acceptance criteria are met. To the extent that licensees would like additional margin in the

hearing schedule, they can obtain up to 75 days of such additional margin through early submission of the uncompleted ITAAC notifications. In addition, as explained in response to the previous set of comments, the presiding officer can make minor adjustments to Commission-established milestones in the hearing schedule to avoid minor delays from a deadline falling on a weekend or holiday.

The NRC recognizes that the Track 1 schedule might not accommodate issuance of the initial decision by scheduled fuel load in all cases, e.g., if new contentions filed after the deadline are admitted. However, even in such cases, the NRC believes that the benefits of written rebuttal would generally outweigh the minor potential time savings from its elimination. Also, 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.

Having weighed the pros and cons, the NRC has decided to make Track 1 the default evidentiary hearing track. Given the advantages of written rebuttal described above, written rebuttal will be included in most cases. Selecting Track 1 as the default hearing track will simplify the process for designating hearing procedures in each proceeding. Nonetheless, the Commission has the authority to eliminate written rebuttal in individual proceedings. The Commission might make such a change, for example, 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 statements of position.[14] To enhance the Commission's ability to make such a change in a timely manner, the final evidentiary hearing template indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

In summary, the procedures have been modified as follows:

(1) Given the advantages of written rebuttal, the Track 1 procedures will be the default evidentiary hearing track.
(2) Notwithstanding this, the Commission has the authority to eliminate written rebuttal in individual proceedings.
(3) The final evidentiary hearing template indicates the modifications that would need to be made if the Commission decides to exclude written rebuttal.

E. Additional Evidentiary Hearing Tracks

NEI: To provide additional schedule margin, NEI suggests that the ITAAC hearing procedures provide the option of an additional hearing track of shorter duration based on a modified Subpart N approach. NEI believes that the proposed procedures' reliance on a Subpart L-type approach may not represent the most efficient approach for completing all ITAAC hearings. As support for the use of Subpart N-type procedures, NEI cites the statement of considerations (SOC) of the 2007 Part 52 Rule (72 FR at 49451), in which the Commission stated that ITAAC hearings would ordinarily be conducted under Subpart L, but that the Commission could direct the use of

[14] *Contrary to SCE&G's assertion, the Commission believes that it is capable of making such judgments based on an assessment of the admitted contention and the information from the parties' initial filings.*

less formal procedures on a case-specific basis, and that any ITAAC hearing will use informal procedures to the maximum extent practical and permissible under law.

NEI understands the NRC's preference to use familiar and long-established adjudicatory procedures, but NEI asserts that the proposed procedures do not make a compelling case for this choice to the exclusion of other approaches. NEI states that it is not obvious that Subpart L hearing procedures are always best suited to govern a first-of-a-kind, late-stage hearing opportunity that is narrowly focused on whether technical acceptance criteria are satisfied. NEI also asserts that given the objective, scientific and/or fact-based nature of the issues in dispute, formal hearing procedures appear unnecessary and perhaps even counter-productive. Under NEI's proposed alternative, pre-filed testimony would not be permitted, but oral presentations at the oral hearing would be allowed. NEI states that if permitted by the presiding officer, the parties could brief the question of which hearing track procedures should be applied in the hearing request and answers thereto, and that the Commission would then specify, on a case-by-case basis, which hearing format should be used as part of its decision on the hearing request.

NEI further asserts that the NRC's stated rationale for rejecting a Subpart N approach was cursory and did not seem to justify the NRC's decision. NEI claims that the use of a Subpart N-like approach might be appropriate for some ITAAC hearings if the contested issues fall within the ambit of those situations for which Subpart N was intended. Specifically, NEI cites the Commission's explanation that Subpart N was intended to be a fast-track process for quickly resolving issues in cases were contentions are few and not particularly complex, and that Subpart N was developed to permit a quick, relatively informal proceeding where the presiding officer could easily make an oral decision from the bench or in a short time after the oral hearing. However, NEI proposes not to use the model milestones for a Subpart N hearing found in 10 CFR Part 2, Appendix D, Section IV, but instead proposes a more truncated hearing schedule.

NEI's proposed schedule for this additional hearing track is similar in many respects to NEI's proposed modifications to the Track 1 schedule except that certain filings and procedures would be eliminated. Specifically, NEI proposes the following schedule:

- The hearing request would be due 60 days after the notice of intended operation.
- Answers to the hearing request would be due 20 days after the hearing request.
- The Commission's decision on the hearing request would be due 21 days after the answers.
- The prehearing conference would be held within 7 days of the grant of the hearing request.
- The initial scheduling order would be issued within 3 days of the prehearing conference.
- Document disclosures would be due 15 days after the grant of the hearing request.
- Pre-filed testimony, proposed questions, and motions for cross-examination would not be permitted.
- The oral hearing would be held 25 days after the grant of the hearing request.
- Joint transcript corrections would be due within 7 days of the oral hearing.
- Proposed findings of fact and conclusions of law would not be permitted.
- The initial decision would be due 30 days after the oral hearing.

Because the hearing would held 25 days after the decision on the hearing request and the initial decision would be due 30 days thereafter, the schedule contemplates an initial decision 55 days after the decision on the hearing request assuming one day for the hearing.

NEI also suggests that if the NRC deems it infeasible at this time to incorporate an additional expedited hearing track in the final ITAAC hearing procedures, the NRC could, similar to its approach with the first COL uncontested hearings, reassess the usefulness of the procedures after conducting several hearings. At that time, the NRC could possibly offer a modified Subpart N approach as an additional alternative hearing format in appropriate cases going forward.

Westinghouse: Westinghouse encourages NRC to consider NEI's recommendations regarding the use of hearing approaches other than those based on Subpart L, such as a legislative hearing.

SCE&G: To mitigate the potential for delay, SCE&G recommends using a shorter hearing track with Subpart N-type procedures in certain circumstances. Under SCE&G's suggested approach, pre-filed testimony would not be permitted and the parties would directly proceed to the oral hearing. SCE&G asserts that some contentions may be so straightforward that it will be apparent that the use of Subpart N-type procedures would be beneficial and that a Subpart N-type approach could save a month or more on the hearing schedule. SCE&G suggests that the use of the Subpart N-type track (or any other hearing track) should be decided on a contention-by-contention basis. SCE&G further recommends that the procedures should require the parties in their initial filings to address which hearing tracks should be used for hearings on the proposed contentions. SCE&G asserts that, contrary to the position taken in the proposed procedures, 10 CFR 2.309(g) does not prohibit parties from addressing the selection of hearing procedures. Instead, SCE&G understands 10 CFR 2.309(g) to mean that the parties would not address the selection of hearing procedures already in 10 CFR Part 2 because 10 CFR 2.310(j) states that the Commission will designate the procedures to be used.

NRC Response: While the NRC agrees with NEI that the NRC should reassess the ITAAC hearing procedures after they have been used in several hearings, the NRC does not adopt the commenters' suggestions to add other evidentiary hearing tracks. As an initial matter, the proposed procedures provided a number of reasons for choosing a Subpart L approach (and in turn rejecting a Subpart N approach):

- *Subpart L is the most widely used approach in NRC hearings and has demonstrated its effectiveness since implementation in its current form in 2004.*
- *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 parties' positions established, oral questions and responses can be used to quickly and efficiently probe the positions of the parties.*
- *The submission of testimony prior to the oral hearing increases the quality of the oral hearing because it allows 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.*
- *In Subpart L proceedings, pre-filed written testimony and exhibits are often admitted en masse at the beginning of the oral hearing, and the presiding officer's questioning can be completed in a relatively short amount of time.*

- *In the absence of pre-filed written testimony, however, an oral hearing will consume more time because the entirety of the evidentiary record will need to be established sequentially and orally, and the admission of exhibits would be subject to a more cumbersome and time-consuming admission process.*

Proposed ITAAC Hearing Procedures, 79 FR at 21964. In addition, with respect to Subpart N, the proposed procedures stated that the NRC does not have sufficient experience to conclude that the issues to be resolved in an ITAAC hearing will be simple enough to profitably employ the procedures of Subpart N and forego the advantages accruing from a Subpart L approach. Id. at 21965. The proposed procedures also stated that a Subpart N approach did not appear to provide a schedule advantage over a Subpart L approach because the model milestones in 10 CFR Part 2, Appendix B, Section IV for an enforcement hearing under Subpart N contemplate that the time between the granting of the hearing request and an initial decision is 90 days plus the time taken by the oral hearing and the closing of the record. Id. As modified in these final procedures, Track 1 and Track 2 would take less time.[15]

However, NEI and SCE&G respond to this rationale by stating that there may be situations where the contested issues are simple enough to employ a Subpart N-type approach and that a Subpart N-type approach can be modified to take as little as 55 days, thereby providing a schedule advantage over the Track 1 and Track 2 procedures. Given this possibility, NEI and SCE&G believe that a Subpart N approach should at least be one of the available options.

While NEI and SCE&G's position seems attractive at first blush, it does not appear to the NRC that the specific modifications NEI proposes to Subpart N would result in a workable process, as explained below. In addition, to make a Subpart N approach workable would require lengthening the hearing schedule to the point that there would be no schedule advantage over a Subpart L-type approach. For the reasons stated above and in the proposed procedures, the NRC prefers the advantages of a Subpart L-type approach for evidentiary hearings and chooses to employ this approach in the absence of a workable alternative that takes less time. The NRC's view is strengthened upon consideration of the fact that Subpart N has never before been employed. The stability and predictability of an ITAAC hearing—itself a first-of-a-kind endeavor—would not be promoted by using a never-before-employed hearing format.

NEI's proposed modifications do not appear to be workable because they would remove aspects of the Subpart N process that make it possible for the presiding officer to effectively conduct the questioning of the witnesses. Specifically, 10 CFR 2.1404 provides that before an oral hearing under Subpart N, the parties are required to provide a "written summary of the oral and written testimony of each proposed witness" and to propose questions (or question areas) for the witnesses. However, NEI's proposal includes neither of these provisions. Instead, under NEI's proposed approach, the presiding officer would not have access to information regarding the parties' testimony and evidence until the oral hearing. This would not allow the presiding officer a sufficient opportunity to consider the parties' evidence and positions so as to ask all of the questions the presiding officer would need to issue the initial decision. While NEI's proposal

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[15] Although the NRC has decided to make Track 1 the default evidentiary hearing track, the Track 2 schedule is relevant to this discussion because the Commission has the authority to select Track 2 in individual proceedings. NEI and SCE&G have suggested using a Subpart N approach in straightforward cases, and any case for which the Commission could justify eliminating pre-filed testimony in its entirety would be a case for which the Commission could justify using the Track 2 procedures.

could be modified to add back provisions on written summaries of the testimony and proposed questions (or question areas), the time needed for the parties to prepare this information and for the presiding officer to consider it before the hearing would seem to warrant lengthening the hearing schedule. However, lengthening NEI's proposed 55-day hearing schedule by even a minor amount would mean that a Subpart N-type approach would no longer provide a schedule advantage over a Subpart L-type approach because the Track 2 hearing schedule can take as few as 70 days.[16] In addition, the NRC believes it is more efficient for the parties to directly provide written testimony that can be entered into evidence rather than a written summary of future oral and written testimony. Therefore, the NRC declines to adopt the commenters' suggestion that the ITAAC hearing procedures establish a Subpart N-type hearing track.

The NRC also does not agree with Westinghouse's suggestion to include a legislative hearing track in the ITAAC hearing procedures. Westinghouse did not provide any supporting rationale for use of legislative hearing procedures. In addition, the NRC has stated that while legislative hearings are "suited to the development of 'legislative facts,' viz., general facts which help a decisionmaker decide questions of policy and discretion," legislative hearings:

> *are not well suited to resolving disputes of fact relating to the occurrence of a past event, where the credibility of an eyewitness may reasonably be expected to be at issue, or where the motive or intent of the party or eyewitness is at issue. Nor does the legislative hearing model appear to offer any real advantages over other informal or formal hearing procedures in resolving matters of law. Moreover, the Commission has little experience in using legislative hearing procedures in contested proceedings, making it difficult to determine what practical problems would arise if contested proceedings were conducted under a legislative hearing model.*

Changes to Adjudicatory Process, 69 FR 2182, 2192 (Jan. 14, 2004) (final rule). Under 10 CFR Part 52, all issues of policy and discretion are decided by the time the COL is issued, and compliance with the ITAAC is purely a matter of meeting narrow, technical acceptance criteria. Because an ITAAC hearing will involve a focused inquiry regarding detailed technical questions, the NRC does not believe that the legislative hearing format is tailored to resolve these questions.

Finally, the NRC disagrees with SCE&G's position that 10 CFR 2.309(g) does not prohibit hearing requests and answers from addressing the selection of hearing procedures. SCE&G states that it understands 10 CFR 2.309(g) only to prohibit parties from addressing the selection of hearing procedures that already exist in 10 CFR Part 2, because 10 CFR 2.310(j) states that the Commission would designate the procedures to be used. However, 10 CFR 2.309(g) does not use qualified language. Instead, it states: "A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310." This 52.103 exclusion was added to the NRC's regulations as part of the 2007 Part 52 Rule. In discussing this provision, the SOCs also use clear, unqualified language: "Under the revised paragraph (g), a request for

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[16] Also, NEI's proposed 55-day schedule assumes that the oral hearing will take only one day even though all testimony will need to be delivered orally and all exhibits will need to be introduced at the oral hearing. As explained above, a Subpart L approach will result in a shorter oral hearing, all other things being equal, and thereby make it more likely that the oral hearing will take only one day.

hearing under § 52.103 shall not address the hearing procedures to be utilized." 2007 Part 52 Rule, 72 FR at 49414. Because answers to hearing requests are intended to address matters raised in the hearing request, this prohibition applies by extension to the answers. Given this, NEI and SCE&G's recommendation regarding the parties providing input to the selection of hearing tracks in an ITAAC hearing does not comply with 10 CFR 2.309(g). Aside from this, the NRC believes that the Commission will be able to select appropriate procedures without specific input from the parties on this matter, and the NRC has considered stakeholder input during the finalization of these general procedures for ITAAC hearings. However, the prohibition in 10 CFR 2.309(g) does not apply to hearing requests from the licensee because such hearing requests are not subject to 10 CFR 2.309 and because the generic procedures did not address the procedures for hearings requested by the licensee.

No changes were made to the procedures in response to these comments, except that some of the rationale for hearing format selection that is discussed above has been added to the final procedures. The procedures have also been clarified to provide that the prohibition in 10 CFR 2.309(g) does not apply to hearing requests from the licensee because such hearing requests are not subject to 10 CFR 2.309 and because the generic procedures did not address the procedures for hearings requested by the licensee.

F. APA Section 554 Provision on Eliminating the Need for a Hearing

NEI: NEI recommends that the final ITAAC hearing procedures address the application of the Administrative Procedure Act (APA) provision at Title 5 of the United States Code (5 U.S.C.) § 554(a)(3) to eliminate the need for an ITAAC hearing where the agency decision on the contention rests "solely on inspections, tests, or elections." NEI points out that potential reliance on this provision was included in the 1989 rule originally promulgating 10 CFR Part 52[17] and that the Commission has consistently stated since 1989 that it is legally possible to apply this provision to avoid a § 52.103 hearing on whether a specific ITAAC (or portion of an ITAAC) has been satisfied.

NEI acknowledges that in the 1989 Part 52 Rule the Commission stated (54 FR at 15381):

> However, not every finding the Commission must make before operation begins under a combined license will necessarily always be based on wholly self-implementing acceptance criteria and therefore encompassed within the APA exception. The Commission does not believe that it is prudent to decide now, before the Commission has even once gone through the process of judging whether a plant built under a combined license is ready to operate, that every finding the Commission will have to make at that point will be cut-and-dried—proceeding according to highly detailed "objective criteria" entailing little judgment and discretion in their application, and not involving questions of "credibility, conflicts, and sufficiency", questions which the Court in UCS v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), held were marks of issues which should be litigated at least under the facts of that case. . . . The final rule does not attempt to say in advance what issues might fall under that exception.

[17] Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 FR 15372 (Apr. 18, 1989) (final rule) (1989 Part 52 Rule).

NEI also cites a comment response from the Commission documented in the 2007 Part 52 Rule in which the NRC said that there are many possible approaches that might be used to determine whether an ITAAC falls within the APA exception. 2007 Part 52 Rule Comment Summary Report at 75. However, the Commission declined to include a specific process for invoking the exception in the 2007 rulemaking because (1) the NRC had no experience with ITAAC hearings, (2) no specific process was described in the proposed rules, and (3) the need for such a process was not imminent. *Id.*

NEI recommends that the ITAAC hearing procedures explicitly recognize the APA exception and provide guidance on how it should be applied because invoking this exception could save time and resources. NEI suggests that the procedures allow the licensee or NRC staff to request the use of this APA exception in their answers to hearing requests. Such a request would need to provide a basis for concluding that the particular ITAAC involves detailed objective criteria entailing little judgment and discretion in their application, and does not involve questions of credibility, conflicts, and sufficiency. NEI also recommends that the other parties be allowed to file a prompt response. As an alternative approach, NEI says all hearing participants, including petitioners, could be required to affirmatively address in their initial filings the application of this exception. Further responses would only be allowed if authorized by the Commission. NEI also suggests that the Commission could raise the APA exception sua sponte.

Westinghouse: Westinghouse endorses NEI's recommendations on use of the APA Section 554 exception.

SCE&G: SCE&G's perspective on the legality and desirability of using the APA Section 554 exception mirrors the position of NEI. In agreement with NEI, SCE&G also recommends that the ITAAC hearing procedures explicitly acknowledge the APA exception and provide guidance on its use. Without outlining a specific process, SCE&G recommends that the hearing procedures allow the participants to argue that the APA exception does or does not apply to a particular ITAAC, with the Commission ruling on the question as part of its decision on the hearing request. In agreement with NEI, SCE&G suggests that those advocating the application of APA Section 554 to an ITAAC provide the basis for concluding that the ITAAC involves highly detailed objective criteria entailing little judgment and discretion in their application (i.e., wholly self-implementing acceptance criteria), and does not involve questions of credibility, conflicts, and sufficiency.

NRC Response: The NRC declines to adopt the suggestion made in the comments. The NRC has never formally examined the ITAAC to determine whether any ITAAC would satisfy the case law requirements for invoking the APA exception in 5 U.S.C. § 554(a)(3) to avoid holding a hearing where the "decision[] rest[s] solely on inspections, tests, or elections." The NRC has also never determined that there are any ITAAC that are subject to this exception. While it may be legally possible in the abstract to apply the APA Section 554 exception to some ITAAC in an ITAAC hearing (depending on the wording of the ITAAC and other relevant circumstances), the commenters' suggested approach for applying the exception is not practical, as explained below. Also, the NRC has not identified at this time a practical alternative to the commenters' suggested approach for applying the APA exception.

The comments suggest applying a standard for invoking the APA Section 554 exception that is derived from Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) (hereinafter "UCS"). In UCS, the court concluded that the exception did not apply to evaluating the results of emergency planning exercises just prior to reactor operation. Id. at 1450. In discussing the

basis for its conclusion, the court in UCS stated that "[t]here is no indication [the APA Section 554 exception] was meant to apply to decisions that are made by weighing evidence tendered by third parties." Id. at 1449-50. The court further stated that where "questions of credibility, conflicts, and sufficiency surface[,] . . . the ordinary reasons for requiring a hearing come into the picture." Id. at 1450. The court also approvingly cited legislative history stating that the exception is intended to obviate the holding of a hearing that "'is not desired or utilized . . . because it gives no added protection.'" Id. at 1449 n.23 (quoting Attorney General's Committee on Administrative Procedure, Final Report to the President and to the Congress 37 (1941), reprinted in United States Dep't of Justice, Attorney General's Manual on the APA 45 (1947)). As the Commission stated in the 1989 Part 52 Rule (54 FR at 15381), the APA exception is appropriate for "cut-and-dried" affairs.

Given the case law standard for applying the APA exception, it would not be practical to adopt the commenters' suggestion and make the decision on the APA exception as part of the NRC's decision on the hearing request. If the hearing request is not granted, there is no need to determine whether the APA exception applies. On the other hand, if the Commission determines that the hearing request requirements have been met, then the Commission will have determined that the petitioner made the prima facie showing. In this circumstance, the petitioner will have, at the very least, raised "questions of . . . sufficiency" (and possibly "questions of credibility[and] conflicts"), which the UCS court said ordinarily require a hearing. UCS, 735 F.2d at 1450. Thus, it would be difficult for the Commission to determine (1) that the ultimate determination on the contested acceptance criteria is a "cut-and-dried" affair (in the words the Commission used in the 1989 Part 52 Rule) not requiring a hearing, and (2) that the contested acceptance criteria are, in fact, met, notwithstanding the petitioner's prima facie showing and notwithstanding the fact that the petitioner was not given an opportunity to address the apparent deficiencies in the petitioner's prima facie showing that the NRC must have later perceived in order to determine that the petitioner was incorrect. The NRC does acknowledge that it might be legally 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 NRC believes that a licensee should generally have an opportunity to contest the petitioner's claims in a hearing.[18]

Although not suggested by the commenters, the NRC also considered the possibility of applying the APA exception prior to the hearing by individually considering all of the ITAAC (875 ITAAC for the Vogtle Unit 3 license) and all of the possible challenges that might be made to the completion of the ITAAC and then determine the particular ITAAC that would fall within the exception. However, the NRC 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.

The NRC is not stating that there are no ITAAC (or situations) for which the APA exception could be invoked, but for the above reasons, the NRC declines to adopt the suggestion made in the comments. The final procedures have been modified to reflect this decision.

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[18] Of course, if the licensee were to concede the petitioner's claims in its answer to the hearing request, then there would be no reason to hold a hearing. However, in that case, the decision not to hold a hearing would be based on an uncontested decision entering judgment in favor of the petitioner instead of being based on the APA Section 554 exception.

G. Contraction of Fuel Load Schedule

NEI: With regard to the schedule for fuel load, NEI disagrees with the statement in the proposed procedures that a licensee cannot load fuel earlier than its previously predicted fuel load date. Proposed ITAAC Hearing Procedures, 79 FR at 21963 n.10 (stating that "a contraction of the initial fuel load schedule after the issuance of the notice of intended operation is contrary to the intent of the AEA"). NEI states that this conclusion is not required by the AEA or NRC regulations, and should be deleted. NEI believes that a licensee should not be delayed in loading fuel merely because it has improved its schedule, provided all other requirements have been met. NEI also states that delays in fuel load would have substantial economic costs for a licensee.

SCE&G: SCE&G asserts that the proposed procedures incorrectly state that a contraction of the fuel load schedule after issuance of the notice of intended operation is contrary to the intent of the AEA. SCE&G suggests that this statement be deleted or clarified because the AEA does not impose any requirements for the fuel load schedule or updates to this schedule, much less state that any contraction of this schedule is not permitted. Although the AEA provides for other deadlines that are linked to the date of scheduled fuel load, SCE&G claims that there is no indication that this date is unmovable. SCE&G also claims that the fact that the AEA refers to this date as a scheduled date or an anticipated date indicates that it should be expected to change. In addition, SCE&G believes that expected movement in the anticipated date is indicated by 10 CFR 52.103(a), which requires updates to the scheduled fuel load date. SCE&G further asserts that there is no indication that the schedule can only be extended, but not contracted.

SCE&G states that licensees will attempt to provide the best available scheduled date for initial fuel load, but it will not be possible to perfectly predict that date 270 days before it happens. If licensees are able to satisfy all requirements prior to the scheduled date of fuel load, then SCE&G believes that they should be able to load fuel early. According to SCE&G, waiting would impose substantial economic costs on licensees and is unnecessary to protect the rights of intervenors. If a hearing is granted and cannot be completed before fuel load, then SCE&G states that interim operation should be allowed if the requirements of 10 CFR 52.103(c) are met.

NRC Response: The NRC does not adopt the suggestion made in the comments but will clarify the NRC's intent in the final procedures. The NRC did not intend to prevent a licensee from operating if all of the requirements for operation are met. So, in the absence of a hearing or if the hearing issues are resolved early in favor of the licensee, the licensee will be allowed to operate if and after the 10 CFR 52.103(g) finding is made. If a hearing is held and has not been completed, but the NRC staff has made the 52.103(g) finding and the Commission has made the adequate protection determination for interim operation, then the licensee will be allowed to enter into interim operation.

The intent of the statement in the proposed procedures was to indicate that, for the purposes of meeting the directive in AEA § 189a.(1)(B)(v) for the NRC to timely complete the hearing, the "anticipated date for initial loading of fuel into the reactor" referenced in AEA § 189a.(1)(B)(v) is established prior to publication of the notice of intended operation and cannot thereafter be moved up. The basis for this interpretation is that § 189a.(1)(B) of the AEA contemplates that the hearing process will be triggered, and the schedule will in part be determined, by publication of the notice of intended operation, the timing of which is based on the fuel load schedule that the licensee provides to the NRC before the notice of intended operation. Therefore, for

purposes of compliance with § 189a.(1)(B)(v), it makes sense that the "anticipated date for initial loading of fuel into the reactor" be established prior to publishing the notice of intended operation and that it cannot thereafter be moved up. If this date could be moved up, then the NRC could be put in the untenable position of having a constantly moving target for completing the hearing. The NRC does not believe that Congress intended this, or that trying to meet such a constantly moving target would be consistent with a fair and orderly hearing process. Having said this, the licensee can, consistent with 10 CFR 52.103(a), move up its scheduled fuel load date after the notice of intended operation is published, but such a contraction in the licensee's fuel load schedule will have no effect on the § 189a.(1)(B)(v) "anticipated date for initial loading of fuel into the reactor" that the NRC's evidentiary hearing schedule will be working toward. As a practical matter, however, the NRC would consider such a contraction in the licensee's schedule as part of its process for making the 10 CFR 52.103(g) finding and the adequate protection determination for interim operation.

The procedures have been modified to include the above clarification.

6. Conduct of ITAAC Hearings

A. Presiding Officer for the Hearing

NEI: NEI takes no position on whether the Commission, an ASLB, or a single legal judge should serve as the presiding officer for evidentiary hearings on ITAAC, but NEI recommends that the final ITAAC hearing procedures either state the Commission's preference for presiding officer or provide criteria in the final ITAAC hearing procedures explaining how the Commission will make this decision on a case-specific basis. If the Commission provides criteria on the case-specific choice of a presiding officer, NEI suggests that a large number of contentions might appropriately be handled by multiple ASLBs while the Commission or a single legal judge might preside over a hearing on legal contentions.

SNC: SNC suggests that the final procedures designate the presiding officer for evidentiary hearings. SNC believes this is desirable because the time needed to decide the presiding officer for an evidentiary hearing on a case-specific basis could be a source of delay. SNC does not state a preference for who the presiding officer should be, but recommends that the Commission consider its experience with the COL mandatory hearings, as well as recent ASLB proceedings. To the extent the Commission wishes to choose a presiding officer on a case-specific basis, SNC recommends that the final procedures identify the criteria that will be used to make this choice, e.g., the number of contentions.

SCE&G: SCE&G's perspective and recommendations largely mirror SNC's, but SCE&G further states that an additional benefit from identifying the presiding officer now is that it would allow that presiding officer, e.g., an ASLB, to follow the proceeding well before a ruling on the hearing request so that it will be immediately prepared to commence hearing work should the hearing request be granted.

NRC Response: The NRC has decided that for evidentiary hearings (i.e., hearings involving testimony), an ASLB or a single legal judge, assisted as appropriate by technical advisors, will preside over the hearing. The NRC agrees with the commenters that it is appropriate to make a decision on this question now, as part of the general procedures, because the factors relevant to the decision are generic in nature. The NRC has decided that an ASLB or a single legal judge should preside over the hearing because such presiding officers can efficiently conduct evidentiary hearings. In addition, this choice promotes an appropriate division of responsibilities

between the Commission and administrative judges because the Commission has tasked itself with (1) issuing decisions on initial hearing requests and on hearing requests, intervention petitions, new contentions, and claims of incompleteness filed after the deadline; (2) designating hearing procedures; and (3) making the adequate protection determination for interim operation.

The case-specific choice on whether to employ an ASLB or a single legal judge for an evidentiary hearing will ordinarily be made by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel after the Commission grants the hearing request.[19] To ensure that the selected presiding officer can immediately engage the proceeding in a meaningful manner, the Chief Administrative Judge will be expected to identify administrative judges who might be selected to serve as the presiding officer at a reasonable period of time prior to a decision on the hearing request. The Commission expects the selected judges to familiarize themselves with the ITAAC hearing procedures and the parties' pleadings before a decision on the hearing request so that they can perform meaningful work immediately after a decision on the hearing request. In addition, the NRC agrees with NEI that a large number of contentions might be handled by multiple presiding officers.

For hearings on legal contentions, the NRC believes that the choice of presiding officer will generally depend on case-specific factors. Because the Commission might choose to serve as the presiding officer or might delegate that function, the final procedures retain discretion on the part of the Commission. The NRC does not believe that it is necessary to identify the criteria for making this choice ahead of time, but the NRC does believe that it can conclude, as a general matter, that a single legal judge should be the presiding officer if the Commission chooses not to be the presiding officer for a hearing on legal contentions. When only legal issues are involved, the considerations in favor of employing a panel are less weighty given that most ASLBs in other proceedings include only one legal judge, with the other two judges being technical experts on factual matters. Also, a single judge may be able to reach and issue a decision more quickly than a panel of judges. Therefore, the final procedures provide that if the Commission chooses not to be the presiding officer for a hearing on a legal contention, the presiding officer will be a single legal judge, assisted as appropriate by technical advisors.

The procedures have been modified to include the decisions described above on the choice of presiding officer for evidentiary hearings and hearings on legal contentions.

B. Pre-Clearance Process for Access to SGI

NEI: NEI supports the use of the pre-clearance background check process for access to SGI set forth in the proposed procedures, as well as the statement that the NRC will not delay its actions in completing the hearing or making the 10 CFR 52.103(g) finding if this pre-clearance process is not used.

SNC: SNC supports the pre-clearance SGI background check process set forth in the proposed procedures as a means of avoiding delay. However, SNC recommends that the final procedures include a requirement that the licensee and all parties seeking pre-clearance consult regarding the provisions for any future protective order and related nondisclosure obligations. SNC notes that the SUNSI-SGI Access Order does not address information possessed solely

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[19] However, as stated in the proposed and final procedures, the Commission reserves the option of making this choice on a case-specific basis.

by the licensee or applicant and suggests that consultation between potential petitioners and the licensee regarding access to such information would avoid potential future delays.

SCE&G: SCE&G also supports the pre-clearance SGI background check process but recommends that the plant-specific pre-clearance notice be issued earlier than is stated in the proposed procedures given the possibility of early publication of the notice of intended operation. Specifically, SCE&G recommends that the pre-clearance notice be published 480 days before scheduled fuel load.

NRC Response: With respect to the pre-clearance process for access to SGI, the NRC does not adopt SNC's suggestion that consultation be required among the potential petitioner, the licensee, and the NRC staff. The pre-clearance process is solely directed at completing an SGI background check and does not encompass the consideration of any specific information for which access might be requested. It would also be premature to require the potential petitioner to identify such information because the pre-clearance process would be announced many months prior to the notice of intended operation, which is before the uncompleted ITAAC notifications and many ITAAC closure notifications will have been submitted. The NRC also notes that it is setting up a consultation process for claims of incompleteness that would encompass access to SUNSI or SGI in the possession of the licensee but not in the possession of the NRC.

With respect to publication of the pre-clearance notice for SGI background checks, the NRC has decided to publish this notice 420 days before scheduled fuel load. Given current information on the time for conducting SGI background checks, the NRC believes that publishing the pre-clearance notice 420 days before scheduled fuel load should provide enough time, even in more complicated cases, to complete the background check before the notice of intended operation if the required forms and fees are submitted within 20 days of the pre-clearance notice.[20] This should be the case even if the notice of intended operation is published 285 days before scheduled fuel load, which is the earliest date the NRC might publish the notice of intended operation. Consistent with this discussion, the pre-clearance notice will state that the required background check forms and fee should be submitted within 20 days of the pre-clearance notice. Such forms and fee may be submitted after this date, but the pre-clearance notice will state that if any delays result from this later submission, then the NRC will not delay its actions in completing the hearing or making the 52.103(g) finding.

NEI supports the statement in the proposed procedures that the NRC will not delay its actions in completing the hearing or making the 10 CFR 52.103(g) finding if this pre-clearance process is not used. However, this statement could be taken to mean that the NRC might delay the 10 CFR 52.103(g) finding or the hearing process if the pre-clearance process is used. Such delay would not seem to be consistent with the statutory objectives for expeditiously completing the ITAAC hearing and preventing the hearing from unnecessarily holding up plant operation. Therefore, this statement is being revised as set forth in the next paragraph.

Given the above discussion, the procedures have been modified to provide that the pre-clearance notice for SGI background checks will be published 420 days before scheduled

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[20] Because the pre-clearance notice will be the first indication to the public that the ITAAC hearing process for a reactor is about to begin, 20 days seems a reasonable period for the submission of the required background check forms and fee.

fuel load. This "pre-clearance" notice will state that the required background check forms and fee should be submitted within 20 days of the notice to allow enough time for the completion of the background check prior to the publication of the notice of intended operation. In addition, the final procedures will include the following statement:

> *This "pre-clearance notice" will also inform potential parties that the NRC will not delay its actions in completing the hearing or making the 52.103(g) finding because of delays from background checks for persons seeking access to SGI. In other words, members of the public will have to take the proceeding as they find it if they ultimately obtain access to SGI for contention formulation. This is necessitated by the plain language of the AEA, which directs the Commission to complete the hearing to the maximum possible extent by scheduled fuel load. The pre-clearance process is designed to prevent the SGI background check process from becoming a barrier to timely public participation in the hearing process. As stated in the SUNSI–SGI Access Procedures (Attachment 1, p. 11), "given the strict timelines for submission of and rulings on the admissibility of contentions (including security-related contentions) . . . potential parties should not expect additional flexibility in those established time periods if they decide not to exercise the pre-clearance option."*

C. Process for Submitting SUNSI-SGI Access Requests

NEI: NEI supports the NRC's modifications to the existing SUNSI-SGI Access Order template to expedite the proceeding, including the required use of email for the initial request for access to SUNSI or SGI. However, NEI asserts that allowing an intervenor not to submit its request by email for reasons of impracticality could result in delay because of arguments on whether email submission was in fact practical. As an alternative, NEI suggests that SUNSI-SGI access requests be made by either email or overnight mail.

NRC Response: The NRC does not adopt NEI's suggestion regarding the methods for submitting initial SUNSI-SGI access requests to the NRC. Email submission is significantly more convenient than submission by hard copy, so hard copy submission should only be made when email submission is impractical. Also, the NRC disagrees with NEI that delay might be caused by arguments over whether email submission is impractical. If a requestor believes that email submission is impractical, it must still submit its request by overnight mail on the date that the request is due. In addition, if a request is timely submitted by overnight mail, the NRC does not intend to reject a submission based on arguments over whether email submission was impractical.

No changes were made to the procedures as a result of this comment.

D. Development of a Protective Order Template for Access to SUNSI or SGI

SNC: To avoid delay, SNC suggests that the NRC develop a generic protective order for use in ITAAC hearings.

SCE&G: SCE&G recommends that a protective order template be developed for ITAAC hearings to ensure quick implementation.

NEI (September 22, 2014 Public Meeting Comments): For cases in which access to sensitive information is appropriate, NEI believes that a standard protective order template would be very helpful. (Transcript at 55-56).

SCE&G (September 22, 2014 Public Meeting Comments): SCE&G believes that a model protective order could facilitate coordination on access to SUNSI. (Transcript at 60).

NEI (October 15, 2014 Written Comments at 8): NEI supports the development of a standard template for protective orders that could be issued promptly should SUNSI be disclosed through the process for consultation on claims of incompleteness.

NRC Response: The NRC adopts the commenters' suggestion regarding the development of generic protective order templates for access to SUNSI and SGI. The NRC intends to do this in a public process allowing stakeholder feedback, separate from the issuance of these final ITAAC hearing procedures.

The final procedures will be modified to reflect the use of the generic protective order templates that will be developed by the NRC.

E. SUNSI-SGI Access Requests After the Initial Deadline

NEI: NEI claims that the required showing of "good cause" for SUNSI-SGI requests after the deadline is useful but not sufficiently stringent. However, NEI does not suggest an alternative standard.

SCE&G: SCE&G recommends barring any requests for access to SUNSI or SGI after the deadline because of the potential for delay from such requests. SCE&G asserts that the need for late access to SUNSI or SGI unrelated to disclosure obligations on admitted contentions should not exist.

NRC Response: The NRC does not adopt NEI's suggestion to make the "good cause" standard for SUNSI-SGI requests after the original deadline more stringent. NEI does not suggest any specific alternative standard, and the NRC believes that the standard in the procedures is appropriate and consistent with the standards for filings after the deadline in analogous situations (e.g., motions for leave to file new or amended contentions after the original deadline). In addition, the NRC does not adopt SCE&G's suggestion of prohibiting SUNSI-SGI access requests after the original deadline. While such requests might lead to delay in some cases, the NRC is allowing for such requests in the interests of fairness. Also, the NRC does not agree with SCE&G that it is impossible for the need for SUNSI or SGI to arise after the original deadline. It is possible for new information after the deadline to give rise to a new or amended contention, and it is possible that this new information (or a portion thereof) might be SUNSI or SGI. In any event, if the petitioner does not show "good cause" for its request after the original deadline, the request will be denied.

No changes were made to the procedures as a result of these comments.

F. Presiding Officer for Review of SUNSI-SGI Access Determinations and Related Matters

OPTIONS FOR COMMENT: In the proposed procedures, the NRC requested comment on whether the Commission or an ASLB (or single legal judge) should be the presiding officer for review of SUNSI-SGI access determinations and for protective orders and other related matters

under the SUNSI-SGI Access Order. See Draft Template A, at 44 nn.23-24, 45-46 (ADAMS Accession No. ML14097A460). For an admitted party seeking access to SUNSI or SGI relevant to the admitted contentions, the proposed procedures provided that the 10 CFR 2.336 disclosures process would be used in lieu of the SUNSI-SGI Access Order, and that any disputes among the parties over access to SUNSI would be resolved by the presiding officer, and any disputes over access to SGI would be resolved in accordance with 10 CFR 2.336(f). See Draft Template B, at 17 (ADAMS Accession No. ML14097A468).

NEI: NEI recommends that the presiding officer responsible for rulings on requests for review of NRC staff determinations on access to SUNSI or SGI be the presiding officer responsible for the proceeding at the time of the request for review. NEI states that before a ruling on the hearing request, this would be the Commission, and thereafter the presiding officer for review of SUNSI-SGI access determinations would be the presiding officer of the evidentiary hearing. NEI suggests that this point be clarified in the final ITAAC hearing procedures. NEI believes that this approach will be efficient because the presiding officer for the information access dispute will be the most familiar with the current status of the proceeding. NEI recommends that this same designation of responsibility also apply to issues concerning protective order and non-disclosure agreements.

SNC and SCE&G: For the same reasons, SNC and SCE&G make the same recommendations as NEI.

NRC Response: The NRC disagrees with some of the assumptions underlying the recommendations made in the comments. For example, while the Commission is the presiding officer for rulings on the initial hearing request, SUNSI-SGI access requests should ordinarily be submitted 10 days after the notice of intended operation, well before the submission of the hearing request or any other filing. Therefore, the NRC does not believe that the Commission will be more familiar with the current status of the proceeding than an administrative judge. The Commission believes that 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. Therefore, the final hearing procedures provide that before a ruling on the hearing request, challenges to NRC staff determinations on SUNSI-SGI access are to be filed with the Chief Administrative Judge, who will assign a single legal judge to rule on the challenge. If the challenge relates to an adverse determination by the NRC Office of Administration on trustworthiness and reliability for access to SGI, then consistent with 10 CFR 2.336(f)(1)(iv), neither the single legal judge chosen to rule on such challenges nor any technical advisors supporting a ruling on the challenge can serve as the presiding officer for the proceeding.[21]

After a ruling on the hearing request, requests for access to SUNSI or SGI can arise in two possible circumstances: (1) a request under the SUNSI-SGI Access Order for information not relevant to the admitted contentions but potentially needed to proffer a new contention, or (2) a motion to compel access to SUNSI or SGI made as part of the mandatory disclosures process. The NRC believes that in the first case, neither the Commission nor the presiding officer for any

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[21] *This restriction is intended to prevent the possible appearance that a presiding officer's ruling on the merits of a contention, for example, might have been improperly influenced by access to personal information about a person requesting access to SGI. See Protection of Safeguards Information, 73 FR 63546, 63550 (Oct. 24, 2008) (final rule).*

admitted contentions will be in a superior position to rule on challenges to NRC staff determinations on access to SUNSI or SGI. Therefore, the same process applicable before the ruling on the hearing request will be applicable afterward. For motions to compel made as part of mandatory disclosures, the NRC agrees that the presiding officer for the admitted contention is in the best position to rule on the motion; however, consistent with 10 CFR 2.336(f)(1)(iv), a separate single legal judge will rule on challenges to adverse Office of Administration determinations on trustworthiness and reliability.

With respect to the presiding officer for issuance of protective orders and other related issues, the NRC agrees with the commenters that this should be the same as the presiding officer selected to rule on any access disputes. However, in cases where there is no access dispute but a presiding officer is needed for protective orders or other related matters, (1) the presiding officer for the admitted contention will be the presiding officer for such matters when the SUNSI or SGI is being provided as part of mandatory disclosures, and (2) the Chief Administrative Judge will choose a presiding officer for protective order matters when the SUNSI or SGI is being provided under the SUNSI-SGI Access Order.

In summary, the procedures have been modified to provide:

- *Challenges to NRC staff determinations on SUNSI-SGI access under the SUNSI-SGI Access Order are to be filed with the Chief Administrative Judge, who will assign a single legal judge (assisted as appropriate by technical advisors) to rule on the challenge. If the challenge relates to an adverse determination by the NRC Office of Administration on trustworthiness and reliability for access to SGI, then consistent with 10 CFR 2.336(f)(1)(iv), neither the single legal judge chosen to rule on such challenges nor any technical advisors supporting a ruling on the challenge can serve as the presiding officer for the proceeding.*
- *A motion to compel access to SUNSI or SGI made as part of the mandatory disclosures process will be heard by the presiding officer of the proceeding, except that, consistent with 10 CFR 2.336(f)(1)(iv), a separate single legal judge (assisted as appropriate by technical advisors) will rule on challenges to adverse Office of Administration determinations on trustworthiness and reliability.*
- *In cases where there is a dispute over access to SUNSI or SGI that was resolved by a presiding officer, the presiding officer for the issuance of protective orders and other related matters will be the same as the presiding officer that heard the dispute over access.*
- *In cases where there is no access dispute but a presiding officer is needed for protective orders or other related matters, (1) the presiding officer for the admitted contention will be the presiding officer for such matters when the SUNSI or SGI is being provided as part of mandatory disclosures, and (2) the Chief Administrative Judge will choose a presiding officer for such matters when the SUNSI or SGI is being provided under the SUNSI-SGI Access Order.*

G. Mandatory Disclosures

NEI: NEI disagrees with making "relevancy to the admitted contentions" the standard for mandatory disclosures. NEI believes this standard to be too broad because of the narrow purpose of an ITAAC hearing and the need to streamline and expedite the proceeding. As an alternative, NEI suggests that disclosures be limited to documents upon which a party intends to rely, and to explicitly exclude from disclosure documents such as drafts, emails, data

compilations (to the extent they are not part of the ITAAC closure package), and other categories of documents that NEI asserts may have limited probative value. NEI also recommends that the case-specific orders identify the documents each party should disclose, and NEI makes the following specific recommendations:

- The licensee should be required to disclose the ITAAC completion package for the contested ITAAC and documents directly referenced therein.
- The NRC staff should disclose inspections reports and records for the contested ITAAC.
- The intervenor should disclose all claims, witness statements, expert reports, or other analyses that relate to the ITAAC subject to the hearing.

NEI also recommends that discovery updates not be required or that the obligation should terminate upon the close of the hearing. NEI also suggests that if the nature of the admitted contention warrants additional discovery, the Commission could provide for such additional discovery in the decision admitting the contention.

SCE&G: SCE&G agrees with NEI that the mandatory disclosure provisions are too broad. SCE&G suggests that disclosures not include drafts, emails, notes, privileged materials, news articles, and other such documents that SCE&G asserts have limited or no probative value. SCE&G makes the same recommendations regarding disclosure updates and the categories of documents subject to disclosure as are made by NEI.

NRC Response: The NRC does not adopt NEI and SCE&G's suggestion to have a narrower scope for mandatory disclosures than "relevancy to the admitted contentions." If information is relevant to the admitted contentions, fairness dictates that the other parties be apprised of that information unless it is privileged. The NRC also does not believe a relevancy standard will be broad in scope because the ITAAC themselves are narrowly focused, and the required prima facie showing will serve to further narrow the issues that are the subject of the hearing. NEI's alternative standard of "documents upon which the party intends to rely" would allow a party to withhold information that is adverse to that party's case, which would result in unfairness and potentially an inaccurate decision from the presiding officer.

The NRC also does not adopt NEI and SCE&G's suggestion to exclude wholesale many categories of documents. If an email, data compilation, or other information is relevant to the admitted contention, it should be disclosed unless the parties have agreed not to disclose such documents. In some cases, such documents might have significant probative value. The NRC acknowledges that in many recent proceedings, the parties have agreed to exclude drafts from the mandatory disclosures. The NRC has no objection to such limitations if agreed to by the parties, and these issues should be discussed at the prehearing conference. However, the NRC does not believe it is wise to impose such limitations on a generic basis. In addition, the NRC does not agree to NEI's suggestion that a party's mandatory disclosure obligations be limited to documents from a particular source (i.e., the licensee's ITAAC closure package). If such a limitation were imposed, the party could evade having to turn over a relevant—potentially highly relevant and significant—document based solely on where the document was filed or how it was labeled.

With respect to privileged material, the NRC recognizes that SGI, security-related SUNSI, and proprietary information could have some bearing on contested issues and that access might be appropriate in some circumstances pursuant to a protective order. On the other hand, other types of privileged information are much more unlikely to have a bearing on contested issues, particularly given the narrow technical nature of ITAAC. Therefore, as a default matter, the final

procedures are providing that privilege logs will only need to identify SGI, security-related SUNSI, and proprietary information. However, the presiding officer may direct otherwise for a case-specific reason, and the parties may jointly agree to change the scope of the privilege log requirement. Given the abbreviated hearing schedule, the NRC will not impose burdensome requirements for privilege logs; rather, privilege logs will be sufficient if they specifically identify each document being withheld (including the date, title, and a brief description of the document) and the basis for withholding (e.g., "contains SGI").

The NRC does not adopt the commenters' suggestion to eliminate disclosure updates. If relevant information is newly uncovered, then it should be disclosed, while if no relevant information is newly uncovered, a simple notification to this effect is all that is required. In the alternative, the commenters suggest that disclosure updates terminate upon the close of the hearing. The NRC has no objection to this on a case-specific basis if the presiding officer agrees with this suggestion. However, the final generic procedures maintain consistency with, and the flexibility of, 10 CFR 2.336(d): "The duty to update disclosures relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention, or at such other time as may be specified by the presiding officer or the Commission."

In summary, the procedures have been revised to provide the following:

- *Parties may agree to exclude certain classes of documents (such as drafts) from the mandatory disclosures. The NRC has no objection to such exclusions if agreed to by the parties, and such exclusions should be discussed at the prehearing conference.*
- *As a default matter, a party is not required to include a document in a privilege log if (1) the document satisfies the withholding criteria of 10 CFR 2.390(a), and (2) the document is not being withheld on the basis that it is SGI, security-related SUNSI, or proprietary information.[22] However, the presiding officer may direct otherwise for a case-specific reason, and the parties may jointly agree to change the scope of the privilege log requirement.*
- *Privilege logs will be viewed as sufficient if they specifically identify each document being withheld (including the date, title, and a brief description of the document) and the basis for withholding (e.g., "contains SGI").*

H. Notifications of Relevant New Developments in the Proceeding

NEI: NEI supports the requirements in the proposed procedures regarding notifications of relevant new developments in the proceeding, but suggests a modification to the proposed requirement that the licensee inform the ASLB and the other parties of an ITAAC closure notification or ITAAC post-closure notification for a contested ITAAC on the same day that the notification is submitted. NEI recommends making the filing to the ASLB and the other parties due within one day of the notification to allow the licensee and its counsel time to make the filing and explain the effect of the filing on the proceeding.

SCE&G: SCE&G makes the same recommendation as NEI but suggests that the filing be made "the next business day" after the ITAAC notification is submitted. SCE&G acknowledges that

[22] *As an example, if a document subject to the attorney-client privilege also contains proprietary information, it would not need to be included in the privilege log because it can be withheld on the basis of attorney-client privilege.*

same day notification can be achieved under some circumstances, but it may be difficult if the ITAAC notification is submitted later in the day, or if it takes some deliberation to reach a conclusion of the effect that the notification has on the proceeding. SCE&G also states that licensees have an incentive to notify the ASLB and the parties as quickly as possible.

NRC Response: The NRC adopts NEI's and SCE&G's suggestion for the reasons given in their comments. While NEI and SCE&G state this suggestion in different terms, the formulations are functionally identical because, under the time computation provisions adopted in these procedures, "within one day" is always the same as "the next business day." The procedures have been revised to state that the notification to the ASLB and the participants will be due within one day of the submission of an ITAAC closure notification or ITAAC post-closure notification on a contested ITAAC.

I. Motions in Limine or Motions to Strike

SCE&G: While SCE&G does not object to the proposed procedures prohibiting written motions in limine and motions to strike, SCE&G believes that the procedures should be clarified to allow evidentiary objections to be made in the parties' rebuttal testimony (if there is rebuttal testimony) or at the hearing, with the understanding that the presiding officer would not rule on any objections prior to the hearing.

NRC Response: The proposed procedures already provided that the parties' will have an opportunity to address the relevance or admissibility of arguments, testimony, or evidence in their pre- and post-hearing filings, or at the hearing. This provision, which is being retained in the final procedures, encompasses SCE&G's suggestion. The final procedures also do not dictate when rulings on such arguments must be made, although, as a matter of logic, a ruling will need to be made by the issuance of the initial decision unless the argument becomes moot.

No changes were made to the procedures as a result of this comment.

J. Proposed Findings of Fact and Conclusions of Law

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21972), the NRC requested comment on the following two options regarding proposed findings of fact and conclusions of law:
(1) Proposed findings of fact and conclusions of law will be allowed unless the presiding officer, on its own motion or upon a joint agreement of all the parties, dispenses with proposed findings of fact and conclusions of law for some or all of the hearing issues.
(2) Proposed findings of fact and conclusions of law will not be permitted unless the presiding officer determines that they are necessary. Under this option, the presiding officer may limit the scope of proposed findings of fact and conclusions of law to certain specified issues.

NEI, SNC, and SCE&G: Of the options provided by the NRC for comment, NEI, SNC, and SCE&G recommend that the NRC adopt the option that would allow proposed findings of fact and conclusions of law unless the presiding officer, on its own motion or upon a joint agreement of all the parties, dispenses with proposed findings of fact and conclusions of law for some or all of the hearing issues. The commenters believe that proposed findings of fact and conclusions of law may aid the presiding officer by summarizing the parties' positions on the issues at hearing and citing to the hearing record. The commenters also assert that allowing proposed findings of fact and conclusions of law should not significantly affect the hearing schedule because the initial decision date is tied to the oral hearing date. SNC further states that

because proposed findings of fact and conclusions of law are filed after the hearing, the parties should have available resources to prepare the filing since all other hearing activities will have concluded.

NEI and SNC also suggest that proposed findings of fact and conclusions of law may avoid delay if the presiding officer adopts, to the extent appropriate, the prevailing party's submission rather than drafting a new decision. NEI recommends that the final procedures encourage this "adoption" approach as a means of reaching a timely decision. Finally, in the context of the considerations for deciding whether to eliminate proposed findings of fact and conclusions of law, SCE&G recommends that these considerations not include whether the pre-hearing statements of position were filed in the form of proposed findings of fact and conclusions of law. SCE&G states that pre-hearing position statements cannot account for the testimony and exhibits of the other parties or the oral testimony during the hearing."

NRC Response: For the reasons given by the commenters, the NRC adopts the option that would allow proposed findings of fact and conclusions of law unless the presiding officer, on its own motion or upon a joint agreement of all the parties, dispenses with proposed findings of fact and conclusions of law for some or all of the hearing issues. The NRC acknowledges that the presiding officer can adopt a party's proposed findings of fact and conclusions of law if the presiding officer deems it appropriate to do so, and that this could save time in some cases. However, the final procedures will not "encourage" such adoption because the appropriateness of doing so depends on the specific facts and circumstances and because this is a matter best left to the presiding officer's discretion.

The NRC disagrees with SCE&G's argument that the filing of pre-hearing position statements in the form of proposed findings of fact and conclusions of law can never be a reason for the presiding officer to eliminate post-hearing proposed findings of fact and conclusions of law. First, pre-hearing rebuttal statements of position could address the other parties' arguments. Second, while it is true that pre-hearing filings can never summarize the oral hearing, the presiding officer might decide that the oral hearing did not produce a quantity of significant, new information to justify post-hearing proposed findings of fact and conclusions of law.

In summary, the procedures have been modified to provide that proposed findings of fact and conclusions of law will be allowed unless the presiding officer, on its own motion or upon a joint agreement of all the parties, dispenses with proposed findings of fact and conclusions of law for some or all of the hearing issues.

K. Initial Decision and NRC Action Under 10 CFR 2.340

NEI: NEI offers a suggestion regarding the interpretation of 10 CFR 2.340(f), which provides that an initial decision that the contested acceptance criteria have been met is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective. Specifically, NEI recommends that the NRC implement a stringent "good cause" standard for requests that the initial decision not become immediately effective.

With respect to the making of the 10 CFR 52.103(g) finding after an initial decision, NEI proposes that the NRC make a post-hearing 10 CFR 52.103(g) finding earlier than the 10 days provided for by 10 CFR 2.340(j) and provides several reasons in support of its recommendation. NEI asserts that there should be no delay related to the contested acceptance criteria because they are within the scope of the initial decision. NEI also claims that a decision on the contested

acceptance criteria should immediately support a 10 CFR 52.103(g) finding and that it is possible to resolve the pending motions or petitions listed in 10 CFR 2.340(j)(3) in less than 10 days. NEI states that taking 10 days to issue the 10 CFR 52.103(g) finding could be extremely important to a licensee seeking to load fuel as scheduled.

NRC Response: The NRC declines to adopt NEI's suggestion to impose a "stringent" good cause standard. To begin with, the 10 CFR 2.340(f) language imposing the "good cause" standard applies to initial decisions in many types of proceedings, not just ITAAC hearings. Therefore, the regulations contemplate that the same "good cause" standard applied in other proceedings will apply to ITAAC hearings. The NRC does acknowledge, however, that whether good cause exists to delay the effectiveness of the initial decision will depend on the specific context. This includes the effect of delaying the decision's effectiveness, which in an ITAAC hearing might be a delay in the commencement of operation. The Commission expects the presiding officer to weigh such factors in deciding whether there is good cause.

With respect to the making of the 10 CFR 52.103(g) finding after an initial decision:

- *The NRC disagrees with NEI to the extent NEI might be asserting that there is never any reason to delay a 10 CFR 52.103(g) finding with respect to contested acceptance criteria within the scope of the initial decision. As stated in the final rule entitled "Requirements for Maintenance of Inspections, Tests, Analyses, and Acceptance Criteria" (77 FR 51880, 51885) (Aug. 28, 2012) (ITAAC Maintenance Rule), a presiding officer's initial decision on a contention that acceptance criteria have been met or will be met does not obviate the need for the NRC to make the required finding that the acceptance criteria are met. For example, a presiding officer could make, in the initial decision, a "predictive finding" that acceptance criteria "will be met," but subsequent information could show that the presiding officer's predictive finding was not borne out by events. Id.[23] Even in cases where the presiding officer's prediction holds true, the ITAAC must actually be performed before the 10 CFR 52.103(g) finding can be made.*
- *The NRC also disagrees with NEI to the extent that it argues that a decision on the contested acceptance criteria should immediately support a 10 CFR 52.103(g) finding in all cases. Aside from the type of situation described above, an initial decision might be issued before certain uncontested ITAAC have been completed.*
- *Notwithstanding the above situations, the NRC does understand that taking 10 days to issue the 10 CFR 52.103(g) finding after an initial decision could be extremely important to a licensee seeking to load fuel as scheduled. Therefore, the NRC intends to expeditiously make the 10 CFR 52.103(g) finding after the initial decision once all the ITAAC are complete and the NRC is in a position to make a determination on all of the ITAAC. If all of the ITAAC have been completed and the NRC is in a position to make a determination on all ITAAC at the time the initial decision is issued, the NRC would make the 10 CFR 52.103(g) finding as expeditiously as possible and not wait for a ten-day period to run. The NRC can take such expeditious action as evidenced in the V.C. Summer Units 2 and 3 proceeding, where the NRC issued the COLs the same day that the Commission issued a decision on the uncontested portion of the hearing.*

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[23] *Given the hearing schedules set forth in the final procedures, this would most likely occur if the notice of intended operation is issued two months or so earlier than 210 days before scheduled fuel load and if the contested ITAAC are completed very late in construction.*

The NRC does not take further action in response to NEI's comment that it is possible for the NRC to resolve the pending motions or petitions listed in 10 CFR 2.340(j)(3) in less than 10 days. Because 10 CFR 2.340(j) states that the 10 CFR 52.103(g) finding will be made notwithstanding the pendency of these filings, action on these filings is not necessary before operation may commence.

No changes were made to the procedures as a result of this comment.

L. Motions and Petitions for Reconsideration and Motions for Clarification

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21968-69, 21970), the NRC requested comment on the following three options regarding requests for reconsideration:

(1) Except for more abbreviated filing deadlines, motions and petitions for reconsideration will be allowed in accordance with 10 CFR 2.323(e) and 10 CFR 2.345, respectively.
(2) Motions and petitions for reconsideration will only be allowed for the initial decision and Commission decisions on appeal of the initial decision.
(3) Motions and petitions for reconsideration will not be permitted.

In addition, for Options 2 and 3, two limitations on motions for clarification would be included to prevent them from becoming de facto motions for reconsideration. Specifically, a motion for clarification would be permitted only if it is based on an ambiguity in a presiding officer order. A motion for clarification also must explain the basis for the perceived ambiguity and may offer possible interpretations of the purportedly ambiguous language, but the motion for clarification may not advocate for a particular interpretation of the presiding officer order.

NEI: With respect to the options for reconsideration that the NRC provided for comment, NEI supports the option that entirely disallows reconsideration. NEI states that given the extremely abbreviated ITAAC hearing schedule and given that appeal rights will quickly accrue, the resources of the presiding officer and the parties should not be diverted to considering requests for reconsideration. NEI further suggests that if the NRC adopts the option allowing reconsideration to be requested for all decisions, then the NRC should explicitly state that a request for reconsideration will not prevent or stay actions by the NRC such as the 10 CFR 52.103(g) finding.

SNC: SNC supports the same option that NEI supports and gives the same reasons for this position that NEI gives. SNC also states that clearly prohibiting reconsideration will allow parties to expeditiously pursue any appeal rights because they will know that an appeal is the only option, rather than having to weigh whether reconsideration is the better option. SNC also states that the possibility that an error might be corrected on reconsideration rather than appeal is a slight benefit outweighed by the advantage of prohibiting requests for reconsideration.

SCE&G: SCE&G suggests that the NRC adopt the option in which reconsideration is allowed for all presiding officer decisions using the standards currently set forth in NRC regulations. SCE&G states that because of the first-of-a-kind nature of ITAAC hearings, reconsideration may be needed to correct misunderstandings or errors in presiding officer decisions. SCE&G also states that, in combination with its recommendation not to allow interlocutory review, allowing reconsideration more broadly should provide some balance.

SCE&G also does not believe that requests for reconsideration will significantly affect ITAAC hearings because requests for reconsideration are uncommon and must satisfy a very high

standard. In addition, SCE&G recommends that the procedures explicitly provide that a request for reconsideration will not delay NRC action or the adjudicatory proceeding. With respect to the option that allows reconsideration for the initial decision and appeals of the initial decision, SCE&G claims that it is too early to know whether this option is too limiting given the lack of any experience in the conduct of ITAAC hearings.

NRC Response: The NRC is taking a middle course and is adopting the option in which motions and petitions for reconsideration are allowed only for initial decisions and Commission decisions on appeal of initial decisions. For adjudicatory decisions prior to the initial decision, the NRC agrees that the resources of the presiding officer and the parties should not be diverted to considering requests for reconsideration given the extremely abbreviated ITAAC hearing schedule and given that appeal rights will quickly accrue. However, after the initial decision, the parties' resources will no longer be consumed by the hearing itself, so the parties should have the resources to file and respond to requests for reconsideration. In addition, a request for reconsideration of the initial decision or a Commission decision on appeal of the initial decision will not prevent these decisions from taking effect. Furthermore, initial decisions and Commission decisions on appeal of initial decisions are the most important decisions in the proceeding, so allowing reconsideration of these decisions seems prudent. The NRC does not agree with SNC that relieving parties from having to weigh their options (reconsideration vs. appeal) is an advantage. The NRC suspects that most parties who do not prevail at hearing would like to at least have the option of pursuing reconsideration and would not perceive a substantial burden from having to make a choice.

The NRC understands why SCE&G takes the view that reconsideration should be allowed for all decisions. The NRC agrees that given the first-of-a-kind nature of ITAAC hearings, there may be a need to correct misunderstandings or errors in a presiding officer's decision. The potential for such errors and misunderstandings may be compounded by the very tight timeline on which decisions must be issued. On the other hand, there should not be very many presiding officer decisions before the initial decision. In addition, to the extent that a presiding officer decision is based on a simple misunderstanding or a clear and material error (e.g., a conflict between the scheduling order and the Commission's order imposing procedures for the hearing), the parties could attempt to more informally raise the issue with the presiding officer by requesting a conference call on the matter.[24] Such requests should be made by email to the presiding officer's law clerk, and the other parties' representatives should be copied on it. If the presiding officer decides that no conference call is necessary, then the parties' and the presiding officer's resources will not have been expended. If a conference call is held, the resource expenditure should be minimal and any error or misunderstanding could be more quickly rectified than through a formal request for reconsideration.

The NRC received no comments on the proposed provisions for motions for clarification, but after further reflection, the NRC has decided to eliminate the prohibition on advocacy. Because motions for clarification will be limited to ambiguities in a presiding officer order, a prohibition on arguing in favor of a possible interpretation does not seem necessary.

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[24] This possibility is not available in cases where the Commission, itself, is serving as the presiding officer because such an informal process would be impractical since Commission action is subject to formal processes (some of which are required by law). In addition, the potential need for such an informal process is less likely to arise in the portions of the ITAAC hearing process over which the Commission will preside.

In summary, the procedures have been modified to provide that motions and petitions for reconsideration will be allowed only for the initial decision and for a Commission decision on appeal of the initial decision. Consistent with the discussion of this option in the proposed procedures, motions for clarification are allowed for decisions other than initial decisions and Commission decisions on appeal of initial decisions, but to prevent them from becoming de facto motions for reconsideration, motions for clarification will be limited to ambiguities in a presiding officer order. In addition, a motion for clarification must explain the basis for the perceived ambiguity and may offer possible interpretations of the purportedly ambiguous language. Finally, the procedures will explicitly state as a rationale for limiting reconsideration the possibility of a party requesting a conference call to discuss a perceived misunderstanding or clear and material error in a presiding officer decision. Such request should be made by email to the presiding officer's law clerk, and the other parties' representatives should be copied on this email.

M. Interlocutory Review

OPTIONS FOR COMMENT: In the proposed procedures (79 FR at 21970), the NRC requested comment on the following two options regarding interlocutory review:

(1) Interlocutory review is available only for presiding officer determinations on access to SUNSI or SGI.
(2) Interlocutory review is available for presiding officer determinations on access to SUNSI or SGI. For other presiding officer decisions, the interlocutory review provisions of 10 CFR 2.341(f) are retained without modification. However, interlocutory review will be disfavored, except in the case of decisions on access to SUNSI or SGI, because of the expedited nature of an ITAAC hearing.

NEI: Of the options provided for comment, NEI recommends the option that would allow interlocutory review only for presiding officer decisions on requests for access to SUNSI or SGI. NEI states that allowing interlocutory review of other decisions is unnecessary and unproductive given the abbreviated ITAAC hearing schedule. NEI also points out that interlocutory review will be unavailable, in any event, for decisions made by the Commission itself.

With respect to interlocutory appeals of decisions on access to sensitive information, NEI suggests eliminating the right to appeal a decision denying access to SUNSI or SGI because it is not clear that such a right must be provided. As for the interlocutory appeal filing deadlines, NEI suggests that 5 days be provided for filing the appeal and 5 days be provided for answers to appeals. NEI states that the shortened filing period is justified by the need to expeditiously complete any hearing and by the limited nature of the questions that could be the subject of the interlocutory appeal.

SNC: SNC supports the option that would allow interlocutory review only for presiding officer decisions on requests for access to SUNSI or SGI. SNC prefers this option because of the shortened ITAAC hearing schedule, because appeal rights on other issues will quickly accrue anyway, and because requests for interlocutory review would be filed during the most resource-intensive part of the hearing.

SCE&G: For the same reasons given by NEI, SCE&G supports the option that would allow interlocutory review only for presiding officer decisions on requests for access to SUNSI or SGI.

NRC Response: The NRC agrees with the commenters that interlocutory review of decisions other than on access to SUNSI or SGI is unnecessary and unproductive given the expedited nature of the proceeding. Given the abbreviated schedule, appeal rights will quickly accrue, and before the initial decision, the parties' resources should be dedicated to completing the hearing. There will be a right to interlocutory review for decisions granting access to SUNSI or SGI because a post-hearing appeal opportunity will not cure the harm from a pre-hearing grant of access to sensitive information. The NRC is also providing a right to interlocutory review for decisions denying access to SUNSI or SGI. The NRC does not adopt NEI's recommendation to eliminate such rights because the NRC believes that those seeking access to SUNSI or SGI should have a reciprocal appeal opportunity and because it is important to quickly resolve disputes over access to such information given the potential effect that an erroneous denial of access might have on the schedule of the proceeding. However, because a denial of access to information does not represent irreparable harm, the Commission expects that presiding officers will not delay any aspect of the proceeding because an interlocutory appeal is filed seeking to overturn a denial of access to SUNSI or SGI.

Finally, the NRC agrees with NEI that because of the limited nature of the dispute, it is appropriate to further reduce the time for filing and answering interlocutory appeals of decisions on access to SUNSI or SGI. However, the NRC believes that 7 days is a more reasonable time period than 5 days. The NRC is also making corresponding changes to the deadlines in 10 CFR 2.336(f)(1)(iii)(B) and (f)(1)(iv) for challenges to adverse NRC Office of Administration determinations on trustworthiness and reliability for access to SGI. Specifically:

- *A requestor's challenge under 10 CFR 2.336(f)(1)(iii)(B) to the completeness and accuracy of the records relied on by the Office of Administration in making its initial adverse trustworthiness and reliability determination must be submitted within 7 days of the distribution of the records, rather than 10 days.*
- *A request for review under 10 CFR 2.336(f)(1)(iv) of a final adverse NRC Office of Administration determination on trustworthiness and reliability must be filed within 7 days of receipt of the final adverse determination, rather than 15 days.*
- *The NRC staff's response to a request for review under 10 CFR 2.336(f)(1)(iv) must be filed within 7 days of the NRC staff's receipt of the request, rather than 10 days.*

In summary, the procedures have been modified as follows:

- *Interlocutory review is available only for presiding officer determinations on access to SUNSI or SGI.*
- *Because a denial of access to information does not represent irreparable harm, presiding officers are not to delay any aspect of the proceeding because an interlocutory appeal is filed seeking to overturn a denial of access to SUNSI or SGI.*
- *An interlocutory appeal must be filed within 7 days of the presiding officer decision on access to SUNSI or SGI, and answers to the appeal are due 7 days from service of the appeal.*
- *A requestor's challenge under 10 CFR 2.336(f)(1)(iii)(B) to the completeness and accuracy of the records relied on by the Office of Administration in making its initial adverse trustworthiness and reliability determination must be submitted within 7 days of the distribution of the records, rather than 10 days.*
- *A request for review under 10 CFR 2.336(f)(1)(iv) of a final adverse NRC Office of Administration determination on trustworthiness and reliability must be filed within 7 days of receipt of the final adverse determination, rather than 15 days.*

- *The NRC staff's response to a request for review under 10 CFR 2.336(f)(1)(iv) must be filed within 7 days of the NRC staff's receipt of the request, rather than 10 days.*

N. Stay Requests

NEI: In addition to the provision in the proposed procedures that would disallow stay requests on interim operation decisions, NEI recommends that no stay requests on any decision or action ever be entertained in an ITAAC hearing because of the potential for stays to cause substantial delay. NEI states that any purportedly irreparable harm from allowing a decision or action to go forward would be outweighed by the harm from delaying fuel load.

SCE&G: SCE&G also recommends that stay requests be entirely prohibited because stay requests present the potential for substantial delay in operation.

NRC Response: The NRC does not adopt the commenters' suggestion because there could be cases where a stay request is appropriate. For example, if a party files an interlocutory appeal of a decision granting access to SUNSI or SGI as well as a stay request associated with that decision, the decision granting access should ordinarily be stayed because of the irreparable harm that would occur if access were to be provided before the appeal was ruled on. NEI provides no support for its position that the harm from delaying fuel load could never be outweighed by other irreparable harm, and it is not clear in all cases that the granting of a stay would delay fuel load.

No changes were made to the procedures as a result of these comments.

O. Motions to Reopen

OPTIONS FOR COMMENT: The proposed procedures (Draft Template B, page 35) provided a procedural mechanism for reopening the record, and provided for comment the following two options on how the reopening standards were to be applied:

(1) The NRC's existing rule in 10 CFR 2.326 will apply to any motion to reopen the record.
(2) Motions to reopen the record will be entertained only with respect to the submission of new information related to a previously admitted contention, and 10 CFR 2.326 will apply to any such motion. A motion to reopen is not required for a hearing request, intervention petition, or motion for leave to file a new or amended contention filed after the original deadline.

As stated in the FRN for the proposed procedures (79 FR at 21967), the intended difference between the two options was whether hearing requests, intervention petitions, and new and amended contentions after the original deadline should be exempted from the requirements in 10 CFR 2.326. The proposed procedures stated that a possible rationale for not applying the reopening standards to these filings after the deadline 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, the proposed procedures stated that one could argue that any timeliness concerns are addressed by the good cause requirement in 10 CFR 2.309(c) and that concerns regarding newly raised issues being significant and substantiated are addressed by the prima facie showing requirement in 10 CFR 2.309(f)(1)(vii).

NEI: Given the tight time frame for completing the hearing, NEI believes that motions to reopen should be prohibited in all circumstances because reopening the record has the potential to

cause significant delay without corresponding benefit. However, if motions to reopen are allowed, NEI recommends that the reopening standards be applied in all circumstances after the record has closed, including to new or amended contentions. NEI states that a motion to reopen is an extraordinary request for relief, and that there is no compelling reason to depart from current practice. NEI also asserts that the "good cause" standard in 10 CFR 2.309(c) is not sufficiently strict. In addition, NEI states that the higher reopening standard is more appropriate given the potential for delay from reopening the record. Finally, NEI recommends that the hearing procedures provide deadlines for when the record should be closed.

SNC: SNC states that reopening the record is an extraordinary action and that the reopening standards are long-standing and serve the important purpose of preserving the finality of the hearing process. SNC cites the "very heavy burden" that the reopening standards are meant to impose and states that the need for such standards is particularly acute in the ITAAC hearing context. SNC also asserts that eliminating the reopening standard in 10 CFR 2.326(a)(3)—"[t]he motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially"—would effectively lower the decades-old threshold for reopening the record. Finally, SNC asserts that the NRC did not give a supporting rationale for eliminating the reopening requirements for hearing requests, intervention petitions, or new or amended contentions filed after the deadline.

SCE&G: SCE&G recommends that the reopening standards be applied in all circumstances after the record has closed because of the potential for delay from reopening the record and because prior to the closing of the record, interested stakeholders had a full opportunity to bring their issues forward. SCE&G does recognize some similarities between the reopening standards and the new or amended contention standards, but SCE&G believes that there are important differences under certain circumstances. As examples, SCE&G states that the "materially different result" standard and the affidavit requirement from the reopening standards are not fully addressed by the new or amended contention standards. SCE&G also states that existing NRC case law and other guidance on reopening should apply. Finally, SCE&G states that to the extent that the reopening standards and the new or amended contention standards overlap, eliminating the reopening standards would not provide any significant benefit in terms of efficiency because to the extent there is overlap, the movant could cross-reference the information it provided to address the other similar standard.

NRC Response: Contrary to the commenters' recommendation, the NRC has decided that the 10 CFR 2.326 reopening requirements will apply to all efforts to reopen the record, with the exception of hearing requests, intervention petitions, and new or amended contentions filed after the deadline. The NRC staff provided a suitable supporting rationale for this option in the proposed procedures, and the same rationale appears in the final procedures. The exception from having to meet the 10 CFR 2.326 reopening standards is limited to hearing requests, intervention petitions, and new or amended contentions after the deadline because the good cause and prima facie showings that are required for these filings are substantially similar to the 10 CFR 2.326 reopening standards, as explained in the proposed procedures. Thus, the exception does not constitute a relaxation of the reopening standards; rather, the exception simply eliminates unnecessary duplication of effort. As a consequence, the exception does not apply to other efforts to reopen the record, e.g., efforts to introduce evidence on existing

contentions after the record has closed or the filing of claims of incompleteness after the record has closed.[25]

The NRC does not agree with the comments suggesting that the reopening standards are significantly different from the good cause and contention admissibility requirements applying to hearing requests, intervention petitions, and new or amended contentions after the deadline. NEI asserts that the 10 CFR 2.309(c) good cause standard is not sufficiently strict, but it is no different than the timeliness standard in 10 CFR 2.326(a). SNC and SCE&G assert that the "materially different result" standard is more strict than the prima facie showing standard, but the NRC does not see a significant difference between a showing that a materially different result would be likely (i.e., that it is likely that the NRC would find that the acceptance criteria have not been or will not be met) and a prima facie showing that the acceptance criteria have not been or will not be met. In this regard, the relevant case law on application of the "materially different result" standard to new or amended contentions provides that the presiding officer is not to make a merits determination on the contention, but is to determine that "evidence [is] sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding." Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 499 (2012). Since the ultimate result in an ITAAC proceeding depends on conformance with the acceptance criteria, it would seem that a prima facie showing that the acceptance criteria have not been or will not be met would generally suggest a likelihood of materially affecting the determination on conformance with the acceptance criteria. The NRC does not take a position on whether the two standards are exactly the same or whether one is slightly more strict than the other, but the differences between the two standards, if any, do not appear to warrant requiring two separate showings by the petitioner.

Furthermore, while an affidavit requirement does not apply to hearing requests, intervention petitions, and new or amended contentions after the deadline, the NRC believes that in most cases, meeting the prima facie showing standard will require signed expert or eyewitness declarations, which would satisfy the intent of an affidavit requirement. Finally, while not explicitly addressed by the commenters, a prima facie showing that operation would be contrary to reasonable assurance of adequate protection of the public health and safety would satisfy the significant safety issue prong of 10 CFR 2.326(a)(2).

The NRC does acknowledge that if the reopening standards were kept for hearing requests, intervention petitions, and new or amended contentions after the deadline, there may be cases where the petitioner could conceivably reference the showing made for one criterion in making the showing for a similar, but differently stated criterion. However, a petitioner might not adopt such an approach out of fear that the licensee will argue that the petitioner should have explained how the one showing applied to a very similar criterion that is worded a little differently. Given the close similarities in the standards, the NRC does not think it necessary to

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[25] *As presented in the draft procedural order templates, the option eliminating the 10 CFR 2.326 requirements for hearing requests, intervention petitions, and new or amended contentions after the deadline, would have limited the application of 10 CFR 2.326 to the submission of new information related to a previously admitted contention. While the submission of new information related to a previously admitted contention is the most likely situation in which a petitioner might move to reopen the record under 10 CFR 2.326, it is possible that a petitioner might move to reopen the record in other circumstances, e.g., claims of incompleteness. Therefore, the final procedures broadly state that 10 CFR 2.326 applies to any effort to reopen the record, with the exception of hearing requests, intervention petitions, and new or amended contentions filed after the deadline.*

impose such additional burdens on petitioners or to spend time teasing out whether, or to what extent, there are substantive differences between the two standards.

Further, the NRC does not agree with NEI that it would be wise or proper to prohibit reopening in all circumstances. If there is a proceeding in existence to reopen and the exacting reopening standards are met, then the NRC believes that reopening the record is an appropriate action to take, notwithstanding the potential for delay. Finally, the NRC declines NEI's invitation to explicitly provide deadlines for when the record should be closed beyond what was provided in the proposed procedures. With respect to litigation on an existing contention, the proposed and final procedures provide, in accordance with existing practice, that "[a]fter ruling on proposed transcript corrections, the presiding officer shall close the record." The NRC sees no reason to depart from existing practice in this regard. With respect to the closing of the record in other contexts, the NRC believes that existing case law is sufficient to define when the record has closed.

In summary, the procedures have been modified to provide that the 10 CFR 2.326 reopening requirements will apply to all efforts to reopen the record, with the exception of hearing requests, intervention petitions, and new or amended contentions filed after the deadline.

7. Interim Operation

A. General Comments on Interim Operation

Mr. Cowan: Mr. Cowan states that 10 CFR Part 52 was created because of the failure of the two-step 10 CFR Part 50 licensing process to provide stability and predictability in licensing. Specifically, Mr. Cowan states that there were numerous instances where fully completed plants could not operate because of long delays in operating license proceedings. Mr. Cowan suggests that Part 52 will be considered a failure if it recreates the failures of the Part 50 licensing process.

Mr. Cowan describes his decades of experience as counsel to Westinghouse, during which time he was involved in licensing proceedings for more than 35 nuclear power plants in the United States. Based on this experience, Mr. Cowan states that intervenors opposing nuclear plant operation were historically very creative in raising procedural issues that caused lengthy delays in licensing proceedings. Mr. Cowan expects the same degree of creativity with ITAAC hearings, which in his view makes the procedures and standards for allowing interim operation very important.

Therefore, Mr. Cowan states that the procedures and standards for allowing interim operation cannot be such that in practice it becomes virtually impossible to obtain interim operating authority when construction has been completed. Otherwise, Mr. Cowan believes that the 10 CFR Part 52 process will recreate the failures of Part 50, and that this will have a significant adverse impact on the purchase and construction of any new nuclear power plants in the United States.

Mr. Lewis (September 22, 2014 Public Meeting Comments): Mr. Lewis is worried that the NRC might be setting up a situation that would repeat the Three Mile Island scenario. According to Mr. Lewis, the licensee went to court to get an emergency order to fuel and then fueled the Three Mile Island reactor without telling anyone. Mr. Lewis states that, three months later, the reactor was being operated contrary to some regulations and had a real problem in March 1979. (Transcript at 20-21).

Mr. Lewis (September 23, 2014 Written Comments): Mr. Lewis states that interim operation is what happened during the Three Mile Island accident in March 1979. Mr. Lewis also states that the licensee was granted an emergency fuel permit while a hearing continued on the danger from an operating nuclear power plant being on the flight path to a nearby airport. Mr. Lewis claims that emergency fueling took place in the middle of the night three months before the accident. Mr. Lewis asserts that the NRC has not learned the lesson of avoiding an accident similar to Three Mile Island, Unit 2, by awaiting the conclusion of an ongoing safety hearing.

NRC Response: The NRC agrees with Mr. Cowan that the interim operation process is important. However, the AEA directs the NRC, "to the maximum possible extent," to complete the hearing and issue a decision by scheduled fuel load. If the NRC meets this goal, then interim operation will not be necessary. To meet this goal, the NRC has streamlined and truncated the hearing process, instituted strict deadlines for issuance of the decision after hearing, and required a showing of unavoidable and extreme circumstances for any deadline extensions. The NRC believes that these measures will ensure that the hearing decision is issued by scheduled fuel load in most cases.

The NRC acknowledges that cases might arise when the hearing decision is not issued by scheduled fuel load. In these cases, the NRC agrees that interim operation is a tool to prevent the hearing from unnecessarily delaying plant operation. To this end, the NRC has instituted processes to allow the Commission to expeditiously determine whether there is reasonable assurance of adequate protection of the public health and safety during a period of interim operation. These processes allow each party a fair opportunity to make its case on this important question and explicitly provide that the licensee has the opportunity to propose mitigation measures to provide reasonable assurance of adequate protection notwithstanding the petitioner's prima facie showing. With respect to the standards for allowing interim operation, these come directly from the AEA, as clarified by the legislative history underlying the interim operation provision. The NRC has faithfully implemented these standards in the proposed procedures, and any change to these standards would require legislative action.

Because Mr. Cowan did not take issue with any specific aspect of the proposed procedures and did not suggest any modifications, no changes have been made to the procedures as a result of this comment. The NRC has attempted to create a workable process that is consistent with fundamental fairness and all legal requirements.

Mr. Lewis is mistaken in his assertion that the accident at Three Mile Island, Unit 2, was associated with an ongoing hearing on safety issues. Mr. Lewis is correct that at the time of the accident there was an ongoing hearing on whether the plant was adequately protected from airplane crashes. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB–692, 16 NRC 921, 926 (1982). However, the accident at Three Mile Island, Unit 2, was not caused by, and was not in any way related to, an airplane crash. With respect to Mr. Lewis' broader concern with allowing interim operation during an ITAAC hearing, the NRC is legally required to allow interim operation if the legal prerequisites for interim operation apply. However, as explained below in response to other comments, the NRC will not allow interim operation unless the Commission determines that there will be reasonable assurance of adequate protection of the public health and safety during interim operation even if the petitioner's prima facie showing proves to be correct. Thus, the NRC's interim operation process is premised on providing assurance that interim operation will be safe whatever the outcome of the hearing.

No changes were made to the procedures as a result of the comments.

B. Basis for the Commission Determination on Whether There is Reasonable Assurance of Adequate Protection During the Interim Operation Period

NEI: NEI asserts that the petitioner's *prima facie* showing in support of its hearing request "does not affect" the Commission's determination on adequate protection during interim operation because the interim operation determination relates only to the period of interim operation. NEI states that construing the petitioner's *prima facie* showing as being determinative for the interim operation adequate protection determination would render the interim operation provision meaningless.

NEI also disagrees with the position taken in the proposed procedures that Congress did not intend for the interim operation adequate protection determination to be a decision on the merits of the petitioner's *prima facie* showing. Instead, NEI suggests that the Commission's determination on adequate protection during interim operation be considered a "preliminary merits decision" similar to the one made under 10 CFR 2.342(e)(1) for stay requests. NEI disagrees with the NRC's interpretation of Senator Johnston's statements during the debate on the interim operation provision, and NEI says that, in any event, the statutory and regulatory provisions are clear on their face, so the legislative history should not be determinative.

Westinghouse: Westinghouse joins NEI in disagreeing with the interpretation of the interim operation provision that was stated in the proposed procedures. Westinghouse states that, consistent with the plain language of AEA § 189a., the Commission retains "broad discretion" to allow interim operation, notwithstanding the *prima facie* showing made by the petitioners. Westinghouse suggests that the NRC embrace a reading of the interim operation provision that gives the Commission "broad discretion" because interim operation decisions will be fact-specific. Westinghouse further asserts that the NRC came to its interpretation of the interim operation provision based solely on the legislative history and that reliance on the legislative history is inappropriate because the statute is clear on its face.

Westinghouse claims that the NRC's interpretation of the interim operation provision involves an interpretation of "reasonable assurance of adequate protection" that is at odds with the long-established understanding of this widely used term. Westinghouse provides a lengthy recitation of legal authorities in support of the propositions (1) that the term "reasonable assurance of adequate protection" has not been objectively defined by the Commission, and (2) that the Commission retains broad discretion to give meaning to this term through case-by-case judgments based on the NRC's technical expertise and all relevant information. Westinghouse also states that there is "no rational basis" to use legislative history to obtain further understanding of the "reasonable assurance of adequate protection" concept. Notwithstanding Westinghouse's argument that it is inappropriate to rely on legislative history, Westinghouse cites to Commission correspondence to Congress endorsing the COL provisions in the bill, and argues that the NRC would not have endorsed the bill had Congress intended to modify the "reasonable assurance of adequate protection" concept. Westinghouse also states that Congress was presumably familiar with the long-established interpretation of this concept and should not be presumed to have intended to overturn it.

Westinghouse also suggests that the NRC's interpretation of the interim operation provision is tantamount to equating "reasonable assurance" with "zero risk." Moreover, Westinghouse asserts that the interpretation of the interim operation provision given in the proposed

procedures "sets a dangerous precedent" regarding interpretation of the "reasonable assurance of adequate protection" concept.

Westinghouse states that to the extent that the NRC staff is concerned with the "regulatory conundrum" of granting interim operation during the pendency of a hearing, the NRC staff should look to relevant precedent from the license amendment arena. Westinghouse states that allowing interim operation based on an adequate protection determination is analogous to issuing a license amendment, notwithstanding the pendency of a hearing, based on a no significant hazards consideration determination. Westinghouse states that these two situations are analogous in that the no significant hazards consideration determination and the interim operation adequate protection determination are both screening devices to determine whether the facility can be operated even though the safety of doing so has been questioned. Westinghouse acknowledges that a no significant hazards consideration determination is not a decision on the merits of the hearing request or the license amendment. However, Westinghouse also states that the interim operation provision is "arguably far broader" than the no significant hazards consideration provision because the interim operation provision permits the Commission to exercise authority to the limits of its general statutory authority.

SCE&G: For the same reasons given by NEI, SCE&G disagrees with the position taken in the proposed procedures that Congress did not intend for the interim operation adequate protection determination to be a decision on the merits of the petitioner's *prima facie* showing. For the reasons given by NEI, SCE&G asserts that the NRC should not rely on legislative history. However, SCE&G also claims, as does NEI, that the NRC is misinterpreting the legislative history. SCE&G asserts that the legislative history cited by the NRC only says that interim operation is limited and provides examples of how the interim operation requirements could be met. Citing to the June 5, 1991 Senate Report Number 102-72 of the Committee on Energy and Natural Resources, SCE&G also asserts that other legislative history indicates that the Commission should make a merits determination on whether there is reasonable assurance of adequate protection of the public health and safety during interim operation.[26] Specifically, SCE&G points to language in the report stating that an interim operation determination would involve a determination of the petitioner's likelihood of success on the merits. SCE&G further asserts that both the AEA and the NRC regulations require the Commission to make this merits determination, which SCE&G says the Commission can make without ruling on the "merits of the contention (i.e., make the same finding as the Initial Decision)." Finally, SCE&G states that the NRC should not at this time limit the Commission's basis for making the interim operation decision because it is a fact-specific determination.

NEI (September 22, 2014 Public Meeting Comments): NEI claims that the NRC staff took a very narrow reading of what can be the basis for the Commission's adequate protection determination for interim operation. As an alternative, NEI suggests that the Commission base this adequate protection determination on an assessment of the petitioner's likelihood of succeeding on the merits, which is a factor for stay requests. NEI acknowledges that the NRC is not required to allow interim operation based on a preliminary merits determination, but NEI believes that the Commission could do so if the evidence warranted it. (Transcript at 19-20).

[26] The comment literally cites to report number "102-7," which is on different legislation, but the comment also cites the date of the report and the committee producing it and cites to specific language in the report. This allowed the NRC to determine that the intended reference was to Senate Report Number 102-72.

During the meeting, the NRC staff asked whether ignoring the legislative history of the interim operation provision, as several commenters suggested, would be consistent with NRC practice on the analogous issue of making a "no significant hazards consideration" determination to issue a license amendment before the conclusion of a hearing. Specifically, the NRC staff said that based on the legislative history, the "no significant hazards consideration" determination is not a determination on the merits and that this view was endorsed by the 9th Circuit Court of Appeals. NEI replied that the NRC should not go too far with an analogy between the "no significant hazards consideration" provision and the interim operation provision, even though they serve similar purposes. NEI added that each of the various findings are based on the words of the statute. In this regard, NEI asserts that "no significant hazards consideration" is a specific standard that is well-defined in the statute. For the interim operation provision, NEI agrees with Westinghouse's view that there is no need to examine the legislative history because the "reasonable assurance of adequate protection" concept is long-established and well-understood. NEI further states that in determining whether the petitioner has made a *prima facie* showing, the Commission will be looking only at the petitioner's evidence, while in making the adequate protection determination for interim operation, the Commission can look at the other side's evidence and not be constrained by the petitioner's *prima facie* showing. Finally, NEI claims that the 9th Circuit decision referenced by the NRC staff simply stands for the proposition that these kinds of determinations are very fact-dependent. (Transcript at 31-32, 33-35).

SCE&G (September 22, 2014 Public Meeting Comments): SCE&G believes that the standard for reasonable assurance of adequate protection of the public health and safety is one the Commission is well-versed in applying and there is no reason or basis to limit what the Commission can consider when making determinations using this standard. SCE&G also agrees with other commenters that the NRC should not rely on legislative history because the statute is straightforward and employs the recognized standard of adequate protection. SCE&G believes that if Congress wished to narrowly limit interim operation, then these limits would have been in the statute. (Transcript at 22-23, 35).

The NRC staff asked SCE&G whether it has the same position as NEI or whether there are any nuanced differences between them. The NRC staff specifically mentioned that in its written comments, SCE&G just mentioned a merits determination without qualifying that by mentioning the stay factors or a preliminary merits determination as NEI did. SCE&G replied that it has the same overarching approach as NEI but might have put different bases or justifications in its comments. SCE&G's fundamental point is that the Commission can consider all the available information when making the adequate protection determination for interim operation and that this determination will be fact-specific. (Transcript at 23-25).

SCE&G also referenced Senate Report Number 102-72 of the Committee on Energy and Natural Resources, mentioned in SCE&G's written comments, where the Senate Committee expressed an intent that the NRC's interim operation determination would look at the petitioner's likelihood of succeeding on the merits. SCE&G believes that the different expressions of intent in the legislative history arose because members of Congress described interim operation in different ways. The NRC staff responded that it was aware of this report language, and that the Chairman of that Senate Committee, Senator Johnston, was also the floor manager of the bill and the sponsor of the later amendment to the interim operation provision. The NRC staff also stated that this Senate Committee report language was based on an earlier version of the legislation that explicitly mentioned consideration of the likelihood of success on the merits but that this language was later taken out of the bill. In the NRC staff's view, the removal of this

language seemed to be an indication that Congress changed its mind on the issue. SCE&G replied that it was only giving this Senate report language as an example of why one statement of a Senator could not be used to interpret a provision. SCE&G said that its main point is that the interim operation standard is what it is, the Commission is familiar with it, and the Commission should apply it as the Commission sees fit. (Transcript at 35-38).

Westinghouse (September 22, 2014 Public Meeting Comments): Westinghouse agrees with NEI and SCE&G's position, and adds that the adequate protection determination for interim operation is going to be very fact-specific and that the Commission should not confine itself using narrow criteria based on legislative history. Also, Westinghouse states that the NRC has a long history of interpreting "reasonable assurance of adequate protection" in other contexts and does not need to rely on legislative history to help interpret this concept. According to Westinghouse, if the statute is clear on its face, there is no need to examine the legislative history. (Transcript at 25-26, 32-33).

The NRC staff asked Westinghouse about its written comment that the NRC staff's position narrowly constrained the Commission's inherent authority to determine what constitutes reasonable assurance of adequate protection. The NRC staff asked whether the NRC staff's position would really constrain Commission authority given that the Commission will have already exercised its independent judgment when admitting the contention in its determination that the petitioner made a *prima facie* showing that the nonconformance with the acceptance criteria would be contrary to adequate protection. Westinghouse replied that the Commission would have more flexibility in making an interim operation determination because the decision on whether to grant the contention is focused solely on whether the *prima facie* showing has been made. Westinghouse also stated that when referring to constraints on the Commission, Westinghouse was focusing on the legislative history language discussed in SECY-13-0033, specifically the language stating that interim operation was intended for situations in which there is no question of safe operation of the plant. According to Westinghouse, this legislative history language seems inconsistent with the NRC's overall statutory authority. (Transcript at 28-31).

Westinghouse also addressed its written comments on the relationship between interim operation and the practice of issuing license amendments prior to the conclusion of a contested hearing. Westinghouse stated that the two processes are analogous to the extent that both involve operation determinations before the conclusion of the hearing. However, Westinghouse said that they differ in that the interim operation provision is based on the very broad standard of adequate protection, which extends to the reaches of the NRC's AEA authority, while the "no significant hazards consideration" standard for license amendments seems to be much narrower. (Transcript at 26-28).

NEI (October 15, 2014 Written Comments at 4-5): NEI's October 15, 2014 written comments agree with NEI's comments at the public meeting and contain the following additional points: First, NEI states that the adequate protection determination can be based on various factors, including a weighing of evidence regarding adequate protection (which can be done without assessing the merits of the contention) or a preliminary assessment for a particular ITAAC that the contention lacks merit notwithstanding a *prima facie* showing. NEI also states that the original written comments of NEI, SCE&G, and Westinghouse asserted that the adequate protection determination for interim operation could be based on a pre-hearing conclusion that the petitioner's contention is incorrect, and NEI claims that this not the same as a pre-hearing conclusion that the petitioner's *prima facie* showing is incorrect.

Second, NEI claims that, contrary to the NRC staff's suggestion at the public meeting, it is not dispositive that Congress contemplated, but did not adopt, language in the statute requiring consideration of the underlying merits when determining interim operation. NEI believes that this drafting history could simply indicate that Congress wanted to afford the Commission maximum flexibility in making the adequate protection determination for interim operation. NEI also suggests that this drafting history should be accorded less weight in interpreting a statute than a Conference Committee Report because this drafting history does not contain an express statement of Congressional intent. Third, NEI states that its position is consistent with the literal language of 10 CFR 52.103(c) because this regulation requires consideration of the *prima facie* showing but does not require that the interim operation determination be based on the *prima facie* showing.

NRC Response: As explained below, the NRC does not adopt the suggestion made by the commenters on this question because the NRC believes that the best interpretation of the statute is that the Commission is not to make a merits determination that the petitioner's prima facie showing is incorrect when determining whether there is reasonable assurance of adequate protection of the public health and safety during interim operation.[27] *The NRC begins by noting that SECY-13-0033 was not intended to serve as a legal brief on interim operation issues. In addition, the proposed procedures did not expand on the legal considerations cited in SECY-13-0033 because the NRC received no adverse feedback on this SECY paper. Before directly addressing the comments on the proper interpretation of the interim operation provision, the NRC will first describe the circumstances in which interim operation can arise and the legislative history on how the interim operation provision came to exist.*

In accordance with AEA § 189a.(1)(B)(iii), interim operation only comes into play when the Commission has granted a petitioner's hearing request. A requirement for granting a hearing request is that the Commission has determined that the petitioner has made the necessary prima facie showing. AEA § 189a.(1)(B)(ii). This prima facie showing is in two parts, the second part of which can further be subdivided into two sub-parts. Specifically, to satisfy AEA § 189a.(1)(B)(ii), the petitioner must show, prima facie:

> *(1) that one or more of the acceptance criteria have not been or will not be met, and*
> *(2) that (a) the operational consequences of nonconformance (b) are contrary to reasonable assurance of adequate protection of the public health and safety.*

Issue (1)—regarding the alleged nonconformance with the acceptance criteria—is a question of technical fact for which prima facie evidence must be provided. Issue (2)(a)—regarding the alleged operational safety consequences flowing from nonconformance—is also a question of technical fact for which prima facie evidence must be provided. Issue (2)(b)—whether these alleged operational consequences of nonconformance are contrary to reasonable assurance of

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[27] NEI makes a distinction between a determination that the contention is incorrect and a determination that the prima facie showing is incorrect, but the NRC sees no relevance to making such a distinction. The prima facie showing is one of the required elements of an admissible contention. 10 CFR 2.309(f)(1)(vii). Thus, the prima facie showing is part of any admitted contention. Also, the other contention admissibility factors in 10 CFR 2.309(f)(1)(i) through (v) are essential elements in making the prima facie showing, as pointed out in the proposed procedures. See Draft Template A, at 9 n.6 (ADAMS Accession No. ML14097A460). Finally, in interpreting the interim operation provision, it is best to focus on the words that appear in the legislation, like "prima facie", rather than on words that do not, like "contention."

adequate protection of the public health and safety—is a matter of regulatory judgment solely within the discretion of the Commission. The NRC agrees that the Commission retains absolute discretion on whether some potential safety question implicates "reasonable assurance of adequate protection," and the NRC staff did not, and never intended to, question this. However, it must be remembered that before making a determination on interim operation, the Commission will have already exercised its regulatory judgment in determining whether the issues raised by the petitioner implicate reasonable assurance of adequate protection of the public health and safety.

With respect to the genesis of the interim operation provision: The original promulgation of 10 CFR Part 52 did not provide for operation during an interim period. See 1989 Part 52 Rule, 54 FR 15372 (containing no interim operation provision). However, the interim operation provision was subsequently added to the AEA in 1992 as part of the Energy Policy Act of 1992 (EPAct). The COL provisions in the EPAct codified important provisions of the 1989 Part 52 Rule. See EPAct, Public Law No. 102-486, §§ 2801-07 (1992). The COL provisions in the EPAct largely derive from Senate Bill 1220, reported out of the Senate Committee on Energy and Natural Resources in Senate Report Number 102-72. Senate Bill 1220 had COL provisions substantially similar to those found in the enacted statute. Compare S. 1220, 102nd Cong. §§ 9101-9107 (1991) with EPAct §§ 2801-2807 (as enacted). The COL provisions in Senate Bill 1220, which included a provision on interim operation, were later introduced in identical form as part of Senate Bill 2166 on January 29, 1992, by Senator Johnston, who was the Chairman of the Committee on Energy and Natural Resources, and Senator Wallop, who was a member of the same committee. After a later amendment, Senate Bill 2166 was passed by the Senate on February 19, 1992.

One of the changes made by the amendment adopted during Senate debate on Senate Bill 2166 brought the interim operation provision to its final form. See 138 Cong. Rec. S1141, S1173 (Feb. 6, 1992) (Amendment Number 1575 passed as introduced by Sen. Johnston, with Sen. Wallop and others co-sponsoring). On May 20, 1992, the House of Representatives amended its version of what became the EPAct, House Bill 776, to add COL provisions that were substantively identical to the provisions in Senate Bill 2166 as passed by the Senate. House Bill 776 was later passed by both the House and Senate and signed into law by the President as the EPAct. The COL provisions were not discussed in the conference report on the bill. H.R. Rep. No. 102-1018 (Oct. 5, 1992) (Conf. Rep.). However, legislative history on the COL provisions can be found in the Senate floor debates and in Senate Report Number 102-72.

The interim operation provision in Senate Report Number 102-72 is substantially different from what was ultimately enacted. In Senate Report Number 102-72, AEA § 189a.(1)(B)(iii) was as follows:

> *If a hearing is held, commencement of plant operation shall not be delayed pending a decision unless the Commission determines, after considering petitioners' prima facie showing and any answers thereto, that petitioners are likely to succeed on the merits and that there will not be reasonable assurance of adequate protection of the public health and safety.*

S. Rep. No. 102-72 at 564. Among the changes to this language made in Senate Amendment Number 1575, the Senate completely removed the determination on the petitioner's likelihood of succeeding on the merits. The final language, which is the result of Senate Amendment Number 1575, is as follows:

> *If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.*

AEA § 189a.(1)(B)(iii).

The commenters assert that the NRC has broad discretion in making the adequate protection determination for interim operation based on the plain language of the statute, and that it is inappropriate to rely on the legislative history. Also, at least one commenter believes that the interpretation stated in the proposed procedures is contrary to the long-established understanding of "reasonable assurance of adequate protection."

In response, the NRC begins by pointing out that the NRC's position is not based on an interpretation of the words "reasonable assurance of adequate protection of the public health and safety." Rather, the NRC's position is based on an interpretation of how the statute directs the NRC to "consider[]" the petitioner's prima facie showing and answers thereto. Thus, the assertion that the NRC is misinterpreting the concept "reasonable assurance of adequate protection" is misplaced. In addition, as stated above, interim operation will only come into play once the Commission has already exercised its independent regulatory judgment regarding whether the contention includes a prima facie showing of the existence of operational safety issues that, if proven true, would be contrary to reasonable assurance of adequate protection of the public health and safety.

Further, the NRC's interpretation of the interim operation provision was made in awareness of the "plain meaning" canon cited by the commenters. However, the "plain meaning" canon applies when the words of a statute are "clear and unambiguous." 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, § 46:1 (7th ed. 2007) (hereinafter "Sutherland"). Where statutory language "[is] capable of two reasonable readings or when no one path of meaning [is] clearly indicated," courts generally consult legislative history for guidance in interpreting the statutory text. 2A Sutherland, § 48:1 (7th ed. 2007). In coming to its interpretation, the NRC also heeded the U.S. Supreme Court's admonition that statutory language is to be interpreted "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" Abramski v. United States, 134 S. Ct. 2259, 2267 (2014) (quoting Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013)). Applying these canons of statutory construction to the interim operation provision, the NRC believes that resort to the legislative history is appropriate because the interim operation provision does not "clearly and unambiguously" state how the petitioner's prima facie showing and the answers thereto will be considered.

The commenters argue that the plain language of the AEA provides that the Commission can make the adequate protection determination by weighing the petitioner's prima facie showing against the arguments and evidence raised in the answers to the petition and make a merits determination. NEI, the only commenter to offer a specific standard for making this merits determination, suggests that the Commission allow interim operation based on a determination on the petitioner's likelihood of succeeding on the merits. NEI states that the adequate protection determination can be based on various factors, including a weighing of evidence regarding adequate protection (which NEI claims can be done without assessing the merits of

the contention)[28] or a preliminary assessment for a particular ITAAC that the contention lacks merit notwithstanding a prima facie showing. However, the statutory language does not mention a merits determination or a consideration of the petitioner's likelihood of succeeding on the merits. Thus, the commenters' position is not dictated by the plain language of the AEA.

In addition, it could be argued that the commenters' reading does not make sense within the context and purpose of the EPAct's COL provisions. See Abramski, 134 S. Ct. at 2267. The interim operation provision allows operation even though a hearing has not been completed on a prima facie showing that acceptance criteria have not been, or will not be, met, and that the specific operational consequences of this nonconformance would be contrary to reasonable assurance of adequate protection of the public health and safety. In NEI's view, the Commission could allow interim operation based on a preliminary merits determination even if interim operation would be contrary to reasonable assurance of adequate protection should the petitioner's prima facie showing prove to be correct. However, given that a petitioner must meet the fairly stringent prima facie showing standard, one could argue that Congress intended that the Commission would, in considering the petitioner's prima facie showing, account for the possibility that the petitioner might prove to be correct. This argument is strengthened by the fact that the statute only requires the NRC to consider the parties' initial filings when making the adequate protection determination. Thus, the statutory text indicates that Congress was willing to allow operation prior to the hearing being completed, but only with an additional safeguard in the form of a required NRC determination that there will be reasonable assurance of adequate protection during interim operation even if the petitioner's prima facie showing proves to be correct. This purpose would not be served if the Commission could allow interim operation based on a pre-hearing determination that the prima facie showing is incorrect, or is likely incorrect.

In other words, the interim operation provision serves the purpose of a stay provision by determining whether the 10 CFR 52.103(g) finding should be given immediate effect, and the interim operation provision should be interpreted in light of this purpose.[29] In this view, the interim operation provision serves the purpose of a stay provision by focusing on the question of irreparable harm, which makes sense because irreparable harm is the most important stay factor, "the sine qua non of obtaining a stay." Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (citing USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1295 (2d Cir. 1995)). With respect to irreparable harm, in the ITAAC hearing context the purported harm is that the alleged nonconformance with the acceptance criteria creates operational safety consequences contrary to reasonable assurance of adequate protection of the public health and safety. Therefore, to determine whether this purported harm will be made irreparable by allowing operation before

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[28] NEI's claim is incorrect because, as explained above, the prima facie showing is one of the required elements of an admissible contention. Thus, a merits determination that is contrary to the petitioner's prima facie showing on adequate protection would be a merits determination on the contention.

[29] In fact, NEI points to the NRC's stay provision in 10 CFR 2.342 as providing a standard to use for making interim operation determinations. While NEI advocates for the use of the 10 CFR 2.342(e)(1) standard of likelihood of success on the merits, this standard was considered by Congress for use in making interim operation decisions and was later rejected through the adoption of Senate Amendment Number 1575. However, the legislative history reflects that Congress was aware of the stay standards at the time it crafted the interim operation provision.

the completion of the hearing, the interim operation provision directs the Commission to consider whether there will be reasonable assurance of adequate protection of the public health and safety during interim operation even if the petitioner's prima facie showing proves to be correct.

While the statutory text does not explicitly include the words "irreparable harm," neither does it explicitly provide for a determination on the merits as advocated by the commenters. Given the above discussion, the NRC believes that the "plain meaning" rule does not apply and that it is appropriate to resort to the legislative history.

With respect to the legislative history, the NRC disagrees with those comments asserting that the NRC incorrectly interpreted the legislative history. In introducing Senate Amendment Number 1575, Senator Johnston, who was the Chairman of the Committee on Energy and Natural Resources and a floor manager of the legislation, explained the basis for the interim operation provision as follows:

> *The kind of situation we envision is where there is no question about the safe operation of the plant, but there might be, for example, a long term implication for safety. For example, in the Yankee Rowe plant, in which case a decision was made recently to close Yankee Rowe after some 30 years of operation. They closed the plant down not because during that first 30 years it was unsafe, but because they could not satisfy themselves that after thirty years of neutron bombardment of this huge pressure vessel that the steel in that pressure vessel, over that period of time, had not become brittle.*
>
> *Interim operation might allow you, when you have that kind of situation where somebody says this pressure vessel will not be good after 30 years of operation, you might allow it, during a hearing process on the question of the integrity of the vessel for beyond 30 years, to begin operation. But in order to do that, the Nuclear Regulatory Commission would have to determine that the plant would operate safely in the interim.*

138 Cong. Rec. S1143 (Feb. 6, 1992) (emphases added).

In explaining the amendment just prior to the Senate agreeing to it, Senator Johnston stated:

> *The authority to allow interim operation is limited. It could be used where, although a petitioner has raised a question about the long-term safety of the plant and the NRC has decided a hearing on the issue is warranted, the NRC is able to determine that the plant is safe to operate during an interim period. This could occur, for example, where the safety problem will not occur for several years or where mitigating measures can be taken to avoid the problem during a period of interim operation.*

138 Cong. Rec. S1173 (Feb. 6, 1992) (emphases added).

As is evident from the above statements, Senator Johnson viewed the authority to allow interim operation as being "limited." 138 Cong. Rec. S1173 (Feb. 6, 1992). Senator Johnston did more than just provide examples of situations in which interim operation could be allowed. Senator Johnston explicitly stated that he was describing "the kind of situation" to which interim operation was intended to apply; in other words, the category of situations to which interim

operation was intended to apply. See 138 Cong. Rec. S1143 (Feb. 6, 1992). As Senator Johnston stated, "the kind of situation we envision is where there is no question about the safe operation of the plant" during the interim operation period. Id. Interpreting this statement in light of the statutory language he was discussing, the "question about safe operation of the plant" refers to the petitioner's prima facie showing that operation is contrary to reasonable assurance of adequate protection of the public health and safety.[30] Therefore, Senator Johnston's evident intent was that the Commission's adequate protection determination for interim operation would not be a merits determination that the petitioner's prima facie showing is, in fact, incorrect. In addition, the examples given by Senator Johnston of where interim operation would be appropriate contemplate that the Commission would make the adequate protection determination while accounting for the possibility that the petitioner's prima facie showing might be correct. See 138 Cong. Rec. S1143 (Feb. 6, 1992) (Sen. Johnston stating, "Interim operation might allow you, when you have that kind of situation where somebody says this pressure vessel will not be good after 30 years of operation, you might allow it, during a hearing process on the question of the integrity of the vessel for beyond 30 years, to begin operation.") See also 138 Cong. Rec. S1173 (Feb. 6, 1992) (Sen. Johnston stating, "[Interim operation authority] could be used where, although a petitioner has raised a question about the long-term safety of the plant and the NRC has decided a hearing on the issue is warranted, the NRC is able to determine that the plant is safe to operate during an interim period.") Therefore, a close reading of Senator Johnston's statements on the interim operation provision show that he did not view the adequate protection determination for interim operation as being based on a merits determination that the petitioner's prima facie showing is, in fact, incorrect.

Because of Senator Johnston's role in introducing and explaining Amendment Number 1575 and his key role in the COL provisions as a whole, the NRC believes that his discussion of the interim operation provision should be accorded substantial weight in interpreting how the Commission should "consider" the petitioner's prima facie showing in accordance with the statute. While the views of one Senator may not be controlling, courts do "give consideration to statements made by a bill's sponsor" and to the member of the committee in charge of the bill in recognition of the fact that "legislators look to the sponsor and to the representative of the committee in charge of it, to be particularly well informed about its purpose, meaning, and intended effect." 2A Sutherland, § 48:15 (7th ed. 2007). The NRC finds the U.S. Supreme Court's 1982 decision in North Haven Board of Educ. v. Bell, 456 U.S. 512, to be particularly relevant to how much weight should be accorded to Senator Johnston's views. In North Haven the Court stated, "Although the statements of one legislator made during debate may not be controlling, . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." Id. at 526-527 (emphasis added). In North Haven, the Court further explained that "because §§ 901 and 902 originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements—which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks—are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902." Id. at 527. Similarly with respect to the interim operation provision, no committee or conference report discusses the final statutory language, the final statutory language was the result of a floor amendment, and Senator Johnston proposed this floor amendment and explained its meaning and intent to other

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[30] Interpreting Senator Johnston's remarks in the context of the statutory language he was discussing should address Westinghouse's concern that "no question about safe operation of the plant" is inconsistent with the AEA.

Senators on the day that the amendment was adopted. Given this, and given the fact that Senator Johnston chaired the committee giving rise to the bill, was a floor manager of the bill, and led the debates on the bill, it would seem that Senator Johnston's views should be accorded substantial weight consistent with the Court's treatment of Senator Bayh's remarks in North Haven.

SCE&G is also mistaken that there is legislative history supporting its position that the Commission's adequate protection determination for interim operation should be a merits determination. SCE&G correctly states that the interim operation provision in Senate Report Number 102-72 provided for an NRC determination on the likelihood that the petitioner would succeed on the merits. However, this language was stripped out of the bill by Senate Amendment Number 1575. The NRC finds it difficult to conclude that Congress still intended the interim operation determination to be a merits determination after removing the pertinent language from of the bill. NEI suggests that the removal of language from a bill during the drafting process should not be according significant weight in interpreting a statute, but as the U.S. Supreme Court has stated, "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." INS v. Cardoza–Fonseca, 480 U.S. 421, 442-43 (1987) (citations omitted). See also Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.").

NEI states that Congress might have removed the preliminary merits determination language to afford the Commission maximum flexibility in making the adequate protection determination for interim operation. NEI offers no evidence for its view, however, and NEI's claim is contradicted by the legislative history. Senator Johnston explained that the changes made to the bill by Senate Amendment Number 1575 were intended to address concerns that Senators had about the bill. 138 Cong. Rec. S1143 (Feb. 6, 1992). Senator Johnston went on to state that "[t]he authority to allow interim operation is limited" and that interim operation was intended to apply to situations "where there is no question about the safe operation of the plant." 138 Cong. Rec. S1143, S1173 (Feb. 6, 1992). Thus, the legislative history cited by SCE&G supports the NRC's interpretation because it shows that Congress explicitly contemplated a merits determination on interim operation but then decided against it.

To remain consistent with Congressional intent, therefore, the Commission should not rule on the merits of the petitioner's prima facie showing when making the adequate protection determination for interim operation. However, the Commission could still allow interim operation if it determines that the matters in the petitioner's prima facie showing do not implicate adequate protection during the interim period. The Commission could also allow interim operation where mitigating measures can be taken to avoid the adequate protection concern during a period of interim operation. See 138 Cong. Rec. S1173 (Feb. 6, 1992) (statement of Sen. Johnston).

The NRC also disagrees with commenter suggestions that the NRC's position is contrary to the plain language of the statute. In making the adequate protection determination for interim operation, the Commission would duly consider the prima facie showing and the answers thereto. The answers filed by the licensee and the NRC staff could be considered in determining whether the prima facie showing has been made and to which aspects of operation the prima facie showing applies—such as whether the adequate protection concern is one of long term safety or the concern only implicates adequate protection at certain operational levels (e.g., greater than five percent power). The licensee's answer might also propose mitigation measures with an explanation of how reasonable assurance of adequate protection would be

maintained during an interim period even if the petitioner's prima facie showing proves to be correct. Thus, the NRC can, as the commenters urge, make a fact-specific determination based on the evidence and arguments from all the parties, albeit without making a merits determination on the petitioner's prima facie showing.[31]

The NRC does agree with Westinghouse that the interim operation adequate protection determination and the no significant hazards consideration determination are analogous in that they are screening devices for determining whether operation is allowed even though a hearing is being held on questions raised about safe operation of the plant. The NRC's interpretation of the interim operation provision is fully consistent with this screening approach because it acknowledges that the petitioner has made a robust prima facie showing and that the determination on whether operation may go forward prior to the completion of the hearing should not be based on a merits determination that the petitioner's prima facie showing is incorrect. NEI and Westinghouse correctly point out that there are differences between the two provisions and, therefore, these could be bases for treating the two provisions differently. However, on the question of whether the interim operation adequate protection determination is to be a determination on the merits of the contention, the legislative history and other considerations described above lead the NRC to treat the two provisions similarly. Also, the differences between the two provisions do not necessarily favor the commenters' argument. For example, because ITAAC hearing requests are held to a higher standard than hearing requests on license amendments, it might be argued that there is greater reason to avoid making a merits determination on the contention when deciding whether to allow operation prior to the completion of the hearing.

For all of the reasons given above, the NRC is not adopting the suggestion made by the commenters. Minor changes have been made to the discussion of interim operation in the procedures to clarify the NRC's position on how the Commission will make the adequate protection determination for interim operation.

C. Whether the 52.103(g) Finding Must Be Made for All ITAAC to Allow Interim Operation

NEI: Contrary to the position stated in SECY-13-0033 and the proposed procedures, NEI believes that the 10 CFR 52.103(g) finding in support of interim operation should be limited to uncontested ITAAC instead of all ITAAC. Thus, NEI suggests that interim operation be authorized when the Commission makes the adequate protection determination for contested ITAAC under 10 CFR 52.103(c) and the NRC staff makes the 10 CFR 52.103(g) finding regarding uncontested ITAAC.

SCE&G: SCE&G disagrees with the statement in the proposed procedures that AEA § 185b. requires the NRC to find that all acceptance criteria are met, including contested acceptance criteria, before interim operation is allowed. SCE&G asserts that this position is contrary to 10 CFR 52.103(c), which SCE&G asserts allows interim operation separate from 10 CFR 52.103(g). Instead, SCE&G claims that the 10 CFR 52.103(g) finding need only be made on the

[31] *The examples described in this paragraph show that the NRC's interpretation of the interim operation provision does not render it "meaningless," as NEI suggested in its comments. In addition, given the statutory language, the NRC disagrees with NEI's assertion that the petitioner's prima facie showing in support of its hearing request "does not affect" the Commission's determination on adequate protection during interim operation. NEI's position is contrary to the plain language of the AEA, which explicitly directs the NRC to consider the petitioner's prima facie showing.*

uncontested ITAAC to support interim operation. SCE&G also states that AEA §§ 185b. and 189a.(1)(B) must be read in context and asserts that the NRC staff's position does not account for the difference between "interim" operation under 10 CFR 52.103(c) and "unrestricted" operation under 10 CFR 52.103(g).

SCE&G further asserts that it would be "anomalous to say the least," to have the NRC staff find that the contested acceptance criteria are met while the Commission has determined that the petitioner has made a *prima facie* showing that the contested acceptance criteria have not been met. SCE&G also asserts that 10 CFR 2.340(j) provides that the 10 CFR 52.103(g) finding on contested acceptance criteria will be made after the presiding officer's initial decision, and rejects the NRC's position that 10 CFR 2.340(j) was not intended to apply in every conceivable situation. SCE&G states that regulations should be interpreted to give meaning to all of them to the extent possible.

NEI (September 22, 2014 Public Meeting Comments): NEI believes that the interim operation provision in 10 CFR 52.103(c) is essentially a carve out from the general requirement in 10 CFR 52.103(g). In this view, 10 CFR 52.103(c) addresses contested ITAAC in the context of the hearing, so the 10 CFR 52.103(g) finding need only be made on the uncontested ITAAC to allow interim operation. NEI recognizes that the NRC staff could make the 52.103(g) finding for contested ITAAC prior to the completion of the hearing in some circumstances, but NEI is concerned that there may be situations in which the NRC staff might not be prepared to make the 52.103(g) finding on contested ITAAC just because the hearing has not been completed. NEI states that not allowing interim operation in this scenario would be contrary to the interim operation provision. NEI also states that interim operation needs to apply to situations in which the NRC staff and licensee disagree over whether the acceptance criteria are met, which would not be possible if the 10 CFR 52.103(g) finding must be made for all ITAAC to allow interim operation. With respect to a post-hearing 10 CFR 52.103(g) finding after a period of interim operation, NEI does not believe that an overall post-hearing finding is necessary, but does not object to a reading of the AEA where such a post-hearing overall finding would be made. (Transcript at 6-8, 11-12).

NEI acknowledges that there is no specific statutory language or legislative history in support of its position other than what NEI perceives to be the clear intent of the statute. The NRC staff then asked whether the plain language of AEA § 185b. requires a 10 CFR 52.103(g) finding on all ITAAC prior to interim operation since § 185b. states that the NRC shall find that the acceptance criteria are met prior to operation and does not qualify this requirement. The NRC staff also asked why the NRC could not interpret AEA §§ 185b. and 189 together as imposing two separate requirements that must both be met prior to interim operation. NEI responded that such an approach would nullify interim operation based on the position that the NRC staff might take on the contested ITAAC. (Transcript at 10-11, 14-16).

The NRC staff also asked why the NRC could not treat interim operation like the somewhat analogous situation of contested license amendment proceedings, where the NRC can issue the license amendment during the hearing, but to do so, it must, among other things, find that that all regulatory requirements, including those that are the subject of contentions, are satisfied. The NRC staff further asked what basis the NRC would have for treating these two analogous situations differently. NEI replied that while the NRC staff could find that the contested ITAAC have been satisfied, the NRC staff does not need to do so. NEI further stated that while the two situations are analogous, they are not the same and do not need to be treated in exactly the same way. (Transcript at 16-18).

SCE&G (September 22, 2014 Public Meeting Comments): SCE&G agrees with NEI's written comments and with NEI's statements at the public meeting on the prerequisites for interim operation. Specifically, SCE&G asserts that to give full effect to AEA § 189, it is necessary to conclude that interim operation should be allowed based on a 10 CFR 52.103(g) finding on the uncontested ITAAC and a 10 CFR 52.103(c) adequate protection determination on the contested ITAAC. SCE&G believes that this follows from the text of § 189, which provides that the Commission is to allow interim operation if there is reasonable assurance of adequate protection of the public health and safety. SCE&G also states that AEA § 185 should be seen as a starting point while AEA § 189 should be seen as applying to unique circumstances when interim operation must be considered. According to SCE&G, the NRC staff could make a full 10 CFR 52.103(g) finding and allow unrestricted operation after the hearing is completed if the hearing decision is in favor of the licensee. This all-encompassing, post-hearing 52.103(g) finding would be based on a hearing decision on the contested ITAAC and the earlier finding on the uncontested ITAAC. (Transcript at 9-10, 12-16).

NEI (October 15, 2014 Written Comments at 2-3): NEI's October 15, 2014 written comments mirror NEI's comments at the public meeting with the following additional points: First, NEI states that reading AEA §§ 185b. and 189a.(1)(B)(iii) together, it is possible and advisable to authorize interim operation once the Commission has made the 10 CFR 52.103(c) adequate protection determination for contested ITAAC and the NRC staff has made the 10 CFR 52.103(g) finding on uncontested ITAAC. Second, NEI states that if the NRC staff does not make the 10 CFR 52.103(g) finding in a particular case because it does not believe that a contested ITAAC has been satisfied, then, under the NRC staff interpretation of the AEA, the NRC staff's position would effectively override the Commission's ability to authorize interim operation even if the Commission has determined that there is reasonable assurance of adequate protection during the interim operation period.

NRC Response: The NRC disagrees with the legal positions set forth in the comments and does not adopt the commenters' suggested modification.[32] *The NRC's position that it must find that all acceptance criteria are met before allowing interim operation is based on the plain language of AEA § 185b. In pertinent part this section states, "Following issuance of the combined license, the Commission shall ensure that the prescribed inspections, tests, and analyses are performed and, prior to operation of the facility, shall find that the prescribed acceptance criteria are met." AEA § 185b. (emphasis added). This section unambiguously states that the finding must be made prior to operation and does not limit the acceptance criteria to which the finding applies. In addition, because "interim operation" is operation by definition, the NRC concludes that the best reading of § 185b. is that it requires the NRC to find that all acceptance criteria are met prior to operation, including interim operation.*

Both SCE&G and NEI acknowledge that § 185b. applies to a decision allowing interim operation because they concede that the NRC must find that the uncontested acceptance criteria are met prior to allowing interim operation. However, they only apply § 185b. to interim operation in part. The NRC sees no basis in the statutory language or legislative history for such a partial application, and concludes that AEA § 185b. should be applied to interim operation in toto.

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[32] *For the reasons stated in the NRC's response to the previous set of comments, the proposed procedures did not elaborate on the legal rationale for the NRC's position on this question because this position was first stated in SECY-13-0033 and no adverse feedback had been received on it.*

SCE&G asserts that the NRC's position is contrary to 10 CFR 52.103(c) because this provision purportedly allows operation independent of 10 CFR 52.103(g). However, as stated previously, SCE&G concedes that the 10 CFR 52.103(g) finding must be made for uncontested acceptance criteria to allow interim operation. In addition, neither 10 CFR 52.103(c) nor the corresponding statutory provision in AEA § 189a.(1)(B)(iii) addresses the finding on whether the acceptance criteria are met.

The NRC also does not agree with NEI's position, supported by SCE&G, that the interim operation provision is a carve out from the requirement to find that the acceptance criteria are met. NEI cites the clear intent of the statute in support of its interpretation, but as NEI acknowledges, there is no explicit legislative language or history in support of its interpretation. The NRC's interpretation, however, is based on the plain language of AEA § 185b., as explained above. Also, the little legislative history there is on the relationship between the 10 CFR 52.103(g) finding and interim operation appears to support the NRC's position. During debate on Amendment Number 1575, the amendment bringing the interim operation provision to its final form, Senator Domenici, a sponsor of the bill, stated that the bill "prevent[ed] the hearing from delaying NRC's go-ahead on plant operations, if the NRC determines that the plant has met all the requirements demanded in its license and is safe to operate." 138 Cong. Rec. S1153 (Feb. 6, 1992) (emphasis added). In context, "all the requirements of the license" is probably best understood as "all of the acceptance criteria in the license" because the proposed statutory provision being debated required that the ITAAC be identified in the license, and the acceptance criteria were referred to in similar terms during debate on the bill. See 138 Cong. Rec. S1173 (Feb. 6, 1992) (Sen. Johnston stating that an ITAAC hearing resolves the question of "conformance with all the requirements of [the] license") (emphasis added). The NRC's reading of the AEA is superior even without resort to the legislative history, but the NRC is acknowledging this relevant information.

In any event, an agency cannot legally take an action until all legal prerequisites for the action are met, which in this case are set forth in AEA §§ 185b. and 189a.(1)(B). For this reason, the NRC disagrees with NEI that the NRC's position would allow the NRC staff to override the Commission's ability to authorize interim operation. The Commission's authority to allow interim operation is confined by the AEA, which requires a 52.103(g) finding on all ITAAC, including contested ITAAC, before operation may begin. The NRC also disagrees with SCE&G that its interpretation is supported by the need to account for the difference between "interim" operation under 10 CFR 52.103(c) and "unrestricted" operation under 10 CFR 52.103(g). The word "unrestricted" appears neither in AEA § 185b. nor in 10 CFR 52.103(g), and the NRC declines to read the word "unrestricted" into the statute or the regulations without a supporting basis in the legislative language or history. See Dean v. United States, 556 U.S. 568, 572 (2009) (the U.S. Supreme Court stating that it "'ordinarily resist[s] reading words or elements into a statute that do not appear on its face'" (quoting Bates v. United States, 522 U.S. 23, 29 (1997))).

The NRC also does not agree with SCE&G that it is "anomalous" for the NRC staff to find that the contested acceptance criteria are met when the Commission has determined that the petitioner has made a prima facie showing that the contested acceptance criteria have not been, or will not be, met. Determining that a petitioner has made a prima facie case is not the same as determining that the petitioner has made a conclusive case; if these were the same, then there would be no reason to hold a hearing. Instead, it is evident that the purpose of the hearing is to explore the prima facie showing and allow the presiding officer to make a merits determination on the contention. This merits determination may go against the intervenor. Just as the presiding officer of the hearing can determine that the contested acceptance criteria are

met notwithstanding the prima facie showing, the NRC staff can also make such a determination.

NEI acknowledges that the NRC staff could make the 52.103(g) finding on contested ITAAC prior to the completion of the hearing, but fears that the NRC staff might effectively disallow interim operation by withholding the 52.103(g) finding simply because a hearing is ongoing. However, the NRC staff will not do as NEI fears. If the Commission has made the adequate protection determination for interim operation and the NRC staff can find that all acceptance criteria are met, then the NRC staff will promptly make the 10 CFR 52.103(g) finding and allow interim operation.

NEI claims that if the SECY-13-0033 interpretation were to prevail, the interim operation provision would be nullified depending on the NRC staff's determination on the contested ITAAC. However, a statutory interpretation can only be said to "nullify" a statutory provision if the interpretation prevents the statutory provision from having any effect. The NRC's interpretation of AEA §§ 185b. and 189 gives effect to both sections, and, as NEI acknowledges, the NRC staff can make a pre-hearing 10 CFR 52.103(g) finding on all ITAAC to allow interim operation.

In addition, under NEI and SCE&G's reading, interim operation would become a way of getting around the AEA § 185b. requirement that the NRC find full compliance with the acceptance criteria before operation. While NEI and SCE&G believe that interim operation is an exception from this requirement, the interim operation provision was intended to prevent the hearing from unnecessarily delaying operation; it was not intended to absolve the licensee from complying with the ITAAC in its license.[33] Also, as is evident from the statutory text, interim operation is not available without the granting of a hearing request under AEA § 189a.(1)(B). That is because, in accordance with § 189a.(1)(B)(iii), interim operation only comes into play if a hearing request under § 189a.(1)(B)(i) has been granted. In accordance with § 189a.(1)(B)(ii), a hearing request under § 189a.(1)(B)(i) must show, prima facie, that there is a nonconformance with the acceptance criteria and that the operational consequences of this nonconformance are contrary to reasonable assurance of adequate protection of the public health and safety. In addition, this prima facie showing is a required consideration for the interim operation determination. AEA § 189a.(1)(B)(iii). Thus, interim operation is not available in the absence of a hearing under § 189a.(1)(B). Given this, it does not seem reasonable to set up a regime by which an NRC staff finding that all acceptance criteria are met is ordinarily required for operation, but the mere existence of a hearing partially absolves the licensee from this requirement.

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[33] As explained after this footnote, the statutory text clearly provides that interim operation only applies when a hearing request has been granted upon the making of the required prima facie showing. In addition, just before passage of the COL provisions in the Senate, the floor managers of the bill, Senators Johnston and Wallop, engaged in a colloquy regarding the reasons why they included the COL provisions in the broader legislation. In this colloquy, Senator Johnston stated that the COL provisions were intended to "to secure for the license holder the benefit of compliance with the license." 138 Cong. Rec. S1686 (Feb. 19, 1992) (emphasis added). Senator Johnston stated that the purpose of the interim operation provision was to prevent the hearing process from interfering with or delaying operation. Id. See also S. Rep. No. 102–72 at 296 (1991) (stating that "[t]he purpose of this provision is to prevent the pendency of a hearing from needlessly delaying operation").

NEI also argues that interim operation needs to apply to cases where there is a dispute between the NRC staff and the licensee, i.e., the NRC staff has affirmatively determined that the acceptance criteria are not met and the licensee disputes this NRC staff determination. However, NEI's position would expand the problem identified above by applying it to situations where the responsible regulatory staff have affirmatively determined that the licensee does not comply with the acceptance criteria in its license. In addition, NEI's position is contrary to the statutory language because if a licensee requests and is granted a hearing, then this is not a hearing under AEA § 189a.(1)(B). As explained in the preceding paragraph, a hearing request under § 189a.(1)(B) must show, prima facie, that there is a nonconformance with the acceptance criteria. A licensee asserting that the acceptance criteria are, in fact, met cannot make this prima facie showing. Thus, any hearing at the request of the licensee is not a hearing under § 189a.(1)(B). Because interim operation is only available for a hearing under § 189a.(1)(B), the interim operation provision does not apply to hearings held at the request of the licensee.

The proposal made by SCE&G and NEI is also inconsistent with the analogous process for issuing a reactor license amendment even though a hearing on contested issues associated with that license amendment has not been completed. In such cases, the NRC staff can issue a license amendment prior to the completion of the hearing after making the necessary safety and regulatory findings (including on matters being contested by an intervenor) and making a final "no significant hazards consideration" determination. See AEA § 189a.(1)-(2); 10 CFR 50.91(a)(4), 50.92(a), (c). For example, in a proceeding on a license amendment for the Shearon Harris Nuclear Power Plant, the license amendment was issued based on a final no significant hazards consideration determination while an admitted environmental contention was still being litigated. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 117 (2001). Notwithstanding the pending litigation on environmental matters, the license amendment issued by the NRC included the finding that all statutory and regulatory requirements were satisfied, including the environmental requirements in 10 CFR Part 51. Amendment No. 103 to Facility Operating License No. NPF-63, Enc. 1, at 1 (ADAMS Accession No. ML003779362). Just as the existence of a license amendment hearing does not excuse the NRC staff from making all of the required statutory and regulatory findings to issue the license amendment, the existence of an ITAAC hearing should not excuse the NRC staff from making an affirmative finding on all of the acceptance criteria prior to allowing interim operation. NEI responds to this analogy by stating that while the "no significant hazards consideration" and interim operation processes are analogous, they are not the same and do not need to be treated the same way. However, NEI did not provide a principled reason for treating these processes separately and the NRC does perceive any.

The NRC also disagrees with SCE&G that the NRC's position is inconsistent with 10 CFR 2.340(j). Section 2.340(j) provides direction on how the 10 CFR 52.103(g) finding is to be made after an initial decision that the contested acceptance criteria have been, or will be, met. However, in the case of interim operation, the 10 CFR 52.103(g) finding is made before this initial decision. Therefore, 10 CFR 2.340(j) does not apply because the interim operation scenario is outside the scope of § 2.340(j). SCE&G urges the NRC to give full meaning to 10 CFR 2.340(j), but applying a regulation to a situation outside its scope is a misapplication of the regulation. In addition, and as stated in the proposed procedures, the NRC's position is based on a statement of Commission intent made in the rulemaking amending 10 CFR 2.340(j). Specifically, the Commission stated in the most recent amendments to this regulation that § 2.340(j) was being amended to "clarify some of the possible paths" for making the 52.103(g) finding after the presiding officer's initial decision and that § 2.340(j) "is not intended to be an exhaustive 'roadmap' to a possible 10 CFR 52.103(g) finding that acceptance criteria are met."

ITAAC Maintenance Rule, 77 FR at 51,885, 51,886 (emphasis added). The NRC also notes that, as explained below in a different context, NEI agrees with the NRC that 10 CFR 2.340(j) is not intended to apply to interim operation.

For all of the reasons given above, the NRC is not adopting the suggestion made by NEI and SCE&G. No changes were made to the procedures as a result of these comments.

D. Process for and Timing of the Interim Operation Decision

NEI: NEI recommends that the hearing procedures clearly define the timing for the Commission's 10 CFR 52.103(c) adequate protection determination, the 10 CFR 52.103(g) finding, and the order allowing interim operation. NEI also disagrees with the statement in the proposed procedures that a 10 CFR 52.103(c) adequate protection determination is sufficiently expeditious if made by scheduled fuel load. NEI suggests that the adequate protection determination be made as soon as possible because the licensee may be able to load fuel before the scheduled date and because the licensee will need time to mobilize its workforce to support fuel load. NEI specifically recommends that the adequate protection determination be made with the decision on the contention or be made shortly thereafter, e.g., shortly after additional briefing that the Commission directs on licensee-proposed mitigation measures. With respect to the 10 CFR 52.103(g) finding, NEI recommends that the Commission establish a goal that the finding be made by the NRC staff within 10 days of the licensee notifying the NRC that the ITAAC have been completed or by scheduled fuel load, whichever is earlier. The purpose of establishing this goal would be to facilitate efficient and timely decisions on interim operation.

NEI also recommends that the Commission clarify the process for allowing operation as follows:

- If there are no admitted contentions, then the NRC staff would make the 10 CFR 52.103(g) finding as soon as it determines that all acceptance criteria are met, notwithstanding the pendency of appeals, motions to reopen, new or amended contentions filed after the deadline, etc.
- If an admitted contention is pending for hearing, then:
  - The NRC staff would make the 10 CFR 52.103(g) finding on all uncontested ITAAC as soon as it can determine that all uncontested acceptance criteria are met.
  - The Commission would make a Section 52.103(c) adequate protection determination concurrent with a decision to admit a contention (or as soon as possible thereafter).
  - The NRC staff would issue an order allowing interim operation and incorporating any conditions the Commission found necessary to support its adequate protection determination as soon as the 10 CFR 52.103(g) finding is made on uncontested ITAAC and the 10 CFR 52.103(c) adequate protection determination on contested ITAAC has been made.

SNC: SNC asserts that the discussion in the proposed procedures of the process for determining whether to allow interim operation is unclear. SNC asserts that the proposed procedures "contemplate[e] that an interim operation finding under § 52.103(c) and a § 52.103(g) finding will occur in tandem with one another, with communication back-and-forth between the Commission and the NRC Staff, just before (or even right at) the scheduled date for initial fuel load." Instead, SNC recommends that the Commission make the 10 CFR 52.103(c) adequate protection determination either with the decision on the hearing request, or when additional briefing is required, within 45 days of the order granting the hearing request, with 15 days being provided for briefing and 30 days for a Commission decision. SNC states that this would ensure that the adequate protection determination precedes the 10 CFR

52.103(g) finding as stated in the proposed procedures. SNC also asserts that there would be a clear separation of time between these two events under its proposal, and that this would ensure that the Commission's adequate protection determination is not seen as prejudicing the NRC staff's findings on ITAAC closure.

SNC also asserts that the process described in the proposed procedures creates the appearance that the Commission's adequate protection determination may somehow influence the 10 CFR 52.103(g) finding or that the Commission's adequate protection determination is somehow based on the NRC staff's plan to make the 10 CFR 52.103(g) finding. SNC further asserts that having the Commission await the NRC staff's 10 CFR 52.103(g) finding "unnecessarily blurs the delegation of that finding to the NRC Staff."

SNC states that its proposal has the added benefit of providing licensees and other hearing participants with predictability and will avoid delays in loading of fuel. SNC suggests that while it is "legalistically correct" to state that an interim operation decision is sufficiently expeditious if made by scheduled fuel load, such an approach is not workable because the licensee will need to complete many preparations to load fuel on the scheduled date. SNC states that licensees will schedule their preparations for loading fuel based on whether or not the Commission has made the adequate protection determination.

SNC also recommends that the interim operation decision making process be clarified.[34] Specifically, SNC states that the proposed procedures did not clearly articulate the distinction between the 10 CFR 52.103(g) finding and the hearing. SNC asserts that the NRC staff's 10 CFR 52.103(g) finding is not based on filings made in the ITAAC hearing process, but on the NRC staff's inspection activities and ITAAC notification reviews. SNC also suggests the following summary, which SNC believes reflects the intent of the proposed procedures but will help clarify this intent:

- If no ITAAC hearing request has been granted when the licensee submits its 10 CFR 52.99(c)(4) all ITAAC complete notification, the NRC staff will issue the 10 CFR 52.103(g) finding as soon as it determines that all acceptance criteria are met, notwithstanding the pendency of appeals, motions to reopen, stay requests, or other pleadings.
- If an ITAAC hearing request has been granted and the hearing is ongoing when the licensee submits its 10 CFR 52.99(c)(4) notification, the NRC staff will make the 10 CFR 52.103(g) finding and issue an order allowing interim operation if (a) the NRC staff has determined that all acceptance criteria are met and (b) the Commission has made the 10 CFR 52.103(c) adequate protection determination for all admitted contentions. Interim operation would be allowed notwithstanding the pendency of appeals, new or amended contentions filed after the deadline, claims of incompleteness, or other pleadings.
- If an ITAAC hearing request has been granted and the hearing is ongoing when the licensee submits its 10 CFR 52.99(c)(4) notification, then the NRC staff's 10 CFR

[34] SNC made specific recommendations in this regard assuming that the final procedures require a 10 CFR 52.103(g) finding on all ITAAC for interim operation, but SNC states that this should not be seen as taking a position contrary to SCE&G's argument that the 10 CFR 52.103(g) finding need only be made for uncontested ITAAC. As explained above, the final procedures require a 10 CFR 52.103(g) finding on all ITAAC for interim operation.

52.103(g) finding will await the outcome of the ITAAC hearing process only when the Commission has not made the 10 CFR 52.103(c) adequate protection determination for all admitted contentions or has made a negative 10 CFR 52.103(c) determination for one or more ITAAC.

SCE&G: SCE&G also disagrees with the statement in the proposed procedures that a 10 CFR 52.103(c) adequate protection determination is sufficiently expeditious if made by scheduled fuel load. SCE&G cites the same practicality concerns that NEI does, but SCE&G further adds that if the 10 CFR 52.103(c) adequate protection is made just before scheduled fuel load, then the licensee either will be seriously disadvantaged with respect to planning or will need to incur significant costs to maintain a ready workforce without knowing whether fuel load can proceed. SCE&G also claims that the 10 CFR 52.103(c) adequate protection determination must, as a matter of law, be made with the decision on the hearing request. SCE&G points out that AEA § 189a.(1)(B)(iii) and 10 CFR 52.103(c) provide that the adequate protection determination is to be made after considering the parties' initial filings and that the interim operation provision is triggered upon the granting of a hearing request. From this, SCE&G concludes that the adequate protection determination must be made with the decision on the hearing request.

NEI (September 22, 2014 Public Meeting Comments): NEI recommends that the NRC make each of the required findings for operation as early as possible rather than approaching the hearing process from the mindset of completing actions at the last possible moment. NEI states that the more advance notice the licensee has, the better it can plan for fuel loading and operation, and that planning equals safety. The NRC staff asked about whether it would be worth consuming resources to make an early adequate protection determination when most hearings will be completed before fuel load, making interim operation irrelevant. According to NEI, whatever additional burden goes into making the decision would be well spent given the possibility that the hearing process could be delayed, for whatever reason, at a later point in the process. NEI states that given the uncertainties involved, good contingency planning would suggest making the decision as early as possible. NEI also recommends that the adequate protection determination not be tied to a decision on the hearing request if this would hold up the decision on the hearing request. (Transcript at 38-39, 42-43, 43-45).

SCE&G (September 22, 2014 Public Meeting Comments): SCE&G agrees with NEI that the adequate protection determination should not be tied to a decision on the hearing request if this would hold up the decision on the hearing request. (Transcript at 45-46).

Mr. Lewis (September 22, 2014 Public Meeting Comments): Mr. Lewis understands the industry's concerns regarding timely decisions, but he thinks that these concerns conflict with the public's concern in ensuring safety. (Transcript at 40-41).

NEI (October 15, 2014 Written Comments at 3, 5-6): NEI encourages the Commission to make the adequate protection determination for interim operation as soon as possible. According to NEI, this will allow the licensee to mobilize its workforce and make other logistical arrangements necessary for fuel load. NEI states that these preparatory actions require considerable coordination and that providing as much time as possible for planning and preparation is consistent with sound safety principles. NEI also states that the hearing schedule in the proposed procedures allows no room for delay, which means that there is no reason to assume that the hearing process will be completed by scheduled fuel load. While NEI expects the Commission to make every effort to complete the hearing before scheduled fuel load, unforeseen circumstances leading to delay are likely to arise in this first-of-a-kind hearing. Finally, NEI recommends that, to the extent that the final ITAAC hearing procedures retain the

requirement that the NRC staff make the 10 CFR 52.103(g) finding on all ITAAC prior to allowing interim operation, the final procedures should adopt the process outlined in SNC's comments for a stand-alone 10 CFR 52.103(c) determination separate from the 52.103(g) finding such that the ongoing hearing process does not impact the 52.103(g) finding on a contested ITAAC.

NRC Response: As an initial matter, the NRC disagrees with the suggestion that the 10 CFR 52.103(c) adequate protection determination is required by law to be made with the decision on the hearing request. The fact that the statute describes the interim operation determination as being triggered by the granting of the hearing request does not imply that the interim operation determination must be made at the same time as the hearing request decision. If anything, the opposite could be implied because when one event or action is triggered by another event or action, they are usually separated in time with the triggering event or action occurring first. However, the NRC does not adopt a position on this timing issue because nothing in either AEA § 189a.(1)(B) or 10 CFR 52.103(c) specifies a time period for making the adequate protection determination for interim operation. The NRC does acknowledge that the interim operation provision is intended to prevent the hearing from unnecessarily delaying fuel load, and the Commission will attempt to make the adequate protection determination by scheduled fuel load if possible.

Other comments suggest that, for practical reasons, the 10 CFR 52.103(c) adequate protection determination should be made with the decision on the hearing request or some short time thereafter. However, the NRC does not believe that it is practical to tie the 10 CFR 52.103(c) adequate protection determination to a decision on the hearing request because that might delay the decision on the hearing request. The NRC does acknowledge that it might be possible in some cases for the NRC to issue an adequate protection determination after a decision on the hearing request but several months prior to scheduled fuel load.[35] However, the NRC does not believe that the comments provide substantial justification for the Commission to commit to making the adequate protection determination several months prior to scheduled fuel load.

The industry commenters believe that early issuance of the adequate protection determination will provide the licensee with predictability, aid in planning, avoid delays in fuel loading, and prevent unnecessary resource costs by allowing the licensee to schedule its resources for fuel loading only if the Commission has made a positive adequate protection determination. However, because the NRC staff's 10 CFR 52.103(g) finding is also required on both contested and uncontested ITAAC for interim operation and licensees cannot presume that the NRC staff will make this finding, early issuance of the adequate protection determination cannot provide assurance that interim operation will be allowed. In addition, if the hearing is completed before fuel load, then interim operation becomes irrelevant. Thus, licensees can schedule their resources based on the understanding that the NRC intends to complete the hearing, make the 10 CFR 52.103(g) finding, and make the 10 CFR 52.103(c) adequate protection determination by scheduled fuel load, but there is no guarantee that the licensee will receive favorable decisions. With respect to planning for the activities necessary to operate the plant, the

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[35] *While Mr. Lewis is concerned that expedited decision making conflicts with assuring safety, the Commission would never make a decision on an expedited schedule unless the Commission was also able to determine that safe operation would be assured.*

licensees should develop these plans well before operation, and their development should not be dependent on the timing of the Commission's interim operation decision.

Industry commenters also suggest that the licensee may be able to load fuel earlier than its scheduled date. However, licensees must recognize that making the required regulatory determinations requires time and resources, and the NRC cannot be expected to contract its already expedited schedule for making these determinations because the licensee discovers late in the process that it is able to complete construction in less time than it previously told the NRC.

On the other hand, several factors favor waiting to issue the adequate protection determination until it becomes necessary. For example, if the hearing decision is issued before scheduled fuel load, the hearing will not be an impediment to plant operation and no interim operation decision is necessary. In addition, new information may arise between the granting of the hearing request and scheduled fuel load that is material to the safety of interim operation. This could especially be the case for ITAAC that were not completed when the hearing request was submitted and that will only be completed late in the process, or where a new or amended contention filed after the deadline is admitted that could affect the Commission's consideration of interim operation. This is not to say that the Commission would wait until the last minute to consider interim operation and prepare its decision. Rather, the Commission will work toward making the interim operation decision as soon as the hearing request is granted, and will issue the decision should it become necessary to do so.

Also, by awaiting a notification from the NRC staff that it is prepared to make the 10 CFR 52.103(g) finding, the Commission would ensure that the Commission's adequate protection determination could not be construed as prejudicing the NRC staff's 10 CFR 52.103(g) finding. SNC disagrees with this conclusion and asserts that this approach could result in persons perceiving that the NRC staff's 10 CFR 52.103(g) finding was prejudiced by the Commission's adequate protection determination. The NRC, however, does not agree with SNC's position since it is not possible for a Commission decision made in the future to affect a NRC staff determination made in the past. The NRC also does not agree with SNC's assertion that the delegation of the 10 CFR 52.103(g) finding to the NRC staff will be blurred if the Commission makes its adequate protection determination after the NRC staff notifies the Commission that it is prepared to make the 10 CFR 52.103(g) finding. The NRC staff will still be making the finding, and the Commission's adequate protection determination will be completely separate, as a matter of fact and law, from the NRC staff's merits determination on the ITAAC.

The NRC also does not agree with SNC's position that an earlier Commission adequate protection determination would preclude persons from perceiving that the Commission's determination influenced the NRC staff's later determination that the acceptance criteria are met. Furthermore, the NRC does not agree with SNC's argument that the Commission's adequate protection determination might be perceived as being influenced by the NRC staff's 10 CFR 52.103(g) finding if the NRC staff's intent to make this finding is communicated before the Commission's adequate protection determination is made. The Commission's adequate protection determination will explicitly state that it is not based on any merits determination with respect to the petitioner's prima facie showing, including any 10 CFR 52.103(g) finding by the NRC staff. Therefore, the NRC does not believe that any adverse perception will arise.

With respect to a summary of the process for allowing operation (including interim operation), the NRC agrees with SNC that a summary of the process would improve the clarity of the hearing procedures. With respect to the specific suggestions made by NEI and SNC:

(1) The NRC disagrees with NEI's proposed summary to the extent it assumes that the NRC can allow interim operation without a 10 CFR 52.103(g) finding on the contested acceptance criteria.

(2) The NRC disagrees with SNC's suggestion that the hearing filings cannot affect the NRC staff's 10 CFR 52.103(g) finding. The NRC staff is obliged to consider relevant information when making regulatory determinations; this includes relevant information from hearing filings.

(3) The NRC agrees with SNC and NEI that if there are no admitted contentions, the NRC staff could make the 10 CFR 52.103(g) finding notwithstanding the pendency of appeals, motions to reopen, stay requests, new or amended contentions filed after the deadline, or any other pending pleadings. As a general matter, the mere filing of a pleading does not serve to stay any action. In addition, the structure of the COL provisions in AEA §§ 185b. and 189a.(1)(B) indicates that operation is automatically stayed only if the Commission has granted a hearing request but the hearing on the contention has not been completed. An automatic stay in this circumstance makes sense because the Commission will have determined that the petitioner made the required prima facie showing, i.e., a robust showing of, among other things, a significant safety problem at some point during reactor operation. The interim operation provision allows operation during the pendency of the hearing if the Commission determines that this possible harm does not apply, or can be mitigated, during the period of interim operation that is contemplated. In this regard, the interim operation provision is a special type of stay provision specially crafted for ITAAC hearings and focused on the issue of irreparable harm. However, in the absence of an admitted contention (i.e., in the absence of a Commission determination that the petitioner has made the required prima facie showing), there has been no Commission determination of a robust showing of possible harm during operation, and the interim operation provision does not come into effect.[36] Therefore, in the absence of an admitted contention and unless directed otherwise by the Commission, the 10 CFR 52.103(g) finding can be made and will be given effect.

Nevertheless, the NRC recognizes that since the interim operation provision does not apply, it makes sense for the general stay provisions in the ITAAC hearing procedures 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. Thus, if there is no admitted contention and a petitioner believes that some aspect of operation must be stayed until some action is taken in the hearing process, then that petitioner can file a stay request with the Commission in accordance with the stay provisions set forth in the case-specific procedural order.

(4) The NRC agrees with SNC that interim operation is allowed if the NRC makes the 10 CFR 52.103(g) finding for all ITAAC and the Commission makes the 10 CFR 52.103(c) adequate protection determination for all admitted contentions. The NRC also agrees that interim operation is allowed notwithstanding the pendency of any other pleading. In addition to SNC's proposed summary, the NRC notes that the hearing procedures disallow any stay request with respect to the NRC's interim operation decision.

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[36] As is stated in the AEA, the interim operation provision only comes into force "[i]f the [hearing] request is granted." AEA § 189a.(1)(B)(iii).

(5) The NRC agrees with SNC's suggestion that the NRC staff will wait to issue the 10 CFR 52.103(g) finding if an ITAAC hearing request has been granted, the hearing is ongoing, and the Commission has not made the 10 CFR 52.103(c) adequate protection determination for all admitted contentions or has made a negative 10 CFR 52.103(c) determination for one or more ITAAC.[37] There does not appear to be any benefit from making the 10 CFR 52.103(g) finding in this scenario because this finding could not be given immediate effect with respect to allowing operation given the statutory provisions on interim operation. In addition, a number of regulatory and license provisions pertaining to operation, including the 40 year term of the license and the implementation of technical specifications and other operational programs, are triggered by the 10 CFR 52.103(g) finding. Because the plant would not be able to operate in the scenario described by SNC, it would not make sense to trigger these other operation-related requirements.

Finally, the NRC does not take any action on NEI's recommended general schedule for the NRC staff making the 10 CFR 52.103(g) finding because this general schedule, which is not dependent on the hearing process, is outside the scope of the hearing procedures. The NRC staff's schedule for making the 10 CFR 52.103(g) finding will be addressed in a separate document.

The procedures have been revised to include a more detailed discussion on the process for allowing interim operation in accordance with the discussion above.

E. The Need for Additional Briefing on Interim Operation

NEI: NEI suggests that additional briefing on licensee-proposed mitigation measures directed at providing reasonable assurance of adequate protection during interim operation be a matter of discretion on the part of the Commission rather than a requirement.

SCE&G: SCE&G recommends that the proposed procedures not mandate additional briefing if a licensee proposes mitigation measures directed at the interim operation period. SCE&G states that given the statutory and regulatory language directing consideration of the parties' initial filings, the Commission should not request additional briefing. However, to the extent that the Commission requests additional briefing, it should be solely a matter within the discretion of the Commission, even in cases where the licensee proposed mitigation measures in its answer.

NRC Response: The NRC disagrees with the comments and is retaining in the final procedures the provision that mandates a briefing opportunity in response to licensee-proposed mitigation measures directed at providing reasonable assurance of adequate protection of the public health and safety during an interim operation period. Because any proposed mitigation measures would be new information not previously available, fairness dictates that the other parties be given a chance to respond, and an additional briefing opportunity should not prevent the Commission from making a 10 CFR 52.103(c) determination by scheduled fuel load. In addition, the Commission desires NRC staff input on any licensee-proposed mitigation measures. Finally, to the extent SCE&G suggests that the AEA and NRC regulations prohibit

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[37] While SNC described this scenario as resulting in the NRC awaiting the outcome of the hearing process, this might not be true in all cases. For example, the Commission's adequate protection determination for interim operation might not be made before scheduled fuel load but might be made at a later time that is still prior to the issuance of the initial decision.

additional briefing, the Commission disagrees because while the AEA mandates consideration of these initial filings, it does not prohibit the consideration of other information.

No changes were made to the procedures in response to these comments.

F. Interim Operation and 10 CFR 2.340(j)

NEI: NEI agrees with the proposed procedures that 10 CFR 2.340(j) was not intended to be an exhaustive roadmap for making the 10 CFR 52.103(g) finding in the hearing context, and specifically agrees that 10 CFR 2.340(j) does not apply to interim operation. However, because 10 CFR 2.340(j) does not explicitly state this, NEI recommends that the final hearing procedures clearly call out this exception to avoid confusion regarding the timing of the finding and determination necessary to allow interim operation.

NRC Response: The NRC adopts NEI's suggestion, which the NRC understands as recommending that the position already stated in the Federal Register notice for the proposed procedures should also be reflected in the notice and order templates that would be issued in each proceeding. The procedures have been revised accordingly.