boards to use Federal or State court rooms when these facilities are available and in such cases the policy of those courts in regard to the use of cameras will be observed.

The Commission plans to reassess this policy in about six months after its hearing and appeal boards have had sufficient experience with camera coverage to determine whether it can be carried out without disruption to the proceeding or unacceptable distraction to the participants.

Dated at Washington, D.C., this 27th day of January 1978.

For the Nuclear Regulatory Commission.

SAMUEL J. CHIL,
Secretary of the Commission.

[FR Doc. 78-2893 Filed 1-31-78; 8:45 am]

[7590-01]

CAMERA COVERAGE OF HEARINGS BEFORE ATOMIC SAFETY AND LICENSING BOARDS AND ATOMIC SAFETY AND LICENSING APPEAL BOARDS

General Statement of Policy

The Nuclear Regulatory Commission has considered requests from television stations and newspapers to permit the use of cameras during proceedings before Atomic Safety and Licensing Boards and Atomic Safety and Licensing Appeal Boards. In the past the NRC has permitted cameras to be used only before and after adjudicatory sessions and during recesses. The Commission has decided that, on a trial basis, it will permit the use of television and still cameras by accredited news media under certain conditions. Cameras may be used by news media during hearings and related public proceedings before Atomic Safety and Licensing Boards and Atomic Safety and Licensing Appeal Boards provided they do not require additional lighting beyond that required for the conduct of the proceeding and are stationed at a fixed position within the hearing room throughout the course of the proceeding. It will continue to be the practice of the hearing and appeal

NUCLEAR REGULATORY COMMISSION

Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings

On August 5, 1983, the Commission set forth interim procedures for handling conflicts between the NRC's responsibility to disclose information to adjudicatory boards and parties, and the NRC's need to protect investigative material from premature public disclosure. "Statement of Policy—Investigations and Adjudicatory Proceedings," 48 FR 36358 (August 10, 1983).

Those interim procedures called for the NRC staff or Office of Investigations (OI), when it felt disclosure of information to an adjudicatory board was required but that unrestricted disclosure could compromise an inspection or investigation, to present the information and its concerns about disclosure to the board *in camera*, without disclosure of the substance of the information to the other parties. A board decision to disclose the information to the parties was appealable to the Commission, and the board was not to order disclosure until the Commission addressed the matter.

That Statement of Policy was to remain in effect until the Commission received and took action on the recommendations of an internal NRC task force established to develop guidelines for reconciling these conflicts in individual cases. The Commission in that Statement also requested public comments on the propriety and desirability of *ex parte in camera* presentation of information to a board, and suggestions for any better alternatives.

The Task Force submitted its report to the Commission on December 30, 1983. A copy of that report will be placed in the Commission's Public Document Room. The Task Force approved the principles discussed in the Commission's earlier Statement of Policy, and made several recommendations intended to define specifically the responsibilities of the boards, the staff, and OI in presenting disclosure issues for resolution.

The Task Force recommended that the final Policy Statement explain that full disclosure of material information to adjudicatory boards and the parties is the general rule, but that some conflicts between the duty to disclose and the need to protect information will be inevitable. The Task Force further recommended that issues regarding disclosure to the parties be initially determined by the adjudicatory boards with provision for expedited appellate review, and that procedures for the resolution of such conflicts be established by rule. Finally, the Task Force suggested that existing board notification procedures should remain unaffected by the Policy Statement, and that those procedures and Commission guidelines for disclosure of information concerning investigations and inspections should apply to all NRC offices. Those recommendations have been incorporated in this Statement.

In addition, two comments were submitted by members of the public.

One commenter stated that the withholding of information from public disclosure should be confined to the minimum essential to avoid compromising enforcement actions, and that appropriate representatives of each party should be allowed to participate under suitable protective orders in any *in camera* proceeding except in the most exceptional cases.

The other commenter maintained that an *in camera* presentation to the board with only one party present is undesirable and violates the *ex parte* rule. That commenter suggested an alternative of having the attorneys or authorized representatives of parties who have signed a protective agreement present at any *in camera* presentation, with appropriate sanctions for violating the protective agreement.[1]

The Commission, after considering these comments and the report of the Task Force, has decided that it would be appropriate, in order to better explain the Commission's policy in this area, to provide the following explanation of the conflict between the duty to disclose investigation or inspection information to the boards and parties and the need to protect that information:

All parties in NRC adjudicatory proceedings, including the NRC staff, have a duty to disclose to the boards and other parties all new information they acquire which is considered material and relevant to any issue in controversy in the proceeding. Such disclosure is required to allow full resolution of all issues in the proceeding. The Commission expects all NRC offices to utilize procedures which will assure prompt and appropriate action to fulfill this responsibility.

However, the Commission recognizes that there may be conflicts between this responsibility to provide the boards and parties with information and an investigating or inspecting office's need to avoid public disclosure for either or both of two reasons: (1) To avoid

[1] Both comments also included suggestions regarding matters beyond the scope of this Policy Statement, which is concerned only with establishing a procedure to handle conflicts between the duty to disclose information to the boards and parties and the need to protect that information. For instance, one suggestion was that the NRC impose a more stringent standard in deciding whether information warrants a board notification. Another recommended that the NRC improve the quality of its investigations.

compromising an ongoing investigation or inspection; and (2) to protect confidential sources. The importance of protecting information for either of these reasons can in appropriate circumstances be as great as the importance of disclosing the information to the boards and parties.

With regard to the first reason, avoiding compromise of an investigation or inspection, it is important to informed licensing decisions that NRC inspections and investigations are conducted so that all relevant information is gathered for appropriate evaluation. Release of investigative material to the subject of an investigation before the completion of the investigation could adversely affect the NRC's ability to complete that investigation fully and adequately. The subject, upon discoving what evidence the NRC had already acquired and the direction being taken by the NRC investigation, might attempt to alter or limit the direction or the nature or availability of further statements or evidence, and prevent NRC from learning the facts. The failure to ascertain all relevant facts could itself result in the NRC making an uninformed licensing decision. However, the need to protect information developed in investigations or inspections usually ends once the investigation or inspection is completed and evaluated for possible enforcement action.

The second reason for not disclosing investigative material—to protect confidential sources—has a different basis. Individuals sometimes present safety concerns to the NRC only after being assured that their individual identity will be kept confidential. This desire for confidentially may arise for a number of reasons, including the possibility of harassment and retaliation. Confidential sources are a valuable asset to NRC inspections and investigations. Releasing names to the parties in an adjudication after promising confidentially to sources would be detrimental to the NRC's overall inspection and investigation activities because other individuals may be reluctant to bring information to the NRC. However, the need to protect confidential sources does not end when the investigation or inspection is completed and evaluated for possible enforcement action.

By this Policy Statement, the Commission is not attempting to resolve the conflict that may arise in each case between the duty to disclose information to the boards and parties and the need to protect that information or its source. The resolution of actual conflicts must be decided on the merits of each individual case. However, the Commission does note that as a general rule it favors full disclosure to the boards and parties, that information should be protected only when necessary, and that any limits on disclosure to the parties should be limited in both scope and duration to the minimum necessary to achieve the purposes of the non-disclosure policy.

The purpose of this Policy Statement is to establish a procedure by which the conflicts can be resolved. The Policy Statement takes over once a determination has been made, under established board notification procedures, that information should be disclosed to the boards and public, but OI or staff believes that the information should be protected. In those cases the Commission has decided that the only workable solution to protect both interests is to provide for an *in camera* presentation to the board by the NRC staff or OI, with no party present. Any other procedure could defeat the purpose of non-disclosure and might actually inhibit the acquisition of information critical to decisions. Allowing the other parties or their representatives to be present in all cases, even under a protective order, could breach promises of confidentiality or allow the subject of an investigation to prematurely acquire information about the investigation. We note in this regard the difficulties of attempting to prevent a party's representative from talking to his client about the relevance of the information and how to respond to it, even under a protective order.

The Commission believes that the boards, using the procedures established in this Policy Statement, can resolve most potential disclosure conflicts once they have been advised of the nature of the information involved, the status of the inspection or investigation, and the projected time for its completion. In many of the cases when the procedures in this Policy Statement are triggered by a concern for premature public disclosure, it may be possible for boards to provide for the timely consideration of relevant matters derived from investigations and inspections through the deferral or rescheduling of issues for hearing. In other instances, the boards may be able to resolve the conflict by placing limitations on the scope of disclosure to the parties, or by using protective orders.

The Commission wishes to emphasize that these procedures do not abrogate the well-established principle of administrative law that a board *may not* use *ex parte* information presented *in camera* in making licensing decisions. These procedures are designed to allow the boards to determine the relevance of material to the adjudication, and whether that information must be disclosed to the parties, and, if disclosure is required, to provide a mechanism for case management both to protect investigations and inspections and to allow for the timely provision of material and relevant information to the parties. As such these procedures are analogous to the procedures for resolving disputes regarding discovery, *see, e.g.*, 10 CFR 2.740(c), and do not violate the prohibition in 10 CFR 2.780 against *ex parte* discussion of substantive matters at issue.

In accord with the above discussion, the Commission has decided that the procedures to be followed, where there is a conflict between the need for disclosure to the board and parties and the need to protect an investigation or inspection, will include *in camera* presentations by the staff or OI. However, because this procedure represents a departure from normal Commission procedure, it is the Commission's view that the decision should be implemented by rulemaking. Accordingly, the Commission directs the NRC staff to commence a rulemaking on the matter.

Until completion of the rulemaking, the following will control the procedures to be followed in resolving conflicts between the duty to disclose to boards and the need to protect information developed in investigation or inspection:

1. Established board notification procedures should be used by staff or OI to determine whether information in their possession is potentially relevant and material to a pending adjudicatory proceeding.[2] The general rule is that all information warranting disclosure to the boards and parties, including information that is the subject of ongoing investigations or inspections, should be disclosed, except as provided herein.

2. When staff or OI believes that it has a duty in a particular case to provide an adjudicatory board with information concerning an inspection or investigation, or when a board requests such information, staff or OI should provide the information to the board and parities unless it believes that unrestricted disclosure would prejudice an ongoing inspection or investigation, or reveal confidential sources. If staff or OI believes unrestricted disclosure

[2] While this Statement refers only to staff and OI who are the organizations principally involved, the statement will apply to any other offices of the Commission which may have the problem.

would have these adverse results, it should propose to the board and parties that the information be disclosed under suitable protective orders and other restrictions, unless such restricted disclosure would also defeat the purpose behind non-disclosure. If staff or OI believes that any disclosure, however restricted, would defeat the purpose behind non-disclosure, it shall provide the board with an explanation of the basis of its concern about disclosure and present the information to the board, *in camera,* without other parties present. A verbatim transcript of the *in camera* proceeding will be made.[3]

All parties should be advised by the board of the conduct and purpose of the *in camera* proceeding but should not be informed of the substance of the information presented. If, after such *in camera* presentation, a board finds that disclosure to other parties under protective order or otherwise is required (*e.g.,* withholding information may prejudice one or more parties or jeopardize timely completion of the proceedings, or the board disagrees that release will prejudice the investigation), it shall notify staff or OI of its intent to order disclosure, specifying the information to be provided, the terms of any protective order proposed, and the basis for its conclusion that prompt disclosure is required. The staff or OI shall provide the board within a reasonable period of time, to be set by the board, a statement of objections or concurrence. If the board disagrees with any objection and the disagreement cannot be resolved, the board shall promptly certify the record of the *in camera* proceeding to the Commission for resolution of the disclosure dispute, and so inform the other parties. Any licensing board decision to order disclosure of the identify of a confidential source shall be certified to the Commission for review regardless of whether OI and staff concur in the disclosure.[4] The board's decision shall be stayed pending a Commission decision. The record before the Commission shall consist of the transcript, the board's Notice of Intent to require disclosure and the objections of Staff or OI. Staff or OI may file a brief with the Commission within ten days of filing a statement of objections with the board. The record before the Commission, including staff or OI's brief, shall be kept *in camera* to the extent necessary to protect the purposes of non-disclosure.

The Commission recognizes that no other party may be in a position effectively to respond to staff or OI's brief because the proceedings have been conducted *in camera.* However, in those cases where another party feels that it is in a position to file a brief, it may do so within seven days after staff or OI files its brief with the Commission.

3. Staff or OI shall notify the board and, as appropriate, the Commission, if the objection to disclosure to the parties of previously withheld information, or any portion of it, is withdrawn. Unless the Commission has directed otherwise, such information—with the exception of the identities of confidential sources—may then be disclosed without further Commission order.

4. When a board or the Commission determines that information concerning a pending investigation or inspection should not be disclosed to the parties, the record of any *in camera* proceeding conducted shall be deemed sealed pending further order. That record will be ordered included in the public record of the adjudicatory proceeding upon completion of the inspection or investigation, or upon public disclosure of the information involved, whichever is earlier, subject to any privileges that may validly be claimed under the Commission's regulations, including protection of the identify of a confidential source. Only the Commission can order release of the identify of a confidential source.

Dated at Washington, D.C. this 7th day of September, 1984.

Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 84-24261 Filed 9-12-84; 8:45 am]

BILLING CODE 7590-01-M

[3] Nothing in this Statement prohibits staff on OI from sharing information.

[4] The Commission has decided to review any licensing board decision ordering disclosure of the identify of a confidential source because of the importance to the Commission's inspection and investigation program of protecting the identity of confidential sources.

NUCLEAR REGULATORY COMMISSION

Alternative Means of Dispute Resolution; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement.

SUMMARY: This Policy statement presents the policy of the Nuclear Regulatory Commission (NRC) on the use of "alternative means of dispute resolution" (ADR) to resolve issues in controversy concerning NRC administrative programs. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combination of these processes. These processes present options in lieu of adjudicative or adversarial methods of resolving conflict and usually involve the use of a neutral third party.

DATES: This policy statement is effective on August 14, 1992. Because this is a general statement of policy, no prior notice or opportunity for public comment is required. However, an opportunity for comment is being provided. The period for comments expires on September 28, 1992. Comments received after this date will be considered to the extent practical; however, to be of greatest assistance to the Commission in planning the implementation of its ADR policy, comments should be received on or before this date.

ADDRESSES: Mail written comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Copies of comments received may be examined and/or copied for a fee at the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC, between 7:45 a.m. and 4:15 p.m.

FOR FURTHER INFORMATION CONTACT: James M. Cutchin IV, Special Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone: (301) 504–1568.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted the Administrative Dispute Resolution Act (Public Law 101–552) on November 15, 1990. The Act requires each Federal agency to designate a senior official as its dispute resolution specialist, to provide for the training in ADR processes of the dispute resolution specialist and certain other employees, to examine its administrative programs, and to develop, in consultation with the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS), and adopt, a policy that addresses the use of ADR and case management for resolving disputes in connection with agency programs. Although the Act authorizes and encourages the use of ADR, it does not require the use of ADR. Whether to use or not to use ADR is committed to an agency's discretion. Moreover, participation in ADR processes is by agreement of the disputants. The use of ADR processes may not be required by the agency.

Discussion

The Act provides no clear guidance on when the use of ADR is appropriate or on which ADR process is best to use in a given situation. However, section 581 of the Act appears to prohibit the use of ADR to resolve matters specified under the provisions of sections 2302 and 7121(c) of title 5 of the United States Code, and section 582(b) identifies situations for which an agency shall consider not using ADR. Nevertheless, numerous situations where the use of ADR to resolve disputes concerning NRC programs would be appropriate may arise. A document issued by ACUS in February 1992, entitled "The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists," suggests that the use of ADR may be appropriate in situations involving a particular type of dispute when one or more of the following characteristics is present:

Parties are likely to agree to use ADR in cases of this type;
Cases of this type do not involve or require the setting of precedent;
Variation in outcome of the cases of this type is not a major concern;
All of the significantly affected parties are usually involved in cases of this type;
Cases of this type frequently settle at some point in the process;
The potential for impasse in cases of this type is high because of poor communication among parties, conflicts within parties or technical complexity or uncertainty;
Maintaining confidentiality in cases of this type is either not a concern or would be advantageous;
Litigation in cases of this type is usually a lengthy and/or expensive process; or
Creative solutions, not necessarily available in formal adjudication, may provide the most satisfactory outcome in cases of this type.

As the Act requires, a Dispute Resolution Specialist has been designated, NRC administrative programs have been reviewed, a policy on the use of ADR has been adopted, and the training of certain NRC employees has begun. As the Act requires, input on development of the policy has been sought from ACUS and FMCS. Although the Act does not require it, input on the policy and its implementation is being sought from the public, including those persons whose activities the NRC regulates, because the possible benefits of ADR cannot be realized without the agreement of all parties to a dispute to participate in ADR processes. Among the possible benefits of ADR are:

More control by the parties over the outcome of their dispute than in formal adjudication;
A reduction in levels of antagonism between the parties to a dispute; and
Savings of time and money by resolving the dispute earlier with the expenditure of fewer resources.

Paperwork Reduction Act Statement

This policy statement contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Statement of Policy

This statement sets forth the policy of the Commission with respect to the use of "alternative means of dispute resolution" (ADR) [1] to resolve issues in controversy concerning NRC administrative programs.

The Commission has conducted a preliminary review of its programs for ADR potential and believes that a number of them may give rise to disputes that provide opportunities for the use of ADR in their resolution. For example, as the Commission has long recognized, proceedings before its Atomic Safety and Licensing Boards (ASLBs) provide opportunities for the use of ADR and case management. The Commission has encouraged its ASLBs to hold settlement conferences and to encourage parties to negotiate to resolve contentions, settle procedural disputes and better define substantive issues in dispute. The Commission also has stated that its ASLBs at their discretion should require trial briefs, prefiled testimony, cross-examination plans and other devices for managing parties' presentations of their cases, and that they should set and adhere to reasonable schedules for moving proceedings along expeditiously consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, (46 FR 28533, May 27, 1981); CLI-81-8, 13 NRC 452 (1981). In addition, the Commission has indicated that settlement judges may be used in its proceedings in appropriate circumstances. Rockwell International Corporation (Rocketdyne Division), CLI-90-5, 31 NRC 337 (1990).

Opportunities for the use of ADR in resolving disputes may arise in connection with programs such as those involving licensing, contracts, fees, grants, inspections, enforcement, claims, rulemaking, and certain personnel matters. Office Directors and other senior personnel responsible for administering those programs should be watchful for situations where ADR, rather than more formal processes, may appropriately be used and bring them to the attention of the NRC's Dispute Resolution Specialist. Persons who become involved in disputes with the NRC in connection with its administrative programs should be encouraged to consider using ADR to resolve those disputes where appropriate.

The Commission supports and encourages the use of ADR where appropriate. The use of ADR may be appropriate: (1) Where the parties to a dispute, including the NRC, agree that ADR could result in a prompt, equitable, negotiated resolution of the dispute; and (2) the use of ADR is not prohibited by law. The NRC's Dispute Resolution Specialist is available as a resource to assist Office Directors and other senior personnel responsible for administering NRC programs in deciding whether use of ADR would be appropriate. That individual should receive the cooperation of other senior NRC personnel: (1) In identifying information and training needed by them to determine when and how ADR may appropriately be used; and (2) in implementing the Commission's ADR policy.

The Commission believes that certain senior NRC personnel should receive training in methods such as negotiation, mediation and other ADR processes to better enable them: (1) To recognize situations where ADR processes might appropriately be employed to resolve disputes with the NRC; and (2) to participate in those processes.

The Commission recognizes that participation in ADR processes is voluntary and cannot be imposed on persons involved in disputes with the NRC. To obtain assistance in identifying situations where ADR might beneficially be employed in resolving disputes in connection with NRC programs and steps that can be taken to obtain acceptance of NRC's use of ADR, input from the public, including those persons whose activities the Commission regulates, should be solicited.

After a reasonable trial period, the Commission expects to evaluate whether use of ADR has been made where its use apparently was appropriate and whether use of ADR has resulted in savings of time, money and other resources by the NRC. The Commission will wait until some practical experience in the use of ADR has been accumulated before deciding whether specific regulations to implement ADR procedures are needed.

Public Comment

The NRC is interested in receiving comments from the public, including those persons whose activities the NRC regulates, on any aspect of this policy statement and its implementation. However, the NRC is particularly interested in comments on the following:

Specific issues, that are material to decisions concerning administrative programs of the NRC and that result in disputes between the NRC and persons substantially affected by those

[1] ADR is an inclusive term used to describe a variety of joint problem-solving processes that present options in lieu of adjudicative or adversarial methods of resolving conflict. These options usually involve the use of a neutral third party. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combinations of these processes.

decisions, that might appropriately be resolved using ADR processes in lieu of adjudication.

Whether employees of Federal government agencies should be used as neutrals in ADR processes or whether neutrals should come from outside the Federal government and be compensated by the parties to the dispute, including the NRC, in equal shares.

Actions that the NRC could take to encourage disputants to participate in ADR processes, in lieu of adjudication, to resolve issues in controversy concerning NRC administrative programs.

Dated at Rockville, Maryland this 7th day of August, 1992.

For the Nuclear Regulatory Commission.

Samul J Chilk,

Secretary of the Commission.

[FR Doc. 92-19454 Filed 8-13-92; 8:45 am]

BILLING CODE 7590-01-M

NUCLEAR REGULATORY COMMISSION

Policy on Conduct Of Adjudicatory Proceedings; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: update.

SUMMARY: The Nuclear Regulatory Commission (Commission) has reassessed and updated its policy on the conduct of adjudicatory proceedings in view of the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities.

DATES: This policy statement is effective on August 5, 1998, while comments are being received. Comments are due on or before October 5, 1998.

ADDRESSES: Send written comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Rulemakings and Adjudications Staff. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 am and 4:15 pm, Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert M. Weisman, Litigation Attorney, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415–1696.

Statement of Policy on Conduct of Adjudicatory Proceedings

[CLI–98–12]

I. Introduction

As part of broader efforts to improve the effectiveness of the agency's programs and processes, the Commission has critically reassessed its practices and procedures for conducting adjudicatory proceedings within the framework of its existing Rules of Practice in 10 CFR Part 2, primarily Subpart G. With the potential institution of a number of proceedings in the next few years to consider applications to renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, recent experience and criticism of agency proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals. Although current rules and policies provide means to achieve a prompt and fair resolution of proceedings, the Commission is directing its hearing boards and presiding officers to employ certain measures described in this policy statement to ensure the efficient conduct of proceedings.

The Commission continues to endorse the guidance in its current policy, issued in 1981, on the conduct of adjudicatory proceedings. Statement of Policy on Conduct of Licensing Proceedings, CLI–81–8,13 NRC 452 (May 20, 1981); 46 FR 28533 (May 27, 1981). The 1981 policy statement provided guidance to the Atomic Safety and Licensing Boards (licensing boards) on the use of tools, such as the establishment and adherence to reasonable schedules and discovery management, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In this context, the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.

The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. Specific Guidance

Current adjudicatory procedures and policies provide a latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 policy statement, the Commission encouraged licensing boards to use a number of techniques for effective case management including: setting reasonable schedules for proceedings; consolidating parties; encouraging negotiation and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, pre-filed testimony, and cross-examination plans; and issuing initial decisions as soon as practicable after the parties file proposed findings of fact and conclusions of law. Licensing boards and presiding officers in current NRC adjudications use many of these techniques, and should continue to do so.

As set forth below, the Commission has identified several of these techniques, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI–90–3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners.

1. Hearing Schedules

The Commission expects licensing boards to establish schedules for promptly deciding the issues before them, with due regard to the complexity of the contested issues and the interests of the parties. The Commission's regulations in 10 CFR 2.718 provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay. Powers granted under § 2.718 are sufficient for licensing boards to control the supplementation of petitions for leave to intervene or requests for hearing, the filing of contentions, discovery, dispositive motions, hearings, and the submission of findings of fact and conclusions of law.

Many provisions in Part 2 establish schedules for various filings, which can be varied "as otherwise ordered by the presiding officer." Boards should exercise their authority under these options and 10 CFR 2.718 to shorten the filing and response times set forth in the regulations to the extent practical in a specific proceeding. In addition, where such latitude is not explicitly afforded, as well as in instances in which sequential (rather than simultaneous) filings are provided for, boards should explore with the parties all reasonable approaches to reduce response times and to provide for simultaneous filing of documents.

Although current regulations do not specifically address service by electronic means, licensing boards, as they have in other proceedings, should establish procedures for electronic filing with appropriate filing deadlines, unless doing so would significantly deprive a party of an opportunity to participate meaningfully in the proceeding. Other expedited forms of service of documents in proceedings may also be appropriate. The Commission encourages the licensing boards to consider the use of new technologies to expedite proceedings as those technologies become available.

Boards should forego the use of motions for summary disposition, except upon a written finding that such

a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding. In addition, any evidentiary hearing should not commence before completion of the staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application, unless the presiding officer finds that beginning earlier, e.g., by starting the hearing with respect to safety issues prior to issuance of the SER, will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner. Boards are strongly encouraged to expedite the issuance of interlocutory rulings. The Commission further strongly encourages presiding officers to issue decisions within 60 days after the parties file the last pleadings permitted by the board's schedule for the proceeding.

Appointment of additional presiding officers or licensing boards to preside over discrete issues simultaneously in a proceeding has the potential to expedite the process, and the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should consider this measure under appropriate circumstances. In doing so, however, the Commission expects the Chief Administrative Judge to exercise the authority to establish multiple boards only if: (1) the proceeding involves discrete and severable issues; (2) the issues can be more expeditiously handled by multiple boards than by a single board; and (3) the multiple boards can conduct the proceeding in a manner that will not unduly burden the parties. Private Fuel Storage, L.L.C. (Private Fuel Storage Facility), CLI–98–7, 47 NRC ____ (1998).

The Commission itself may set milestones for the completion of proceedings. If the Commission sets milestones in a particular proceeding and the board determines that any single milestone could be missed by more than 30 days, the licensing board must promptly so inform the Commission in writing. The board should explain why the milestone cannot be met and what measures the board will take insofar as is possible to restore the proceeding to the overall schedule.

2. Parties' Obligations

Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

3. Contentions

Currently, in proceedings governed by the provisions of Subpart G, 10 CFR 2.714(b)(2)(iii) requires that a petitioner for intervention shall provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] The Commission has stated that a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in § 2.714(b)(2). Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI–91–12, 34 NRC 149, 155 (1991). The Commission re-emphasizes that licensing boards should continue to require adherence to § 2.714(b)(2), and that the burden of coming forward with admissible contentions is on their proponent. A contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 CFR 2.714(b)(2). The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations. For example, with respect to license renewal, under the governing regulations in 10 CFR Part 54, the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 CFR 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses. See 10 CFR 54.21(a) and (c), 54.29, and 54.30. In addition, the review of environmental issues is limited by rule by the generic findings in NUREG–1427, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants." See 10 CFR 55.71(d) and 51.95(c).

Under the Commission's Rules of Practice, a licensing board may consider matters on its motion only where it finds that a serious safety, environmental, or common defense and security matter exists. 10 CFR 2.760a. Such authority is to be exercised only in extraordinary circumstances. If a board decides to raise matters on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and the General Counsel. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI–81–24, 14 NRC 614 (1981). The board may not proceed further with sua sponte issues absent the Commission's approval. The scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the board to raise sua sponte.

Currently, 10 CFR 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the regulation reflects the Commission's general policy to minimize interlocutory review, under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 CFR Part 54 may arise as the staff and licensing board begin considering applications for renewal of power reactor operating licenses. Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to

[1] "[A]t the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 FR 33168, 33171 (Aug. 11, 1989).

the Commission in accordance with 10 CFR 2.730(f) early in the proceeding. In addition, boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 CFR 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted.

4. Discovery Management

Efficient management of the pre-trial discovery process is critical to the overall progress of a proceeding. Because a great deal of information on a particular application is routinely placed in the agency's public document rooms, Commission regulations already limit discovery against the staff. See, e.g.,10 CFR 2.720(h), 2.744. Under the existing practice, however, the staff frequently agrees to discovery without waiving its rights to object to discovery under the rules, and refers any discovery requests it finds objectionable to the board for resolution. This practice remains acceptable.

Application in a particular case of procedures similar to provisions in the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure or informal discovery can improve the efficiency of the discovery process among other parties. The 1993 amendments to Rule 26 provide, in part, that a party shall provide certain information to other parties without waiting for a discovery request. This information includes the names and addresses, if known, of individuals likely to have discoverable information relevant to disputed facts and copies or descriptions, including location, of all documents or tangible things in the possession or control of the party that are relevant to the disputed facts. The Commission expects the licensing boards to order similar disclosure (and pertinent updates) if appropriate in the circumstances of individual proceedings. With regard to the staff, such orders shall provide only that the staff identify the witnesses whose testimony the staff intends to present at hearing. The licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.

Upon the board's completion of rulings on contentions, the staff will establish a case file containing the application and any amendments to it, and, as relevant to the application, any NRC report and any correspondence between the applicant and the NRC. Such a case file should be treated in the same manner as a hearing file established pursuant to 10 CFR 2.1231. Accordingly, the staff should make the case file available to all parties and should periodically update it.

Except for establishment of the case file, generally the licensing board should suspend discovery against the staff until the staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the staff before the staff's review documents are issued will expedite the hearing, discovery against the staff on safety issues may commence upon issuance of the SER, and discovery on environmental issues upon issuance of the FES. Upon issuance of an SER or FES regarding an application, and consistent with such limitations as may be appropriate to protect proprietary or other properly withheld information, the staff should update the case file to include the SER and FES and any supporting documents relied upon in the SER or FES not already included in the file.

The foregoing procedures should allow the boards to set reasonable bounds and schedules for any remaining discovery, e.g., by limiting the number of rounds of interrogatories or depositions or the time for completion of discovery, and thereby reduce the time spent in the prehearing stage of the hearing process. In particular, the board should allow only a single round of discovery regarding admitted contentions related to the SER or the FES, and the discovery respective to each document should commence shortly after its issuance.

III. Conclusion

The Commission reiterates its long-standing commitment to the expeditious completion of adjudicatory proceedings while still ensuring that hearings are fair and produce an adequate record for decision. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

Dated at Rockville, Maryland, this 28th day of July, 1998.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Assistant Secretary of the Commission.

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NUCLEAR REGULATORY COMMISSION

Conduct of New Reactor Licensing Proceedings; Final Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Final policy statement.

SUMMARY: The Nuclear Regulatory Commission (NRC or the Commission) is adopting a statement of policy concerning the conduct of new reactor licensing proceedings.

DATES: This policy statement becomes effective April 17, 2008.

FOR FURTHER INFORMATION CONTACT: Robert M. Weisman, Senior Attorney, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1696, e-mail *Robert.Weisman@nrc.gov.*

SUPPLEMENTARY INFORMATION: On June 11, 2007 (72 FR 32139), the Commission published in the **Federal Register** a request for public comment on the draft statement of policy on Conduct of New Reactor Licensing Proceedings (draft Policy Statement). The Commission received eight letters transmitting comments on the draft Policy Statement by the deadline set in the June 11, 2007, notice for receipt of comments. Commenters included a law firm (Morgan Lewis on behalf of five energy companies), a lawyer (Diane Curran), two advocacy groups, (Beyond Nuclear/ Nuclear Policy Research Institute (BN/ NPRI) and the Union of Concerned Scientists (UCS)), an industry organization (the Nuclear Energy Institute (NEI)), a vendor (GE–Hitachi Nuclear Energy), and one individual energy company (UniStar Nuclear)(two letters). BN/NPRI endorsed Ms. Curran's comments, and UCS incorporated them by reference in the UCS comments. Similarly, GE–Hitachi and UniStar endorsed the NEI comments.

The comments fell primarily in the following three categories. First, many comments related to 10 CFR 2.101(a)(5), which permits an applicant to submit its application in two parts filed no more than eighteen months apart. The comments were primarily concerned with whether the NRC should issue a Notice of Hearing (required by 10 CFR 2.104) for each part of the application or just one Notice of Hearing when the application is complete. Second, many comments related to the NRC's consideration of applications that propose to build and operate reactors of identical design (except for site-specific elements). The comments addressed the implementation of the "design-centered review approach" in the NRC Staff's (Staff) review of the applications and the adjudicatory proceedings on the applications before the Atomic Safety and Licensing Board (Licensing Board). Third, many comments requested rulemaking to implement a variety of measures that the commenters believe desirable or necessary for the effectiveness or efficiency of the review or adjudicatory processes. Below, the Commission summarizes and responds to the comments beginning with these three categories of comments. Discussion of additional comments follows. In response to the comments, the Commission has revised the policy statement in several respects, as noted below. The Commission has also corrected the Policy Statement or added explanatory text in a few instances.

Comments on Notice of Hearing

Comment: The Commission should modify the final Policy Statement to provide that the NRC will issue a Notice of Hearing for the complete partial Combined License Application (hereinafter COLA) "as soon as practicable" after the NRC dockets that portion of the COLA, unless the applicant affirmatively requests that the Notice of Hearing be issued after the entire COLA is docketed. (NEI 2, Morgan Lewis 1, UniStar 1)

The commenters state that the approach they suggest will lessen the burdens on all parties. Specifically, these commenters submit that a Notice of Hearing should be issued upon the docketing of the first part of an application submitted under 10 CFR 2.101(a)(5) so that the hearing on that portion of the application may be completed sooner, thus providing an applicant the opportunity to shorten the critical path for the licensing proceeding. These commenters also state that the proposed approach "smoothes" peak resource demands for all parties, provides for earlier public participation, would not call for different NRC staff support or different Staff or Licensing Board reviews, minimizes the likelihood of potential new issues arising late in the review process, would not affect any person's substantive rights, and is consistent with the NRC intent to publish a separate Notice of Hearing on a request for a limited work authorization (LWA). Further, these commenters indicated that docketing one part of an application and then waiting up to 18 months to issue the Notice of Hearing cannot be considered to result in issuing the notice "as soon as practicable" after docketing, as required by 10 CFR 2.104(a). These commenters also state that the draft Policy Statement approach of normally issuing only one Notice of Hearing appears to ignore NRC precedent for adjudication of safety and environmental issues on separate hearing tracks. One commenter states that issuing separate notices focuses all parties on results, not process, while another asserts that the draft Policy Statement, as written, discourages early application submission and causes delay in the licensing process.

UniStar bases its comments on its plans to submit the environmental portion of its COL application first, in accordance with § 2.101(a)(5), and provides the following additional comments. UniStar believes issuing a Notice of Hearing in connection with the first part of the application docketed provides an earlier opportunity for public participation on environmental matters, offers the Staff an early opportunity to consider and address environmental issues unique to COLs, and lessens the potential for the NRC environmental review to be "critical path" for the UniStar application.

NRC Response: The NRC does not believe that an overall benefit can reasonably be predicted to derive from issuing separate Notices of Hearing for separate portions of applications filed pursuant to 10 CFR 2.101(a)(5). The assertion that issuing two Notices of Hearing will provide an applicant the opportunity to shorten the critical path for a licensing proceeding is speculative. The nature and complexity of contentions that may be raised with respect to the safety and environmental aspects of any application may vary considerably. Moreover, while an earlier, separate Notice might be advantageous to an applicant by allowing potential intervenors to raise their concerns early and thus allow the applicant more time to consider the gravity of those concerns and provide information to the staff to address them, if appropriate, we do not believe those possible advantages overcome the inefficiencies that could be introduced into the NRC's internal review and hearing processes as well as the potential burden on the resources of the advocacy community to monitor and respond to multiple Notices of Hearing.

Industry commenters assert that issuing separate notices would not impair the substantive rights of any party, and is consistent with the practice established in the LWA rule and previous licensing proceedings. The Commission agrees that no person's substantive rights would be impaired if either a single Notice of Hearing is issued on a complete application, or if two such notices are issued on parts of an application submitted under 10 CFR 2.101(a)(5). In this respect, the two procedures are equivalent. However, in the case of a request for an LWA, there is a clear potential benefit—issuance of an LWA to permit an applicant to begin certain safety-related construction activities before a COL is issued—not just a more nebulous "smoothing" out of resource demands, to balance against the potential negative impacts noted above.

The industry commenters point to a proceeding in which a Notice of Hearing was issued for a single part of an application relating solely to antitrust matters. *See Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP–83–2, 17 NRC 45, 47 (1983). The requirements of 10 CFR 50.33a that applied in that proceeding, however, explicitly required submission of antitrust information in advance of the rest of the application, presumably because litigation of antitrust matters before the Licensing Boards were virtually always the lengthiest portion of a licensing proceeding. See 10 CFR 50.33a (1983). As described above, that rationale does not apply here. Similarly, the fact that in some proceedings safety and environmental matters were considered on separate tracks, based on the admitted contentions, does not present a rationale for issuing separate Notices of Hearing for such matters. Specifically, hearings on admitted safety and environmental contentions may proceed on separate tracks, if the presiding officer finds that this is warranted. The advantages derived from establishing such separate hearing tracks can be obtained without issuing separate notices for each part of an application submitted under § 2.101(a)(5).

Accordingly, the Commission does not support issuing a separate Notice of Hearing on each part of an application filed under 10 CFR 2.101(a)(5). With respect to the additional issues UniStar raises that are unique to its application, and which are summarized above, the Commission does not believe it appropriate to address such application-specific concerns in responses to comments on a generally applicable policy statement such as this one. The comments do not warrant changes in the Policy Statement.

Comment: Why not, in the name of efficiency and fairness, wait until the application process is complete before holding a hearing—one hearing—on a completed design and completed application for a specific reactor site? (UCS 1, Curran 2). The Commission has previously recognized the unfairness of piecemeal litigation governed by a license applicant's indecision about whether to pursue a project. The Commission should redraft its policy statement to ensure that COL hearings will be conducted in a manner that is fair to all parties (Curran 4).

In essence, the commenter is objecting to the Commission's proposal to consider exemptions to the requirements of § 2.101 if the granting of such exemptions will further the design centered review approach. The commenter indicates that such exemptions will result in issuing two rather than one Notice of Hearing on each complete application, and will overtake the Commission's stated intention to issue just one Notice of Hearing on each complete application in the absence of the advantages of the design centered review approach. The

commenters indicate that under the design-centered approach, intervenors will be forced to participate in "abstract" proceedings in order to protect their rights, and that this will waste the intervenors' resources. Further, the commenters assert that such proceedings may subject them to abusive litigation tactics, since an applicant could request consideration of one design pursuant to an exemption from § 2.101(a)(5), and then drop that design in favor of another upon filing the remaining portion of the application. They conclude that potential intervenors will not be able to prioritize the most important issues that should be raised with respect to a proposed new plant on a particular site.

NRC Response: The commenters misapprehend the effect of an exemption from § 2.101 that would further the design-centered review approach. Such an exemption would not result in an "abstract" application. Rather, the applicant would, in its application, request approval to construct and operate a particular facility at a particular site. Prospective intervenors will not need to guess what plant might be described in an application for a COL that could affect them, nor will they need to participate in proceedings on proposed reactors that do not affect their interests.

Further, exemptions from § 2.101 in furtherance of the design-centered review approach would not result in litigation of design matters that an individual applicant might readily change. The point of allowing such a procedure is to permit the Staff and the Licensing Board to consider the standard portions of an incomplete application submitted pursuant to an exemption from § 2.101 together with other applications involving the same design or operational information. An individual applicant obtains the benefits of participating in such a proceeding by relinquishing some of its ability to change that information.

Although the Commission notes that established doctrines of repose (res judicata, collateral estoppel) apply once an adjudication is finally decided, prospective intervenors need not seek to participate in proceedings unrelated to their locale by virtue of the Policy Statement provisions discussing possible exemptions from § 2.101.

With respect to the concern that an applicant might decide to substitute one design for another in an application, modify its proposal, or decline to complete or pursue an application, and thus render any hearings related to those aspects of an application moot, that possibility exists whether or not an applicant has sought an exemption from § 2.101. For example, it may become apparent during the course of the NRC staff review that the proposed plant is not acceptable for the proposed site. Accordingly, the Commission concludes that these comments do not warrant changes to the Policy Statement.

The Commission notes that UCS, in connection with its comment, identified a confusing sentence in the draft Policy Statement to the effect that the NRC "may give notice" with respect to a complete application. This sentence has been revised to read that the NRC "will give notice" with respect to a complete application.

Comments on Design-Centered Review Approach

Comment: The proposed policy appears to relax or abandon the requirement for reliance on design certifications, allowing license applicants to depart from certified designs in license applications, and then forcing the consolidation of hearings where the applications appear to have something in common. In this respect, the policy seems intended to maximize the rigidity of design certification where intervenors' interests are at stake, and maximize flexibility where license applicants' interests are at stake. The policy should be consistent for both intervenors and applicants. (Curran 3, UCS 1, BY/NPRI)

NRC Response: Part 52 has never required an applicant for a COL to reference a certified design. Rather, a COL applicant has always had the option of requesting a COL for a design that is not certified under Part 52, Subpart B (a "custom" plant). See 10 CFR 52.79. Similarly, Part 52 has always provided for exemptions or departures from a certified design. *See* 10 CFR Part 52, Appendices A, B, C, and D, Section VIII. The draft Policy Statement offered guidance on the effect these provisions might have in the context of an adjudication consolidated to take advantage of the design-centered review approach. The design-centered review approach is an effort to encourage applicants to adopt identical approaches to issues, which should increase reliance on standard design certifications. Moreover, multiple applicants could choose the same uncertified design (*e.g.*, a gas-cooled reactor), which the NRC could review using the design-centered approach. This circumstance would be consistent with the Commission's policy encouraging greater standardization, albeit not via design certification.

With respect to whether proceedings should be consolidated, the draft Policy Statement does not *require* consolidation. Rather, it provides, among other things, that the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP) should do so only if consolidation will not impose an undue burden upon the parties. Further, the draft Policy Statement recommends that applicants and intervenors alike agree on a lead representative. The Policy Statement does not treat intervenors and applicants inconsistently in this regard.

Finally, the draft Policy Statement does not state that consolidation is appropriate when "applications appear to have something in common." Rather, the Commission is suggesting that intervenors, applicants, and the NRC alike may save and appropriately focus resources by litigating matters relating to applications for identical designs in consolidated proceedings. Our rules of practice have long provided for the possibility of consolidation of issues and parties.

Comment: Encouraging generic "variances and exemptions" from certified designs and endorsing the notion that "security" considerations in reactor siting are ever "identical" from one site to another flies in the face of the commonly accepted view that each piece of land is unique. To encourage licensees to seek variances, exemptions, and generic licenses based on the premise that only components are at issue without reference to where they are located is, in a Post-9/11 world, burying one's head in the sand. If the Commission needs to encourage, under the guise of a policy statement, myriad exemptions to the new Part 52 rules, the new Part 52 rules patently need revision. (UCS 2)

NRC Response: The Commission of course recognizes that certain aspects of security are site-specific. The Commission has not "endorsed the notion that 'security' considerations in reactor siting are * * * 'identical' from one site to another[,]" as suggested by the commenter. Nonetheless, certified designs include certain features or design elements directed to security and safeguards, and these design matters will be common at sites referencing the design certification. The Policy Statement is focused on "components" in this regard because it is focused on the design-centered approach. The Policy Statement's focus should not be read to exclude site-specific issues from the scope of NRC review. The Commission does not believe it is encouraging a "myriad" of exemptions by this Policy Statement. The Statement identifies limited circumstances under which an exemption to Part 2 may be

entertained or granted. The regulations in Part 52 have long accommodated the need for exemptions to design certification rules in defined circumstances. See 10 CFR part 52, Appendices A, B, C, and D, Section VIII.

Comment: The final Policy Statement should more clearly explain the parameters or necessary conditions for consolidation. (NEI 3, Morgan Lewis 4)

NRC Response: Whether separate proceedings should be consolidated depends on their particular circumstances, and is within the discretion of the presiding officers in the proceedings, as currently set forth in Part 2. See 10 CFR 2.317. The draft Policy Statement adequately explains how the design-centered review approach may be appropriately factored into the presiding officers' decision on consolidation. Whether two applications are sufficiently close in time to warrant consolidation depends on the particular facts involved. No modification to the Policy Statement is warranted.

Comment: The Commission should clarify that consolidation of hearings on identical portions of the COL application is not required to obtain the NRC staff's design-centered review. While the use of Subpart D is permissible, it is not required and should not be presumed. (NEI 4, Morgan Lewis 4)

NRC Response: The Commission believes that the Policy Statement already makes clear that consolidation of hearings is not required to obtain the NRC staff's design-centered review. Without consolidation of hearings, however, some of the benefits of the design-centered review approach may not be realized. Therefore, the Policy Statement presumes the use of Subpart D because the Commission believes that such use will offer benefits not otherwise available. A particular applicant's choice not to seek the use of Subpart D will mean that such benefits will not be available to that applicant.

Comment: The draft Policy Statement should treat COL applications that reference applications for design certification amendments in a manner comparable to COL applications that reference design certifications. (Morgan Lewis 3, NEI 5)

NRC Response: The draft Policy Statement explicitly discusses applications for design certification. The Commission believes that discussion also encompasses an application for an amendment to a design certification, and the Policy Statement need not be changed.

Comment: The Policy Statement should direct the Licensing Board to deny a contention in a COL proceeding if the contention addresses a matter subject to a design certification rulemaking, rather than holding the contention in abeyance and denying it later upon adoption of the final design certification rule. (NEI 6)

NRC Response: While the approach NEI suggests is consistent with the Commission decisions cited in the draft Policy Statement, the Commission believes that an application for design certification calls for a different approach. An applicant for a COL may choose to pursue its application as a custom design if, for example, the review of an application for design certification originally referenced is delayed. In such a case, the Commission believes it inefficient to require previously admitted intervenors to justify, for a second time, admission of contentions which address aspects within the scope of the design certification rulemaking. Holding these contentions in abeyance instead of denying them resolves this problem. Accordingly, the Commission has determined to leave the Policy Statement unchanged in this regard.

Comment: The Commission should clarify the statement in section B.3 of the Policy Statement that "[i]f initial COL applicants referencing a particular design certification rule succeed in obtaining COLs, the Commission fully expects subsequent COL applicants to reference that design certification rule."

NRC Response: The Commission has clarified the sentence by stating that if the NRC grants an initial application referencing a design certification rule, the Commission believes it is likely that subsequent applications referencing that rule will be filed.

Comments Relating to Rulemaking

Comment: The NRC should ensure consistency in its rules by conforming 10 CFR 51.105, which contains mandatory findings on NEPA matters in uncontested proceedings, to 10 CFR 2.104, which does not specify the findings to be made. (Morgan Lewis 6)

NRC response: This proposal would involve rulemaking, which is beyond the scope of the development of this Policy Statement. Because this matter has been raised as a comment on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under § 2.802. If the commenter wishes the agency to undertake such a consideration, the commenter should file such a petition. The Commission would note that the commenter's proposed change was considered in the development of the final Part 52 rulemaking, but was rejected for several reasons. Such a change would have represented a fundamental change to the NRC's overall approach for complying with NEPA, in which the agency's record of decision consists of the presiding officer's findings with respect to NEPA, as required by Section 51.105. The Commission did not believe it made sense to modify the NRC's approach in one specific situation—the issuance of combined licenses—without considering the implications or desirability of adopting a global change to Part 51 with respect to the agency's NEPA's procedures. Moreover, the Commission believed that such a change in the NRC's NEPA compliance procedures should be subject to a notice and comment process and did not want to further delay agency adoption of a final part 52 rule.

Comment: The NRC should revise 10 CFR 2.101(a)(5) to permit the first part of a phased application to consist solely of the environmental report plus the general administrative information specified in § 50.33(a) through (e). It is not necessary for the NRC to have complete seismic and other siting information, plus financial and emergency planning information, to review an environmental report. (Morgan Lewis 7)

NRC response: First, this proposal would require a change to Commission rules, which is beyond the scope of the development of this Policy Statement. Second, with respect to the commenter's proposal that siting (which includes seismic) information is not necessary for the first part of a phased COL application (even if the rest of the first part is the environmental report), the Commission does not find persuasive this argument for omitting siting information.

The Commission requirements governing site safety are based upon the Atomic Energy Act (AEA). The NRC's National Environmental Policy Act (NEPA) review responsibilities do not expand its AEA authority, but are complementary thereto. Consequently, there is no need for a NEPA siting review absent consideration of site safety under the AEA. Regarding site safety, the information an applicant must submit to satisfy the requirements of 10 CFR 2.101(a)(5) addresses the suitability of the site with respect to manmade and natural hazards (including seismic information) and potential radiological consequences of postulated accidents and the release of fission products. Furthermore, the site characteristics must comply with 10 CFR part 100, "Reactor Site Criteria." Additional safety elements required in a

siting determination include information on emergency preparedness and security plans. Administrative information, including the protection of sensitive information is necessary to fulfill requirements under the AEA. The Commission considers that much of the above site safety information may be of use in informing the Commission NEPA review.

Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The final Policy Statement should direct the NRC staff to consider, on a case-by-case basis, whether generic or design-specific issues could be addressed through rulemaking. (GE–Hitachi Nuclear Energy 1, NEI 10)

NRC Response: The Commission does not believe that a direction to the NRC staff to undertake rulemaking, which is an internal agency matter, is an appropriate subject for a policy statement. The Commission has, however, directed the NRC staff, in consultation with the Office of the General Counsel, to consider initiating rulemakings in appropriate circumstances to address issues that are generic to COL applications. See SRM COMDEK–07–0001/COMJSM–07–0001—Report of the Combined License Review Task Force (June 22, 2007) (ADAMS Accession No. ML0717601090). Accordingly, the Commission does not see any further benefit in duplicating this Commission direction in a policy statement.

Comment: The NRC should institute notice-and-comment rulemaking to provide for meaningful public participation in the licensing hearing process under Subpart L of Part 2, including full and fair discovery procedure and cross-examination of adverse witnesses. (UCS 3)

NRC Response: The Commission does not agree that its current requirements in 10 CFR Part 2, Subpart L, governing discovery and cross-examination, are unfair to any potential party in an NRC adjudication, nor does the Commission believe that Part 2 fails to provide for meaningful public participation in the licensing hearing process. The Commission addressed the fairness and expected benefits of the reconstituted discovery process in Subpart L in the statement of considerations for the final 2004 revisions to Part 2. See 69 FR 2182 (January 14, 2004) upheld by *Citizens Awareness Network, Inc.* v. *U.S., 391 F.3rd 338* (1st Cir. 2004). The discovery process provides for mandatory disclosures by all parties of information relating to admitted contentions, and Staff preparation of a hearing file. Furthermore, cross-examination is allowed or may be allowed by the presiding officer under those circumstances in which the Commission has determined that cross-examination would be best-suited to result in the timely development of a record sufficient to inform a fair decision by the presiding officer. The commenter provided nothing other than the generalized assertion that the new procedures are unfair or would preclude meaningful public participation in the licensing hearing process. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Comment: The NRC should decrease the time periods in the 10 CFR part 2 Milestone Schedules to further streamline the hearing process and promote more timely hearings on ESP and COL applications, by (1) decreasing the 175 day period between issuance of the SER and final EIS and the start of the evidentiary hearing; and (2) reducing from 90 to 60 days the period for the presiding officer to issue its initial decision following the end of the evidentiary hearing. (NEI 13)

NRC Response: The Commission does not agree that the Model Milestones in Appendix B to 10 CFR part 2 should be modified to adopt the two changes suggested by the commenter. The 175 day time period provides for, among other things, scheduling and holding a pre-hearing conference, issuance of the presiding officer's order following the prehearing conference, mandatory disclosures, preparation of summary disposition motions, issuance of presiding officer orders on such motions, preparation of pre-filed written testimony, suggested presiding officer questions based upon the pre-filed testimony, and any motions for cross-examination together with cross-examination plans. It may well be that, with the particular parties involved or matters at issue in any individual case, the schedule can be shortened by the presiding officer. But, given the activities outlined above, the Commission does not believe that the 175 day period is unreasonable or should be significantly shortened at this time.

The Commission believes that the 90 day period provided for issuance of a presiding officer decision is reasonable, given the likelihood—as described above—that the first set of combined license application hearings may be complex and raise issues of first impression for the NRC. If, however, the issues to be addressed in an initial decision are small in number, simple in nature and lack complexity, enabling the presiding officer to issue the initial decision in a shorter period of time, the Commission expects the presiding officer to do so rather than taking the full 90 day period.

The Commission also notes that the Model Milestones were adopted on April 20, 2005 (70 FR 20457), and have yet to be applied in full in any early site permit or combined license proceeding. Hence, the NRC has yet to develop any extensive experience on their application in such proceedings. Absent some fundamental problem or error with the Model Milestones—which the commenter has not described—the Commission is unwilling to modify the Model Milestones at this time. Once the Commission has had greater experience with the conduct of combined license application hearings, the Commission will revisit the Model Milestones to see if adjustments are desirable or if a specific schedule of milestones should be established for early site permit and combined license proceedings. Because the commenter's suggestion that the agency undertake rulemaking has been raised as part of the comment process on this Policy Statement, the agency is not treating the comment as a petition for rulemaking under 10 CFR 2.802. If the commenter continues to believe the agency should consider rulemaking on this matter, the agency would suggest the commenter file such a petition.

Other Comments

Comment: The provisions in the draft Policy Statement (in Section B.1) regarding the finality of COL proceedings should be revised to be consistent with a recent decision by the U.S. Court of Appeals in which the Seventh Circuit held that if all of an intervenor's contentions are resolved by the Licensing Board, then the Board's decision is final agency action with respect to that intervenor. (Morgan Lewis 5)

NRC Response: The Commission agrees that the draft Policy Statement could be misinterpreted on this score. Accordingly, the Commission has modified the pertinent provision of the

Policy Statement to state that "a decision on common issues would become final agency action if it resolves a specific intervenor's contentions in a proceeding on an individual application."

Comment: It is not an insubstantial change in the rules to now state the Commission, presiding officer on any request for hearing filed under § 52.103, will, by fiat, "designate the procedures under which the proceeding shall be conducted." A bit of rulemaking might be in order well before commencement of extraordinary hearings before the Commission. (UCS 1A) NEI recommends that the NRC identify the hearing procedures to be used in the 10 CFR 52.103(a) ITAAC compliance hearings in the near term and certainly well before the first such hearing is imminent. (NEI 8)

NRC Response: Section 189a.(1)(B)(iv) of the Atomic Energy Act explicitly authorizes the Commission to establish procedures for ITAAC compliance hearings. This AEA provision has been reflected in Commission rules since 1992. ITAAC compliance hearing procedures warrant in-depth consideration, which would unduly delay the issuance of the Policy Statement. The Commission believes it appropriate to first issue guidance on proceedings on COL applications, which are indeed imminent, before turning to ITAAC compliance hearings. While the Commission is not addressing ITAAC compliance hearing procedures in this Policy Statement, the Commission intends to do so "well before" the first such hearing, as both intervenor and industry commenters request. The Commission, however, does not believe it necessary to establish such procedures by rule, and retains the discretion to specify such procedures in a future policy statement or on a case-by-case basis by order.

Comment: The draft policy statement instructs licensing boards to tailor hearing schedules to accommodate limited work authorizations, by holding hearings on environmental matters and portions of the Safety Evaluation Report that are "relevant" to environmental matters. Given that compliance with safety regulations is the principal means by which the NRC protects the environment, it is difficult to conceive of any safety-related issues whose resolution could lawfully be considered unrelated to compliance with the National Environmental Policy Act. Therefore, the Commission should eliminate this instruction from the policy statement. (Curran 5)

NRC Response: The Commission agrees that the portion of the draft Policy Statement to which the comment is addressed could be misunderstood, but disagrees with the comment's underlying premise. Specifically, the Commission need not resolve all safety issues in order to perform the environmental evaluation required in connection with a request for an LWA. Rather, the Commission need only resolve those safety issues identified in 10 CFR 50.10 as needing resolution before the Commission may issue an LWA. The Commission has revised the Policy Statement to eliminate the ambiguity identified in the comment.

Comment: The final Policy Statement should incorporate the following revision: "In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request, *unless the applicant specifically requests otherwise.*" (NEI 2A) (additional suggested text in *italics*)

NRC Response: The presiding officer already has the authority to modify the schedule of a proceeding consistent with fairness to all parties and the expeditious disposition of the proceeding. See 10 CFR 2.319, 2.332, and 2.334. In this regard, the presiding officer must consider the interests of all parties, as well as the overall schedule, and not just the interests of the applicant. Accordingly, the Commission declines to add the suggested language to this portion of the Policy Statement.

Comment: The final Policy Statement should incorporate the following revision: "Specifically, if an applicant requests [an LWA] as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing [an LWA], *up to and including an early partial decision on the LWA.*" (NEI 2B) (additional suggested text in *italics*)

NRC Response: "Resolution" of issues prerequisite to issuing an LWA necessarily includes a Licensing Board decision on those issues. To add the suggested language would be redundant and possibly confusing. Accordingly, the Commission declines to add the suggested language.

Comment: The draft Policy Statement should provide guidance for a proceeding in which a COL application references an early site permit (ESP) application or an application for ESP amendment, comparable to guidance set forth for COL applications which reference a design certification application. (Morgan Lewis 2, NEI 5)

NRC Response: The Commission agrees with this comment, and has modified the Policy Statement accordingly.

Comment: The Commission need not delay issuance of a combined license referencing a design certification application until the certification rule is final, absent a legal prohibition. A COL license condition premised on promulgation of the DC rule could be imposed, allowing any judicial challenge to be raised in a timely manner without adversely impacting the COL. (GE–Hitachi 2, NEI 7)

NRC Response: As the comment recognizes, the AEA requires the NRC to make certain findings before issuing a license. While a license condition may, in some instances, impose specific design or operational requirements to allow the NRC to make the required findings, a license condition may not be used to defer the required findings beyond the issuance of the license, *e.g.*, in order to complete a rulemaking. The Commission believes that the approach proposed in the comment may be inconsistent with the AEA in this respect, and so declines to adopt it.

Comment: The final Policy Statement should clarify the definition of completeness in the context of whether an application is acceptable for docketing, particularly given Commission approval of the Combined License Review Task Force recommendation to extend the duration and broaden the scope of the NRC licensing acceptance reviews. (NEI 1)

NRC Response: The NRC staff is developing detailed guidance on this subject. Such guidance is beyond the scope of this Policy Statement and will not be addressed in it.

Comment: The Commission should seek legislation to eliminate mandatory uncontested hearings. (NEI 9)

NRC Response: The question of whether legislation on a particular matter should be sought is beyond the scope of the Policy Statement. The Commission is not modifying the Policy Statement in response to this comment.

Comment: The Commission should commence COL licensing hearings based on the availability of draft licensing documents where circumstances warrant. (NEI 11)

NRC Response: We have recently addressed this question in our decision in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI–07–17, 65 NRC 392 (2007). In that decision, we held that the Licensing Board, pursuant to 10 CFR 2.332(d), may not commence a hearing on environmental issues before the final environmental impact statement has been issued. *Id.* at 394. Hearings may be held on safety issues, however, prior to the staff's publication of its safety evaluation. The commenter has not

identified any reason for us to revisit that decision, which provides the basis for our position on the matter, and we decline to do so.

Comment: Commission policy should seek to ensure the NRC staff's timely completion of licensing reviews for new plant applications. (NEI 12)

NRC Response: The NRC has, for the last several years, been diligently preparing to review applications to build and operate new reactors. Part of that preparation has involved significant NRC staff effort in planning for timely reviews that assure that the agency discharges its duties under the Atomic Energy Act and NEPA. These efforts have been and continue to be reflected in the agency's Strategic Plans and budget requests, among other statements. The commenters can be assured that the NRC is committed to timely reviews provided it receives complete, high quality information from applicants.

In closing, the Commission notes that several commenters offered general statements of support or criticism of the Commission's licensing process or parts of that process. While the Commission acknowledges those comments, they do not raise any specific issue related to the Policy Statement, and no response to them is necessary.

STATEMENT OF POLICY ON CONDUCT OF NEW REACTOR LICENSING PROCEEDINGS CLI–08–07

I. Introduction

Because the Commission has received the first several applications for combined licenses (COLs) for nuclear power reactors and expects that several more applications for COLs will be filed within the next two years, the Commission has reexamined its procedures for conducting adjudicatory proceedings involving power reactor licensing. Such examination is particularly appropriate since the Commission will be considering these COL applications at the same time it expects to be reviewing various design certification and early site permit (ESP) applications, and the COL applications will likely reference design certification rules and ESPs, or design certification and ESP applications. Hearings related to the COL and ESP applications will be conducted within the framework of our Rules of Practice in 10 CFR part 2, as revised in 2004 and further updated in 2007 to reflect the revisions to 10 CFR part 52, and the existing policies applicable to adjudications. The Commission has, therefore, considered the differences between the licensing and construction of the first generation of nuclear plants, which involved developing technology, and the currently anticipated plants, which may be much more standardized than previous plants.

We believe that the 10 CFR part 2 procedures, as applied to the 10 CFR part 52 licensing process, will provide a fair and efficient framework for litigation of disputed issues arising under the Atomic Energy Act of 1954, as amended (Act) and the National Environmental Policy Act of 1969, as amended (NEPA), that are material to applications. Nonetheless, we also believe that additional improvements can be made to our process. In particular, the guidance stated in this policy statement is intended to implement our goal of avoiding duplicative litigation through consolidation to the extent possible.

The differences between the new generation of designs and the old, including the degree of standardization, as well as the differences between the 10 CFR part 50 and 10 CFR part 52 licensing processes, have led the Commission to review its procedures for treatment of a number of matters. Given the anticipated degree of plant standardization, the Commission has most closely considered the potential benefits of the staff's conducting its safety reviews using a "design-centered" approach, in which multiple applicants would apply for COLs for plants of identical design at different sites, and of consolidation of issues common to such applications before a single Atomic Safety and Licensing Board (licensing board or ASLB). The Commission has also considered its treatment of Limited Work Authorization requests; the timing of litigation of safety and environmental issues; and the order of procedure for hearings on inspections, tests, analyses, and acceptance criteria (ITAAC), which are completed before fuel loading. In considering these matters, the Commission sought to identify procedural measures within the existing Rules of Practice to ensure that particular issues are considered in the agency proceeding that is the most appropriate forum for resolving them, and to reduce unnecessary burdens for all participants.

The new Commission policy builds on the guidance in its current policies, issued in 1981 and 1998, on the conduct of adjudicatory proceedings, which the Commission endorses. *Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI–98–12, 48 NRC 18 (July 28, 1998), 63 FR 41872 (August 5, 1998); *Statement of Policy on Conduct of Licensing Proceedings,* CLI–81–8, 13 NRC 452 (May 20, 1981), 46 FR 28533 (May 27, 1981). The 1981 and 1998 policy statements provided guidance to licensing boards on the use of tools, such as the establishment of and adherence to reasonable schedules, intended to reduce the time for completing licensing proceedings while ensuring that hearings were fair and produced adequate records. Since the Commission issued its previous statements, the Rules of Practice in 10 CFR Part 2 have been revised, and licensing proceedings are now usually conducted under the procedures of Subpart L, rather than Subpart G. *See* "Changes to Adjudicatory Process," Final Rule, 69 FR 2182 (January 14, 2004). In addition, we have recently amended our licensing regulations in 10 CFR Parts 2, 50, 51 and 52 to clarify and improve the 10 CFR Part 52 licensing process. This statement of policy thus supplements the 1981 and 1998 statements.

With both the recent revisions to 10 CFR Part 2 and this guidance, the Commission's objectives remain unchanged. As always, the Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing processes, and to enable the development of an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. In the context of new reactor licensing under 10 CFR part 52, members of the public should be afforded an opportunity for hearing on each genuine issue in dispute that is material to the particular agency action subject to adjudication. By the same token, however, applicants for a license should not have to litigate each such issue more than once.

The Commission emphasizes its expectation that the licensing boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission. In addition, the Commission has identified certain specific approaches for its licensing boards to consider implementing in individual proceedings, if appropriate, to minimize burdens on all parties involved. The measures suggested in this policy statement can be accomplished within the framework of the Commission's existing Rules of Practice. The Commission may consider further changes to the Rules of Practice as appropriate to enable additional improvements to the adjudicatory process.

II. Specific Guidance

Current adjudicatory procedures and policies provide the latitude to the Commission, its licensing boards and presiding officers to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings. In the 1981 and 1998 policy statements, the Commission encouraged licensing boards to use a number of techniques for effective case management in contested proceedings. Licensing boards and presiding officers should continue to use these techniques, but should do so with regard for the new licensing processes in 10 CFR part 52 and the anticipated high degree of new plant standardization, which may afford significant efficiencies.

The Commission's approach to standardization through design certification has the potential for resolving design-specific issues in a rule, which subsequently cannot be challenged through application-specific litigation. *See* 10 CFR 52.63 (2007). Matters common to a particular design, however, may not have been resolved even for a certified design. For example, matters not treated as part of the design, such as operational programs, may remain unresolved for any particular application referencing a particular certified design. Further, site-specific design matters and satisfaction of ITAAC will not be resolved during design certification. The timing and manner in which associated design certification and COL applications are docketed may affect the resolution of these matters in proceedings on those applications, *e.g.*, with respect to what forum is appropriate for resolving an issue. As discussed further below, a design-centered review approach for treating such matters in adjudication may yield significant efficiencies in Commission proceedings.

As set forth below, the Commission has identified other approaches, as applied in the context of the current Rules of Practice in 10 CFR Part 2, as well as variations in procedure permitted under the current Rules of Practice that licensing boards should apply to proceedings. The Commission also intends to exercise its inherent supervisory authority, including its power to assume part or all of the functions of the presiding officer in a given adjudication, as appropriate in the context of a particular proceeding. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI–90–3, 31 NRC 219, 229 (1990). The Commission intends to promptly respond to adjudicatory matters placed before it, and such matters should ordinarily take priority over other actions before the Commissioners. We begin with the docketing of applications.

A. INITIAL MATTERS

1. Docketing of Applications

The rules in part 52 are designed to accommodate a COL applicant's particular circumstances, such that an applicant may reference a design certification rule, an ESP, both, or neither. *See* 10 CFR 52.79. The rules also allow a COL applicant to reference a design certification or ESP application that has been docketed but not yet granted. *See* 10 CFR 52.27(c) and *52.55(c)*. Further, we have changed the procedures in § 2.101 to address ESP, design certification, and COL applications, in addition to construction permit and operating license applications. Accordingly, a COL applicant may submit the safety information required of an applicant by §§ 52.79 and 52.80(a) and (b) apart from the environmental information required by § 52.80(c), as is now permitted by § 2.101(a)(5). In addition, we have lengthened the time allowed between submission of parts of an application under § 2.101(a)(5) from six to eighteen months.

Notwithstanding these procedures, the Commission can envision a situation in which an applicant might want to present a particular ESP or COL application for docketing in a manner not currently authorized. For example, an applicant might wish to apply for a COL for a plant identical to those of other applicants under the design-centered approach, and request application of the provisions of 10 CFR part 52, Appendix N and Part 2, Subpart D, before it has prepared the site- or plant-specific portion of the application. Such an applicant might not be prepared to submit its application as required by the rules, even considering the flexibility afforded by § 2.101(a)(5).

Under such circumstances, the Commission would be favorably disposed to the NRC staff's entertaining a request for an exemption from the requirements of § 2.101. Such an exemption request could be granted if it is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Moreover, because this is a procedural rule established for the effective and efficient processing of applications, the Commission can exercise its inherent authority to approve such exemptions based on similar considerations of effectiveness and efficiency. The Commission strongly discourages piecemeal submission of portions of an application pursuant to an exemption unless such a procedure is likely to afford significant advantages to the design-centered review approach described in more detail below. The Commission intends to monitor requests for exemptions from the requirements of § 2.101, and to issue a case-specific order governing such matters if warranted. Whether a COL application is submitted pursuant to § 2.101 or an exemption, the first part of an application submitted should be complete before the staff accepts that part of the application for docketing. Similarly, the staff should not docket any subsequently submitted portion of the application unless it is complete.

2. Notice of Hearing

As required by § 2.104(a), a Notice of Hearing on an application is to be issued as soon as practicable after the application is docketed. A Notice of Hearing for a complete COL application should normally be issued within about thirty (30) days of the staff's docketing of the application. Section 2.101(a)(5), which provides for submitting applications in two parts, does not specify when the Notice of Hearing should be issued, nor is it clear when a Notice of Hearing would be issued for an application filed in parts under an exemption from § 2.101. With two exceptions, the Commission believes it most efficient to issue a Notice of Hearing only when the entire application has been docketed. The first exception is a construction permit application submitted in accordance with § 2.101(a–1), which results in a decision on early site review. The second exception involves circumstances in which: (1) A complete application is submitted; (2) one or more other applications that identify a design identical to that described in the complete application are submitted; and (3) another application is incomplete with respect to matters other than those common to the complete application. Under such circumstances, the Commission will give notice of the hearing on the complete application, and give notice of the hearing on the other application with respect to the matters common to the complete application. The Commission determination in this regard will consider the extent to which any notice is consistent with the timely completion of staff reviews using the design-centered approach and with the efficient conduct of any required hearing, with due regard for the rights of all parties. Upon submission of information

completing the other application, the Commission would give notice of a hearing with respect to that information. Under all other circumstances, the Commission will issue a Notice of Hearing only when a complete application has been docketed in order to avoid piecemeal litigation.

3. Limited Work Authorizations

Section 50.10 contains provisions for limited work authorizations, which allows certain construction activities on production and utilization facilities to commence before a construction permit or combined license is issued. The Commission has redefined the term "construction" in 10 CFR 50.10, as well as the provisions governing limited work authorizations. Accordingly, we are providing additional guidance regarding limited work authorizations.

In all proceedings, the licensing boards should formulate hearing schedules to accommodate any limited work authorization request. Specifically, if an applicant requests a limited work authorization as part of an application, the licensing board should generally schedule the hearings so as to first resolve those issues prerequisite to issuing a limited work authorization. This may lead to hearings on the safety and environmental matters specified in 10 CFR 50.10 before commencement of hearings on other issues. Such considerations should be incorporated into the milestones set for each proceeding in accordance with 10 CFR Part 2, Appendix B.

B. Treatment of Generic Issues

1. Consolidation of Issues Common to Multiple Applications

The Commission believes that generic consideration of issues common to several applications may well yield benefits, both in terms of effective consideration of issues and efficiency. Such benefits would accrue not only to the staff review process, but also to litigation of such matters before the licensing board. We acknowledge that consideration of generic matters common to several applications may be possible in several contexts. For example, an applicant might seek staff review of a corporate program such as quality assurance or security that is common to several of its applications. If contentions on such a program are admitted with respect to more than one application, consolidation of such contentions before a single licensing board may result in more efficient decision making, as well as conserving the parties' resources. Licensing boards should consider consolidating proceedings involving such matters, pursuant to an applicant's motion or pursuant to their own initiative under § 2.317(b). In addition, different applicants may seek COLs for plants of identical design at multiple sites, as in the design-centered review approach, and may therefore seek to implement the provisions of 10 CFR Part 2, Subpart D. In this regard, we have amended Subpart D to Part 2 and Appendix N to 10 CFR Part 52 to provide explicit treatment of COL applications for identical plants at multiple sites.

Because we believe that the design-centered approach is the chief example of circumstances in which generic consideration of issues common to several applications may yield benefits, we discuss that approach in detail below. While much has changed since we first promulgated Subpart D in 1975, we believe many of the concepts originally underpinning Subpart D still apply today, and we presume that Subpart D procedures, as well as other applicable Rules of Practice in 10 CFR Part 2, will be applied to applications employing a design-centered review approach. Our vision for the implementation of a "design-centered" approach under the procedures of Subpart D is set forth below.

As indicated above, issues, such as those involving operational programs or design acceptance criteria,[1] common to several applications referencing a design certification rule or design certification application may be most effectively and efficiently treated with a single review in a "design-centered" approach and, subsequently, in a single hearing. In order to achieve such benefits, however, applicants who intend to apply for licenses for plants of identical design and request the staff to employ the design-centered review approach should submit their applications simultaneously. Subpart D nonetheless affords the licensing board discretion to consolidate applications filed close in time, if this will be more efficient and otherwise provide for a fair hearing. While not required, we believe applicants for COLs for plants of identical design should consolidate the portions of their applications containing common information into a joint submission. In doing so, each applicant would also submit the information required by §§ 50.33(a) through (e) and 50.37 and would identify the location of its proposed facility, if this information has not already been submitted to the Commission.

Appendix N requires that the design of those structures, systems, and components important to radiological health and safety and the common defense and security described in separate applications be identical in order for the Commission to treat the applications under Appendix N and Subpart D. The Commission believes that any variances or exemptions requested from a design certification in this context should be common to all applications. In addition, while not required, the Commission encourages applicants to standardize the balance of their plants insofar as is practicable.

Subpart D provides flexibility in the hearing process. Each application will necessarily involve a separate proceeding to consider site-specific matters, and the required hearings may, as appropriate, be comprised of two (or more) phases, the sequence of which depends on the circumstances. For any of the phases, the hearings may be consolidated to consider common issues relating to all or some of the applications involved.

An applicant requesting treatment of its application under the design-centered approach may seek to submit separate portions of the application at different times, pursuant to § 2.101(a)(5) or an exemption from § 2.101, as discussed above. Under such circumstances, the Commission intends to issue a Notice of Hearing for the portion of the application to be reviewed under the design-centered approach, and a second notice limited to the portion of the application not treated under the design-centered review approach upon submission of the complete application. Such a procedure would not affect any prospective intervenor's substantive rights; i.e., members of the public will still have a right to petition for intervention on every issue material to the Commission's decision on each individual application.

The staff would review the common information in the applications, or in the joint submission, for sufficiency for docketing and, if acceptable, would docket this information as a portion of each application. Each application would be assigned a docket number in connection with the first portion of the application docketed, which could be the common submission. The applicants should designate one applicant to be the single point of contact for the staff review of this common information, and to represent the applicants before the licensing board.

[1] Design acceptance criteria are a special type of ITAAC that are used to verify the resolution of design issues for which completed design information was not provided in the design certification application.

Consistent with our guidance set forth above, we would expect to issue a Notice of Hearing only upon the docketing of at least one complete application that includes the common information. The Notice of Hearing will not only provide an opportunity to petition to intervene in the proceeding on the complete individual application, but will also provide such an opportunity with respect to the information common to all the applications, which would be docketed separately. Accordingly, upon issuance of such a notice, the Chief Judge of the Atomic Safety and Licensing Board Panel (ASLBP or Panel) should, as is the normal practice, designate a licensing board to preside over the application-specific proceeding, and should also designate a licensing board to preside over the consolidated portions of the applications. Initially, these two licensing boards could be the same.

A person having standing with respect to one of the facilities proposed in the applications partially consolidated would be entitled to petition for intervention in the proceeding on the common information. Such a petitioner would be required to satisfy the other applicable provisions of § 2.309 with respect to the application being contested to be admitted as a party to the proceeding on the common information. Petitioners admitted as parties to such a proceeding with respect to a proposed facility for which the application remains incomplete at the time of the initial Notice of Hearing would have an opportunity to propose contentions with respect to the rest of the application upon the docketing of a complete application, but would not need to demonstrate standing a second time. Those persons granted intervention are required to designate a lead for common contentions, as required by § 2.309(f)(3); as stated above, applicants submitting common information under the design-centered approach would likewise designate a representative to appear before the licensing board. In addition, the presiding officer may require consolidation of parties in accordance with § 2.316.

The Commission is willing to consider other methods of managing proceedings involving consideration of information common to several applications. For example, the Commission does not intend to foreclose the Chief Judge of the Panel from designating a licensing board to preside over common portions of applications on the motion of the applicants, even if separate proceedings have already been convened on one or more of the applications involved. In such a case, however, the applicants should jointly identify the common portions of their respective applications when requesting the Chief Judge to take such action. Petitioners admitted as parties to any affected proceeding would of course have the right to answer such a motion.

As stated above, upon issuance of a Notice of Hearing for a complete plant-specific application that includes information on "common issues," the Chief Judge of the Panel should designate a licensing board to preside over the plant-specific portion of each application that is then complete. Each licensing board, whether designated to consider the common issues or a specific application, should manage its respective portion of the proceedings with due regard for our 1981 and 1998 policy statements. We emphasize that the Chief Judge of the Panel should not designate another licensing board to consider specific aspects of a proceeding unless the standards we enunciated in *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI–98–7, 47 NRC 307, 310–11 (1998) for doing so are met. These standards are that the proceeding involve discrete and separable issues; that multiple licensing boards can handle these issues more expeditiously than a single licensing board; and that the proceeding can be conducted without undue burden on the parties. *Id.*

An initial decision by the licensing board presiding over a proceeding on a joint submission containing information common to more than one plant-specific application will be a partial initial decision for which a party may request review under § 2.341 (as is also provided in Subpart D) and which we may review on our own motion. Such a decision would become part of each initial decision in the individual application proceedings, which will become final in accordance with the regulation that applies depending on which subpart of our Rules of Practice has been applied in a proceeding on a particular application (*e.g.*, § 2.713 under Subpart G; § 2.1210 under Subpart L). Accordingly, a decision on common issues would become final agency action if it resolves a specific intervenor's contentions in a proceeding on an individual application.

Revisions of specific applications during the review process could result in formerly common issues being referred to the licensing board presiding over a specific portion of one or more applications. These issues would be resolved in the normal course of adjudication, but may well result in delay in final determination of the individual application.

2. COL Applications Referencing Design Certification and ESP Applications

With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI–99–11, 49 NRC 328, 345 (1999), *quoting Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB–218, 8 AEC 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.

Similar considerations apply if a COL applicant references an ESP application that has not been granted. In such a case, the Licensing Board presiding over the proceeding on the COL application should refer contentions within the scope of the ESP proceeding to the Licensing Board presiding over the ESP proceeding.

An individual applicant, nonetheless, may choose to request that the application be treated as a "custom" design, and thereby resolve any specific technical matter in the context of its individual application. An applicant might choose such a course if, for example, the referenced design certification application were denied, or the rulemaking delayed. The application-specific licensing board would then consider contentions on design issues, which otherwise would have been treated in the design certification proceeding. Similarly, a COL applicant referencing a design

certification application may request an exemption from one or more elements of the requested design certification, as provided in § 52.63(b) and Section VIII of each appendix to 10 CFR Part 52 that certifies a design. As set forth in those provisions, such a request is subject to litigation in the same manner as other issues in a COL proceeding. Since the underlying element of the design may change after the exemption request is submitted, such an exemption may ultimately become unnecessary or may need to be reconsidered or conformed to the final design certification rule. Such matters would be considered by an application-specific licensing board. A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final. In such circumstances, the license may not issue until the design certification rule is final, unless the applicant requests that the entire application be treated as a "custom" design.

COL applicants should coordinate with vendors applying for certified designs to ensure that decisions on design certification applications do not impede decisions on COL applications. If design certification is delayed, a licensing board considering common technical issues may likewise be delayed.

3. Subsequent Applications Referencing a Design Certification Rule

If the Commission grants initial COL applications referencing a particular design certification rule, the Commission believes it likely that subsequent COL applicants will also reference that design certification rule. In this event, the Commission would expect to develop additional processes to facilitate coordination of proceedings on such applications. We observe, however, that an issue associated with such matters as operational programs or design acceptance criteria may be resolved through the design-centered review approach for initial applications containing common information, but we do not intend to impose any resolution so obtained on subsequent COL applicants. While there is no requirement to adopt a previously-approved resolution of an issue, and subsequent applicants are free to use the most recent state-of-the-art methods to resolve such issues, we nevertheless urge such applicants to consider adopting previous resolutions in order to maximize plant standardization. If a COL applicant adopts an approach to a technical issue previously found acceptable, no further staff review of the adequacy of the approach is necessary. Rather, the staff review should be limited to verification that the applicant has indeed adopted the previously approved approach and will properly implement it, and, for technical issues that depend on site-specific factors, that the previously-approved approach applies to the applicant's proposed facility.

C. ITAAC

In first promulgating 10 CFR Part 52 in 1989, we determined that hearings on whether the acceptance criteria in a COL have been met (ITAAC-compliance hearings) would be held in accordance with the Administrative Procedure Act (APA) provisions applicable to determining applications for initial licenses, but that we would specify the procedures to be followed in the Notice of Hearing. *See* 10 CFR 52.103(b)(2)(i) (1990); 54 FR 15395 (April 18, 1989). In enacting the Energy Policy Act of 1992, Congress subsequently confirmed our authority to adopt 10 CFR Part 52, and by statute accorded us additional discretion to determine procedures, whether formal or informal, for ITAAC-compliance hearings. *See* Atomic Energy Act section 189a.(1)(B)(iv), 42 U.S.C. 2239(a)(1)(B)(iv). We therefore amended § 52.103(d) to provide that we would determine, in our discretion, "appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under [§ 52.103(a)]."

While we recognize that specification of procedures for the treatment of requests for hearings on ITAAC would lend some predictability to the ITAAC compliance process, we are not yet in a position to specify such procedures, since we have not approved even one complete set of ITAAC necessary for issuing a COL. Further, ITAAC-compliance hearings are likely several years distant, and we have no experience with the type and number of hearing requests that we might receive with respect to ITAAC compliance. While it may not be necessary to consider the first requests for ITAAC-compliance hearings in order for us to determine the procedures appropriate to govern such hearings, we believe it premature to specify such procedures now. In addition, the staff is now formulating guidance on the times necessary for the staff to consider different categories of completed ITAAC, and this guidance should assist licensees in scheduling and performing ITAAC so as to minimize the critical path for staff consideration of completed ITAAC.

In view of the above considerations, we have identified one measure to lend predictability to the ITAAC compliance process: The Commission itself will serve as the presiding officer with respect to any request for a hearing filed under § 52.103. In acting as the presiding officer under these circumstances, we will make three initial determinations. First, we will decide whether the person requesting the hearing has shown, *prima facie*, that one or more of the acceptance criteria in the COL have not been, or will not be met, and the attendant public health and safety consequences of such non-conformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety. Second, if we decide to grant a request for a hearing on ITAAC compliance, we will decide, pursuant to § 52.103(c), whether there will be reasonable assurance of adequate protection of the public health and safety during a period of interim operation. Third, we will designate the procedures under which the proceeding shall be conducted. We have amended § 52.103 and our Rules of Practice (10 CFR 2.309, 2.310, and 2.341) to incorporate these changes.

III. Conclusion

The Commission reiterates its long-standing commitment to ensuring that hearings are fair and produce an adequate record for decision, while at the same time being completed as expeditiously as possible. The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. To this end, the Commission will act in individual proceedings, as appropriate, to provide guidance to licensing boards and parties, and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.

Dated at Rockville, Maryland, this 11th day of April 2008,

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

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