Attachment 7

NRC General Counsel Memorandum
to the NRC Commissioners
dated January 10, 2012

RULEMAKING ISSUE
AFFIRMATION

January 10, 2012 SECY-12-0004

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS" (RIN 3150-AI43)

PURPOSE:

To obtain Commission approval to publish a final rule to amend portions of 10 Code of Federal Regulations (CFR) Part 2 and to make conforming changes to other provisions of the regulations. On February 28, 2011, the U.S. Nuclear Regulatory Commission (NRC) published the proposed rule in the *Federal Register* for public comment. The NRC received three public comment letters on the proposed rule. The enclosed *Federal Register* notice (FRN) contains the Office of the General Counsel's (OGC) recommended amendments to the adjudicatory rules and responses to the public comments. This paper does not address any new commitments or resource implications.

SUMMARY:

The draft final rule contains a number of improvements to the NRC's hearing process, as well as many minor corrections and clarifications. The most significant changes include amending the § 2.309 standards for hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the § 2.309(b) filing deadline; amending the mandatory disclosure and discovery provisions in subparts C, G, and L; and clarifying the Secretary's authority under § 2.346(j).

The proposed rule specifically requested public comment on two issues: the scope of the NRC staff's mandatory disclosures, and the rules that govern interlocutory appeals. After reviewing the public comments, OGC recommends that the Commission adopt the

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proposed changes that would narrow the scope of the NRC staff's mandatory disclosures under § 2.336. OGC also recommends that the Commission not change the rules that govern interlocutory appeals, which currently allow the applicant and staff to immediately appeal an order granting an intervention petition or hearing request on the grounds that the petitioner lacks standing or that all of the petitioner's admitted contentions are inadmissible, but do not allow the petitioner to immediately appeal an order denying the admissibility of a contention proposed by the petitioner unless the order denies all of the petitioner's proposed contentions.

BACKGROUND:

The NRC last issued major revisions to part 2 in January 2004. 69 Fed. Reg. 2,181. Since that time, provisions requiring correction and clarification, and several areas in need of additional improvement, have been identified. The NRC published the proposed rule in February 2011. 76 Fed. Reg. 10,781. In response to the proposed rule, the NRC received three comment letters. After consideration of the public comments and ongoing internal discussions, OGC is recommending a number of changes to the proposed rule, which are summarized below.

SUMMARY OF SIGNIFICANT CHANGES FROM THE PROPOSED RULE:

Changes to 10 CFR § 2.309 Standards for Filings after the Deadline

Currently, there is confusion, as demonstrated in NRC jurisprudence, with regard to which standards apply to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the § 2.309(b) filing deadline. Current § 2.309 contains two different standards for hearing requests, intervention petitions, and new or amended contentions filed after the deadline, without any indication as to how these standards interrelate. Current § 2.309(c) applies an eight-factor balancing test to "nontimely" hearing requests, intervention petitions, and new or amended contentions, with the most important of these factors being "good cause."[1] Current § 2.309(f)(2) applies a three-factor test to new or amended contentions filed after the initial filing.[2]

[1] The current § 2.309(c) factors include (1) good cause for the failure to file on time; (2) the nature of the requestor's or petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's or petitioner's property, financial, or other interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the requestor's or petitioner's interest; (5) the availability of other means to protect the requestor's or petitioner's interest; (6) the extent to which the requestor's or petitioner's interest will be represented by other parties; (7) the extent to which the requestor's or petitioner's interest will broaden the issues or delay the proceeding; and (8) the extent to which the requestor's or petitioner's participation may reasonably be expected to assist in developing a sound record. Three of these factors—current § 2.309(c)(1)(ii)-(iv)—are the same as the factors for standing found at § 2.309(d)(1)(ii)-(iv).

[2] The current § 2.309(f)(2) factors include (1) the contention is based on information that was not previously available; (2) the contention is based on information that is materially different from previously available information; and (3) the contention was submitted in a timely fashion based on the availability of the subsequent information.

(continued. . .)

Some Atomic Safety and Licensing Boards have concluded that new or amended contentions submitted after the initial filing do not need to meet the current eight § 2.309(c) factors if the current three § 2.309(f)(2) factors are satisfied, while other Boards have required new or amended contentions to satisfy both the current § 2.309(c) and the current § 2.309(f)(2) factors.[3]

The proposed rule would have made good cause the only factor in § 2.309(c) (eliminating the other factors from § 2.309(c)), and would have defined good cause as being only the three factors currently in § 2.309(f)(2). Thus, under the proposed rule, the only way for a hearing request, intervention petition, or motion for leave to file new or amended contentions to be considered would be for the request, petition, or motion to satisfy the current three § 2.309(f)(2) factors. Only one commenter commented on this proposed change, requesting that the NRC not eliminate the current eight § 2.309(c)(1) factors. It is also worth noting that this commenter described the current framework as requiring that "nontimely hearing requests and/or petitions . . . address each of the eight factors in 10 CFR 2.309(c) (*Non-timely filings*) as well as the requirements of Section 2.309(f)(2) (*Contentions*)." The Atomic Safety and Licensing Board Panel (ASLBP) commented that proposed § 2.309(c) defines "good cause" too narrowly because numerous situations that should be permitted to constitute good cause under certain circumstances—such as natural disasters, personal emergencies, and other events beyond the filer's control—cannot satisfy the definition of "good cause" under proposed § 2.309(c).

After consideration of the ASLBP's comments, OGC is recommending that the Commission approve a final § 2.309(c) that is slightly modified from the proposed rule. As with the proposed rule, draft final § 2.309(c) will permit the consideration of a hearing request, intervention petition, or motion for leave to file new or amended contentions filed after the deadline only if the request, petition, or motion demonstrates good cause by satisfying the current § 2.309(f)(2)(i)–(iii) factors. However, draft final § 2.309(c) addresses the ASLBP's concerns by clarifying that § 2.307, which allows for an extension of a filing deadline, applies to requests to change a filing deadline for reasons not related to the substance of the filing (such as natural disasters, personal emergencies, or other events beyond the filer's control). Further, the draft final rule clarifies that a § 2.307 request can be filed before or after a filing deadline. And the Statements of Consideration for the draft final rule also make clear that the presiding officer is expected to make a case-by-case determination on the merits of extension requests under § 2.307. In addition, the Statements of Consideration clarify that after a § 2.307 extension request is granted, the participant's filing (if filed by the extended date)

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The Commission has also applied the three factors in current § 2.309(f)(2) to a late intervention petition. *See Fla. Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 33 (2006).

[3] *E.g., compare Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005), *with* Memorandum and Order (Ruling on Request to Admit New Contention), at 4-7 (Oct. 14, 2008) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML082880571).

will be treated as if the participant filed by the deadline that was extended—in other words, the participant would need to satisfy the requirements that would have applied had the participant filed by the deadline that was extended.

Similar to the proposed rule, the draft final rule will eliminate the other, less significant factors from § 2.309(c) and move the current three § 2.309(f)(2) factors to § 2.309(c). Thus, under the draft final rule, a hearing request, intervention petition, or motion for leave to file a new or amended contention filed after the deadline based on a draft or final NRC National Environmental Policy Act (NEPA) document may be considered if the participant demonstrates good cause by (1) showing that there is information in the draft or final NRC NEPA document that is materially different from the information in the applicant's documents; (2) demonstrating that the information was not previously available; and (3) filing in a timely manner after the NRC NEPA document's issuance. An NRC NEPA document is a draft or final environmental impact statement, environmental assessment, or any supplement to these documents.

These amendments to § 2.309 will provide a simpler and more equitable system for dealing with hearing requests, intervention petitions, and motions for leave to file new or amended contentions after the § 2.309(b) filing deadline. The same tests would be applied to all parties, participants, and petitioners, whether they are filing a new or amended contention, petition to intervene, or request for hearing after the deadline. The applicable standard for petitions to intervene, requests for hearing, and new or amended contentions will be in one paragraph—final § 2.309(c)—not split between two different paragraphs in the regulations—like current §§ 2.309(c) and 2.309(f)(2). Further, the draft final rule will make clear the relationship between the standards in current §§ 2.309(c) and 2.309(f)(2).

Removal of Proposed § 2.309(c)(5)

In its Staff Requirements Memorandum (SRM) for the proposed rule, the Commission directed OGC to add a new § 2.309(c)(5) to the proposed rule. This proposed section would require new or amended contentions challenging an NRC NEPA document to show that there is a significant difference between the applicant's environmental report and the staff's NEPA document. Thus, this proposed section would treat the "significant difference" language in current § 2.309(f)(2) as an additional requirement, beyond the proposed § 2.309(c) requirements described above, for environmental contentions filed after the deadline.[4]

After further consideration, review of the public comments, and discussion with the ASLBP, OGC recommends that the Commission not adopt proposed § 2.309(c)(5) in the final rule. Instead, OGC recommends that the Commission require that all new or amended contentions filed after the deadline, whether safety or environmental, meet the same § 2.309(c) standards, including the draft final § 2.309(c)(1) requirement to

[4] Current § 2.309(f)(2) states that "[t]he petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents."

demonstrate good cause. Under the draft final rule, participants are still required to file their initial environmental contentions based on the applicant's environmental report, even though the NRC staff's NEPA documents are the subject of the environmental portion of the hearing. New or amended environmental contentions filed after the deadline, like new or amended safety contentions filed after the deadline, need to satisfy the requirements in draft final § 2.309(c). OGC does not believe that there should be an additional requirement that must be satisfied for new or amended environmental contentions filed after the deadline.

The Statements of Consideration for the draft final rule clarify that the "significant difference" language in current § 2.309(f)(2) is not a separate standard, but is captured by the three factors in final § 2.309(c)(1). In addition, the Statements of Consideration make clear that, as specified in current § 2.309(f)(2), participants may file a new or amended contention after the § 2.309(b) filing deadline based on a draft or final NRC NEPA document if the participant demonstrates good cause by (1) showing that the information that is the subject of the new or amended contention was not previously available; (2) showing that there is information in the draft or final NRC NEPA document that differs significantly (i.e., is "materially different") from the information in the applicant's documents; and (3) filing the contention in a timely manner after the NRC NEPA document's issuance. Consequently, OGC recommends deleting the significant difference language from § 2.309(f)(2) to reduce ambiguity and avoid confusion.

OGC believes that the draft final rule text captures the intent of proposed § 2.309(c)(5), reduces ambiguity, and removes a source of possible confusion for participants in NRC proceedings.

Changes to the Mandatory Disclosure and Discovery Provisions in Subparts C, G, and L

Narrowing the scope of NRC staff disclosures under § 2.336(b)

The proposed rule requested public comment on a proposal to adjust the scope of the staff's disclosure obligations to mirror those of the other parties to NRC proceedings. After reviewing the public comments and considering the proposal to make changes to the scope of the staff's disclosure obligations, OGC recommends that the Commission adopt a revised § 2.336(b) that will limit the scope of the staff's mandatory disclosures to documents relevant to the admitted contentions; currently, the staff's mandatory disclosure obligations effectively extend to all documents relevant to the application. OGC believes that this change will reduce the burden on both the NRC staff and other parties to NRC proceedings. This change will allow the parties to focus on the admitted contentions instead of being forced to sort through thousands of pages of documents that are not relevant to the matters being adjudicated. The NRC staff will continue to provide all non-sensitive official agency records to the public through public ADAMS, and nothing in this draft final rule affects the scope of the staff's ongoing record-retention and disclosure obligations outside the adjudicatory process. This change affects only the scope of the documents that have to be included in the staff's mandatory disclosures in NRC proceedings.

Changes to the discovery timeline in § 2.336(d)

OGC has also included a revised discovery timeline in draft final § 2.336(d). Current § 2.336(d) requires parties to update their mandatory disclosures within 14 days of obtaining or discovering new information or documents. In the proposed rule, the NRC proposed replacing the requirement to disclose information or documents within 14 days of discovery with a continuing duty to provide a disclosure update every 30 days because experience has demonstrated that the current disclosure provisions are much more burdensome for litigants than was initially anticipated. One commenter supported this proposal, but suggested that the mandatory disclosure updates be required "monthly" instead of "every 30 days."

Instead of requiring disclosure updates every 30 days as would've been required in proposed § 2.336(d), draft final § 2.336(d) will direct the presiding officer to select a day during the month (e.g., the first day of the month or the first Thursday in the month) and will require parties to provide disclosure updates on that date every month, unless the parties agree to a different due date or frequency for disclosure updates. Documents obtained, discovered, or generated in the two weeks before an update will not need to be included in that update, but will then need to be included in the next update. OGC believes that draft final § 2.336(d) will reduce the burden and increase the usefulness of updated disclosures. Moreover, draft final § 2.336(d) will provide parties with greater flexibility than proposed § 2.336(d) by allowing them to choose a different due date or frequency for disclosure updates.

Changes to subpart G and a conforming change to § 2.336(b)

In the proposed rule, the NRC suggested an amendment to § 2.704 that would have changed the due date for initial disclosures in subpart G proceedings from 45 days after the issuance of a prehearing conference order following the initial prehearing conference to 30 days after the order granting a hearing. Upon further reflection, OGC recommends that the Commission not change the deadline for initial disclosures in subpart G proceedings. After reviewing the proposed rule, OGC believes that modifying the 45-day period in current § 2.704 would limit the time available to the parties to develop a proposed discovery plan (which is required in subpart G proceedings, but not other part 2 proceedings). Reducing the 45-day period could result in situations where initial disclosures would be due before the parties are required to submit a proposed discovery plan to the presiding officer (under § 2.705(f)).

Consistent with the recommendation described in the previous paragraph, OGC is recommending that a conforming change be made to § 2.336(b). Current § 2.336(b) applies to NRC staff disclosures in subpart G proceedings. Section 2.336(b) requires that the NRC staff's initial disclosures be made in NRC proceedings within 30 days of the issuance of the order granting a hearing request or intervention petition. Further, current § 2.336(a) specifically excludes subpart G from the general discovery requirements for parties other than the NRC staff—under the current regulations all the other parties to subpart G proceedings are subject to the specific discovery provisions in subpart G, not those in § 2.336. OGC, therefore, recommends amending § 2.336(b) to remove subpart G proceedings from the general discovery requirements for the NRC staff because, as explained in the previous paragraph, subpart G in the current and draft

final rule requires initial disclosures to be made within 45 days of the issuance of the prehearing conference order following the initial prehearing conference (not within 30 days of the order granting a hearing), and because this change will establish parallel discovery responsibilities for all parties to subpart G proceedings.

OGC is also recommending that the Commission adopt a modified disclosure update provision in draft final § 2.704(a)(3), which is similar to the proposed rule and parallels the timing provisions in draft final § 2.336(d). Current § 2.704(e) requires a party that has made a disclosure under § 2.704 to supplement its disclosures "at appropriate intervals . . . within a reasonable time" after the party learns that in some material respect the information disclosed was incomplete or incorrect (provided that the additional or new information was not made available to other parties during the discovery process or in writing). Draft final § 2.704(a)(3) will require parties to update disclosures every month on a due date selected by the presiding officer, but will allow the parties to agree to a different due date or frequency for disclosure updates. Documents that are developed, obtained, or discovered during the two weeks before the due date will not be required to be included in the update (but if they are not included in the first update after they're discovered, then they will need to be included in the next update). Draft final § 2.704(e)(1) clarifies that supplemental disclosures must be made in accordance with the schedule established in draft final § 2.704(a)(3). This change to § 2.704 will reduce the burden and increase the usefulness of updated disclosures.

Clarification of the Authority of the Secretary in § 2.346

Current § 2.346(j) authorizes the Secretary to "[t]ake action on minor procedural matters." This language could be read to suggest that the Secretary's authority includes a more limited set of matters than intended, as matters must be both "minor" and "procedural" to qualify. In the proposed rule, the NRC proposed amending § 2.346(j) to allow the Secretary to "[t]ake action on procedural and other minor matters." However, proposed § 2.346(j) could suggest that all procedural matters—no matter their precedential or policy significance—are appropriate for resolution by the Secretary. Upon further consideration, OGC believes that the Commission should revise proposed § 2.346(j) to avoid misleading interpretations, without altering its intended meaning. Draft final § 2.346(j) will allow the Secretary to "[t]ake action on other minor matters." This revision is designed to clearly authorize the range of minor matters that are appropriate for resolution by the Secretary.

Under the draft final rule, the Secretary will have authority to decide "other minor matters" (not covered by the other provisions in § 2.346) that come before the Commission, whether procedural or otherwise. The question of whether a given matter is "minor" will depend upon the matter's precedential or policy significance. Accordingly, even a matter that might arguably not be considered minor from a purely procedural standpoint, such as an unopposed withdrawal of a construction and operating license application, may fall within the scope of § 2.346(j) because of its lack of precedential or policy significance. The draft FRN references a number of recent Secretary orders that informed OGC's recommendation to revise proposed § 2.346(j), as well as Commission decisions that involve non-minor procedural matters and thus would not fall within the scope of draft final § 2.346(j).

Interlocutory Appeals

In the proposed rule, the NRC requested public comments regarding amendments to § 2.311. Section 2.311 provides requirements for the interlocutory review of rulings by a presiding officer granting or denying a hearing request or intervention petition, including those filed after the deadline. Current § 2.311(c) effectively allows the petitioner to appeal an order wholly denying an intervention petition or hearing request. Therefore, if the presiding officer grants the intervention petition and denies the admissibility of one or more proposed contentions, the petitioner may not appeal the denial of any proposed contentions until the presiding officer issues a final decision at the end of the proceeding. Conversely, any party other than the petitioner may immediately appeal the order on the grounds that the petitioner lacks standing or that all of the petitioner's proposed contentions are inadmissible.

Although this basic scheme for interlocutory review of intervention petitions and hearing requests has been in place since 1972 (*see* 37 Fed. Reg. 28,710 (Dec. 29, 1972)), there have been some suggestions that a change to the current practice might be warranted either to provide earlier appellate review of contention admissibility or to discourage frivolous appeals. The NRC proposed two options for public comment in the proposed rule. Option 1 would have amended § 2.311(c) and (d) to allow any party to appeal an order granting a hearing request or intervention petition, in whole or in part, within 25 days of the issuance of the order. Option 2 would have deleted § 2.311(d)(1) to remove the right of parties other than the petitioner to appeal orders granting an intervention petition. The NRC requested comments on these options, the possible rule language that would implement each option, and the resource implications of both options for all participants and for the Commission.

After reviewing the two options and the one public comment received on this issue, OGC recommends that the Commission not modify its standards for interlocutory appeals. The one public comment received on this issue (from an industry group) did not support changing the appeals process. The lack of public comments on this issue suggests that there is not a clamor for a change in the standards for interlocutory appeals. Thus, while an argument can be made in support of a change, OGC finds no compelling justification to change the current process. Further, Option 1 allowing any party to appeal an order granting a hearing request or intervention petition, in whole or in part, would have significant resource implications for the Commission, the Office of Commission Appellate Adjudication (OCAA), and OGC.

The ASLBP reviewed the draft final rule, and some Panel members indicated support for Option 2. These Panel members believe that the current system has the potential to promote inefficiencies. These members believe that the current system has the practical effect of encouraging the applicant to oppose every proffered contention, regardless of its merit, because that is the only way to preserve an applicant's "automatic" appeal right. In addition, some Panel members perceive an inequity in the current system, which allows applicants and the staff to file an interlocutory appeal of a partial loss in arguing for dismissal of all contentions, but fails to provide a similar method for intervenors to pursue an appeal of a denied contention until the completion of the proceeding.

Other Less Substantial Changes

The following less substantial changes are also in the draft final rule:

- Several sections throughout part 2 are updated to include references to the Office of Federal and State Materials and Environmental Management Programs or the Director, Office of Federal and State Materials and Environmental Management Programs.
- In response to a public comment, OGC proposes to amend § 2.305 to allow participants in NRC proceedings to file more limited certificates of service when a document is filed using the NRC's E-Filing system.
- In response to a public comment, OGC proposes to amend subpart L to no longer require that affidavits be included with motions for summary disposition. This section would mirror the summary-disposition section in subpart G, which does not require affidavits. The Statements of Consideration would, however, encourage submissions of affidavits.

RECOMMENDATIONS:

That the Commission:

Approve the enclosed draft final rule (Enclosure 1) for publication in the *Federal Register*.

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

Note:

- The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. § 605(b);
- The enclosed FRN contains the Regulatory Analysis for this rulemaking;
- No environmental impact statement or environmental assessment has been prepared for this rulemaking because of the categorical exclusion in 10 CFR § 51.22(c)(1);
- Copies of the FRN of this rulemaking will be distributed to all affected Commission licensees, Agreement States, and other States. The notice will be sent to other interested persons upon request;
- The NRC has determined that no Part 2 rules are major rules under the Congressional Review Act, and has obtained generic approval for this determination from the Office of Management and Budget. The appropriate Congressional and Government Accountability Office contacts will be informed;
- The appropriate Congressional committees will be informed;

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

COORDINATION:

The FRN attached to this SECY paper has been reviewed by the Rules and Directives Branch of the Office of Administration, the ASLBP, and OCAA. The ASLBP and OCAA comments have been incorporated into the draft final rule language.

/RA/

Stephen G. Burns
General Counsel

Enclosure**:**
1. Draft final rule *Federal Register* notice

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

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Stephen G. Burns
General Counsel

Enclosure**:**
1. Draft final rule *Federal Register* notice

Document Name:G/GC/Burns/Part 2 Secy Paper-1-2012/Part 2 SECY Tracked.docx; G/GC/Burns/Part 2 Secy Paper-1-2012/Part 2 Final Rule FRN Draft.pdf;

*see previous concurrence

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