ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEYOND NUCLEAR, INC.,
Petitioner,
v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
Respondents,

and

DTE ENERGY COMPANY,
Intervenor.

On Petition for Review of an Order by the United States Nuclear Regulatory Commission

INITIAL BRIEF OF FEDERAL RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

(A) Parties, Intervenors, and Amici

Petitioner is Beyond Nuclear, Inc. Respondents are the United States Nuclear Regulatory Commission and the United States of America. DTE Energy Company (DTE Electric Company's parent corporation) has been granted leave to intervene in support of respondents. There are no amici.

(B) Rulings under Review

Beyond Nuclear, Inc. identifies the following orders of the Nuclear Regulatory Commission as the rulings under review:

1. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-13, 81 NRC 555 (2015);
2. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1 (2015);
3. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157 (2014); and
4. Issuance of combined license NPF-95 to DTE Electric Company for Fermi Nuclear Power Plant, Unit 3 (80 Fed. Reg. 26,302 (May 7, 2015)).

In its petition for review, Beyond Nuclear, Inc. also identified two orders associated with the lawfulness of the Nuclear Regulatory Commission's Continued Storage Rule (79 Fed. Reg. 56,238 (Sept. 19, 2014)): (1) *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC 551 (2015); and (2) *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC 221 (2015). Beyond Nuclear, Inc.'s arguments related to those orders were resolved by this Court's decision in *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016).

(C) Related Cases

The case on review was not previously before this Court or any other court. There are no related cases pending in this Court or any other court.

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GLOSSARY

AEA	Atomic Energy Act
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

JURISDICTIONAL STATEMENT

Petitioner Beyond Nuclear, Inc. ("Beyond Nuclear") seeks review of Nuclear Regulatory Commission ("NRC" or "Commission")[1] orders associated with NRC's issuance of a "combined" license to construct and operate a new Unit 3 at the existing Fermi Nuclear Power Plant site. The Hobbs Act confers jurisdiction upon this Court to review a challenge to a final order in an NRC licensing proceeding, so long as the challenge is filed by a "party aggrieved" within 60 days after the final order's entry.[2] Accordingly, this Court has jurisdiction over Beyond Nuclear's challenge to the NRC order issuing a combined license for Fermi Unit 3, notice of which was published in the *Federal Register* on May 7, 2015,[3] because Beyond Nuclear was admitted as a party to the contested portion of the licensing proceeding (and thus was a party aggrieved by the order) and timely filed this petition for review on June 19, 2015, within 60 days after the order's entry.[4]

Beyond Nuclear's petition for review also specifically challenges two interlocutory orders associated with its intervention in the licensing proceeding (the

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[1] As used herein, the term "NRC" refers generically to the agency; "Commission" refers to the collegial body that issued the adjudicatory decisions under review.

[2] 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A).

[3] DTE Electric Company; Fermi 3, 80 Fed. Reg. 26,302 (May 7, 2015) (JA___).

[4] *See City of Benton v. NRC*, 136 F.3d 824, 825-26 (D.C. Cir. 1998); *Massachusetts v. NRC*, 924 F.2d 311, 321-22 (D.C. Cir. 1991).

Commission's decisions designated CLI-14-10[5] and CLI-15-1[6]). When reviewing a challenge to a final order under the Hobbs Act, the Court may review associated interlocutory orders to which the petitioner is a party.[7] Therefore, this Court's jurisdiction to review the final order in this case includes the authority to review CLI-14-10 and CLI-15-1.[8]

With regard to standing, we note that Beyond Nuclear has not complied with Circuit Rule 28(a)(7) because its brief does not set forth a basis for its claim of standing. However, based on the demonstration that Beyond Nuclear included in

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[5] *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157 (2014).

[6] *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1 (2015) (JA___).

[7] *See Alaska v. Fed. Energy Regulatory Comm'n*, 980 F.2d 761, 764-65 (D.C. Cir. 1992); *Nat. Res. Def. Council v. NRC*, 680 F.2d 810, 816-17 (D.C. Cir. 1982).

[8] Beyond Nuclear also identifies the Commission's CLI-15-13 order as a ruling under review. *See DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-13, 81 NRC 555 (2015) (JA___). But Beyond Nuclear was not a "party," for Hobbs Act purposes, to CLI-15-13 because CLI-15-13 documents the Commission's final decision on the "mandatory" hearing (i.e., the uncontested portion of the licensing proceeding) for Fermi Unit 3, and participation in mandatory hearings is limited to the license applicant and the NRC staff. *See Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 188, 199-200 (D.C. Cir. 2013); *see infra* notes 11-14 and accompanying text. Consequently, Beyond Nuclear's petition for review does not provide the Court with jurisdiction to review the merits of CLI-15-13. In any event, the three "assignments of error" identified in Beyond Nuclear's brief (Br. 36, 45, 51) contest the determinations in CLI-14-10 and CLI-15-1, and none specifically challenges the conclusions set forth in CLI-15-13.

its Docketing Statement (submitted to the Court on July 22, 2015), we do not contest that Beyond Nuclear has standing.

STATEMENT OF ISSUES

1. Whether, in CLI-15-1, the Commission reasonably denied Beyond Nuclear's petition for review of the decision by the Atomic Safety and Licensing Board ("Board") not to admit for adjudication Contention 23, which challenged NRC's compliance with the National Environmental Policy Act ("NEPA") related to consideration of the environmental impacts of the anticipated transmission corridor for Fermi Unit 3, because the contention was raised impermissibly late.

2. Whether, in CLI-15-1, the Commission abused its discretion in declining to permit the Board to consider, on a *sua sponte* basis in a contested proceeding, issues concerning the adequacy of the NRC staff's review of transmission corridor impacts under NEPA, where a timely contention concerning these issues had not been filed, the impacts had been addressed throughout the Final Environmental Impact Statement ("EIS"), and the issues would be appropriately considered as part of the sufficiency review performed in the mandatory hearing required by the Atomic Energy Act ("AEA").

3. Whether, in CLI-14-10, the Commission reasonably denied Beyond Nuclear's petition for review of the Board's ruling on Contention 15, which challenged the adequacy of the license applicant's quality assurance program,

where there was extensive factual support for the Board's conclusion that the applicant's quality assurance program satisfied applicable NRC requirements.

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations is set forth in the addendum bound with this brief.

STATEMENT OF THE CASE

This petition for review concerns the issuance to DTE Electric Company ("DTE")[9] of a combined license to construct and operate a new Unit 3 at the existing Fermi Nuclear Power Plant site in Monroe County, Michigan.[10] NRC issued the license in accordance with section 189a. of the AEA, 42 U.S.C. § 2239(a), which requires NRC to "afford interested parties an opportunity to participate in a contested hearing subject to additional procedural requirements" and requires NRC, regardless of whether a hearing has been requested by a member of the public, to hold a "mandatory" hearing on each application to construct a nuclear power plant.[11] Participation in the mandatory hearing is limited to the

[9] The applicant was operating under the name "Detroit Edison Company" until January 1, 2013, when it was renamed "DTE Electric Company." *See* DTE Electric Company; Fermi 3, 79 Fed. Reg. 24,457, 24,457 (Apr. 30, 2014).

[10] CLI-15-13, 81 NRC at 558 (JA___).

[11] *Blue Ridge*, 716 F.3d at 187-88, 199-200.

license applicant and NRC staff.[12] The licensing proceeding for Unit 3 thus involved both a "contested" portion, in which Beyond Nuclear was admitted as a party and permitted to raise "contentions" before a Licensing Board consisting of a legal judge and two technical judges,[13] as well as a "mandatory" portion, during which the Commission was tasked with evaluating whether the NRC staff's safety and environmental review for the application was sufficient to support the regulatory findings required for issuance of the license.[14]

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[12] *Id.* at 188, 199-200.

[13] *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 306 (2009) (JA___). In NRC adjudicatory practice, the term "contention" is used to refer to the specific claim that a person seeks to litigate before the agency. An interested person may be admitted as party to an NRC adjudicatory proceeding upon a showing of standing and submission of at least one contention that meets the agency's admissibility requirements. *See* 10 C.F.R. § 2.309(a), (f).

[14] *See* CLI-15-13, 81 NRC at 559-61 (JA___). NRC regulations specify safety-related and environmental issues that must be examined as part of the mandatory hearing for a combined license application. *See* 10 C.F.R. § 52.97(a) (specifying safety-related issues); *id.* § 51.107(a) (specifying environmental issues, such as whether the requirements of NEPA sections 102(2)(A), (C), and (E) and NRC's NEPA-implementing regulations have been met and whether the staff's NEPA review has been adequate). As a result of these obligations, examination of the sufficiency of the staff's environmental review for combined license applications as part of the mandatory hearing process is standard NRC practice. *See, e.g., Blue Ridge*, 716 F.3d at 188, 199; *Duke Energy Fla., LLC* (Levy Nuclear Power Plant, Units 1 and 2), CLI-16-16, 83 NRC __ (Oct. 20, 2016) (slip op. at 5-6, 40-45); *S.C. Elec. & Gas Co. & S.C. Pub. Serv. Auth.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-9, 75 NRC 421, 428, 473-75 (2012). *See generally Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 27-31 (2005) (describing the statutory and regulatory background for the mandatory hearing process). The mandatory hearing for a combined license

Among the contentions that the Board admitted during the contested portion of the proceeding was Contention 15, in which Beyond Nuclear challenged the adequacy of DTE's quality assurance program.[15] After holding a two-day evidentiary hearing, the Board ruled in favor of DTE on Contention 15.[16] In CLI-14-10, the Commission denied Beyond Nuclear's petition to review the Board's ruling.[17]

Although the Board admitted Contention 15, it dismissed Contention 23 as impermissibly late. In Contention 23, Beyond Nuclear challenged the adequacy of NRC's consideration under NEPA of the environmental impacts associated with the anticipated transmission corridor for Fermi Unit 3.[18] Beyond Nuclear did not submit Contention 23 by the deadline for hearing requests.[19] Beyond Nuclear first

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application does not address admitted or pending contentions. *See Blue Ridge*, 716 F.3d at 188; CLI-15-13, 81 NRC at 564-65 (JA___).

[15] *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-10-9, 71 NRC 493, 498-99 (2010) (JA___).

[16] CLI-14-10, 80 NRC at 160 (JA___).

[17] *Id.* at 166 (JA___).

[18] CLI-15-1, 81 NRC at 3 (JA___).

[19] *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 775-76 (2012) (JA___); Detroit Edison Company; Notice of Hearing, and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836, 837 (Jan. 8, 2009) (setting forth the deadline for hearing requests associated with the Fermi Unit 3 application).

filed Contention 23 in January 2012, nearly three years after the deadline for hearing requests, and then again in February 2013; the Board dismissed both filings as impermissibly late.[20] In CLI-15-1, the Commission denied Beyond Nuclear's petition to review the dismissal of Contention 23 and the Board's request to review, on a *sua sponte* basis, NEPA issues related to the contention, notwithstanding its untimeliness.[21] The Commission explained that the NEPA issues did not merit *sua sponte* review in a contested hearing and, in any event, would be addressed as part of the sufficiency review performed during the mandatory hearing for Fermi Unit 3.[22]

After holding the mandatory hearing, the Commission issued an order (CLI-15-13) finding the NRC staff's environmental and safety review for the Unit 3 application to be sufficient and authorizing issuance of the combined license.[23] On May 1, 2015, NRC issued the combined license.[24]

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[20] CLI-15-1, 81 NRC at 3-4 (JA___); *see* LBP-12-12, 75 NRC at 775-76 (JA___); Memorandum and Order (Denying Intervenors' Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (Apr. 30, 2013), at 21-24 (unpublished) (JA___).

[21] CLI-15-1, 81 NRC at 8, 11 (JA___).

[22] *Id.* at 9-11 (JA___).

[23] CLI-15-13, 81 NRC at 589 (JA___).

[24] DTE Electric Company; Fermi 3, 80 Fed. Reg. 26,302, 26,302 (May 7, 2015) (JA___).

STATEMENT OF FACTS

I. Factual background associated with Contention 23 – the challenge to NRC's consideration under NEPA of the environmental impacts of the anticipated transmission corridor.

A. DTE's and the NRC staff's consideration of transmission corridor impacts.

On September 18, 2008, DTE filed an application with NRC to obtain a combined license to both construct and operate a new Unit 3 at the existing Fermi Nuclear Power Plant site in Monroe County, Michigan.[25] DTE's application included an Environmental Report identifying the reasonably foreseeable impacts resulting from the licensing of the proposed facility.[26] DTE noted in its Environmental Report that a new transmission corridor would need to be developed offsite to deliver electricity from Unit 3 to the electrical grid, and it described impacts from the corridor.[27] It also explained that, because this offsite

[25] CLI-15-13, 81 NRC at 558 (JA___).

[26] Under NEPA, preparation of an EIS is the responsibility of an agency undertaking a major federal action. *See Blue Ridge*, 716 F.3d at 188; 10 C.F.R. § 51.20(b)(2) (specifying that an EIS or supplement to an EIS is required for issuance of a combined license). NRC regulations also require applicants for combined licenses to submit an environmental report. *See* 10 C.F.R. § 52.80 (requiring a combined license application to include an environmental report); *id.* § 51.50(c) (cataloguing contents of report). The NRC staff uses the environmental report to assist in developing both a draft EIS and, after notice and comment, a final EIS.

[27] LBP-12-12, 75 NRC at 775-76 (JA___).

corridor would be owned and operated by a separate company known as ITC*Transmission*, DTE would have no control over its construction or operation and could only describe the impacts based upon its anticipated form and location.[28]

The NRC staff included an analysis of the reasonably foreseeable impacts of the transmission corridor in the Draft EIS and, later, in the Final EIS.[29] Development of the corridor was formally identified as a "pre-construction activity" and thus not designated as a "connected action."[30] However, the Final EIS, in its description of the affected environment, discussed the terrestrial resources, as well as the historic and cultural resources, that would likely be found along the anticipated transmission corridor.[31] Further, the impacts anticipated from construction and operation of the transmission corridor on land use, noise, terrestrial resources, aquatic ecology, soil, historic and cultural resources, air quality, and public and occupational health were analyzed throughout the Final EIS

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[28] *See* "Fermi 3 Combined License Application, Part 3: Environmental Report," Rev. 2, at 1-4 to 1-5, 3-57 to 3-58, 4-12 (Feb. 2011) (JA___).

[29] NUREG-2105, *Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3,* Vols. 1-4 (2013) (JA___) ("Final EIS").

[30] *Id.*, Vol. 1, at 1-6 to 1-7 (JA___).

[31] *See id.*, Vol. 1, at 2-45 to 2-48, 2-61 to 2-65, 2-79 to 2-82, 2-100 to 2-111, 2-126, 2-208 to 2-209 (JA___); *see also id.*, Vol. 1, at 3-17 to 3-22, 3-28 (JA___) (describing the anticipated form and location of the transmission corridor expected to be constructed and operated by ITC*Transmission*).

(including in those chapters devoted to the direct impacts of Unit 3).[32] The Final EIS also identified mitigation measures associated with the anticipated corridor[33] and discussed transmission corridor impacts in its cumulative impacts and alternatives analyses.[34] In addition, the final conclusions and recommendations in the Final EIS accounted for transmission corridor impacts.[35] Similar to DTE's Environmental Report, the Final EIS noted that, because ITC*Transmission* had not announced the final route for the offsite corridor, it could only describe impacts and mitigation associated with the corridor based upon publicly available

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[32] *See id.*, Vol. 1, at 4-8 to 4-9, 4-28, 4-29 to 4-30, 4-44 to 4-45, 4-47, 4-51 to 4-61, 4-100 to 4-102, 4-109 to 4-110, 5-3 to 5-4, 5-22 to 5-23, 5-26 to 5-27, 5-41 to 5-54, 5-57, 5-59, 5-88 to 5-89, 5-91 to 5-92, 5-100 to 5-101, 5-104 to 5-105 (JA___).

[33] *See, e.g., id.*, Vol. 1, at 4-9 (JA___) (noting that ITC*Transmission* had stated that it would use best practices for minimizing environmental impacts); *id.*, Vol. 1, at 4-25 (JA___) (noting mitigation measures recommended by the U.S. Environmental Protection Agency related to the clearing of forested land for overhead transmission lines); *id.*, Vol. 1, at 5-143 to 5-146 (JA___) (summarizing mitigation measures proposed by DTE, including some related to the transmission corridor).

[34] *See, e.g., id.*, Vol. 1, at 7-7, 7-18 to 7-23, 7-31 to 7-33, 7-37, 7-46, 9-4, 9-7, 9-16, 9-22, 9-24, 9-27, 9-40, 9-42 to 9-43, 9-44, 9-50 to 9-51, 9-65 to 9-67, 9-94 to 9-98, 9-101 to 9-102, 9-104 to 9-106, 9-128, 9-132 to 9-133, 9-143 to 9-144, 9-150 to 9-154, 9-157 to 9-160, 9-181 to 9-185, 9-193, 9-200 to 9-203, 9-206 to 9-207, 9-209, 9-234 to 9-237, 9-246 to 9-247, 9-253 to 9-257, 9-260 to 9-263, 9-286 to 9-289 (JA___).

[35] *Id.*, Vol. 4, at M-2 (JA___).

information and reasonable assumptions regarding the configuration likely to be used for the corridor.[36]

B. Regulatory framework governing untimely contentions.

Beyond Nuclear did not file Contention 23 until close to three years after the deadline for hearing requests.[37] Rather than filing Contention 23 after DTE submitted its Environmental Report, Beyond Nuclear filed Contention 23 first in January 2012, after the NRC staff's issuance of the Draft EIS, and then again in February 2013, after the issuance of the Final EIS.[38] In both cases, the Board dismissed the contention as untimely under NRC's regulations governing new or amended contentions filed after the deadline for hearing requests. As we explain below, slightly different NRC regulations applied to these two filings because, in August 2012, NRC simplified these regulations.[39]

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[36] *See, e.g., id.*, Vol. 1, at 2-10, 2-45, 4-29 (JA___).

[37] *See supra* text accompanying note 20.

[38] *See* CLI-15-1, 81 NRC at 3-4 (JA___).

[39] *See id.* at 7 n.29 (JA___); Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012); Order (Notifying Parties of Amendments to Rules of Practice) (Aug. 29, 2012), at 1 (unpublished) (JA___) (informing the parties that the amended rules applied to new or amended contentions filed after September 4, 2012). Beyond Nuclear's description of the issue in its brief (*see* Br. 50) does not acknowledge the change in NRC regulations and instead describes only the older version of the regulations, which did not apply when Contention 23 was submitted after the issuance of the Final EIS.

At the time of Beyond Nuclear's first filing in 2012, two NRC regulations contained standards applicable to new or amended contentions. The first—10 C.F.R. § 2.309(c)(1)—provided that a new or amended contention "will not be entertained absent a determination . . . that . . . the contention[] should be admitted based upon a balancing of [eight specified] factors," one of which was "good cause."[40]

The second—10 C.F.R. § 2.309(f)(2)—stated that, on issues arising under NEPA, a petitioner "shall file contentions based on the applicant's environmental report."[41] However, it further provided that the "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."[42] Section 2.309(f)(2) identified three factors to be considered in determining whether to admit a new or amended contention: (1) whether the information upon which the contention was based was previously available; (2) whether the information upon which the contention was based was "materially different" from information that was previously available; and

[40] 10 C.F.R. § 2.309(c)(1) (2012).

[41] *Id.* § 2.309(f)(2) (2012).

[42] *Id.*

(3) whether the contention was "submitted in a timely fashion based on the availability of the subsequent information."[43]

By the time of the second filing in 2013, NRC had simplified its regulations to contain one standard applicable to new or amended contentions (which has not been modified since that time).[44] That standard—10 C.F.R. § 2.309(c)(1)—provides that a new or amended contention "will not be entertained absent a determination . . . that a participant has demonstrated good cause" by satisfying the three factors listed previously in section 2.309(f)(2), set forth above.[45] Section 2.309(f)(2) continues to require contentions arising under NEPA to be filed based on the applicant's environmental report, but it makes clear that a new or amended environmental contention may be filed after the deadline for hearing requests only if it satisfies the requirements in section 2.309(c).[46]

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[43] *Id.*

[44] *See* 77 Fed. Reg. at 46,571-72 (explaining that "good cause" was the factor given the most weight prior to the 2012 amendments and thus the amendments merely simplified the rules to focus on the most relevant question—i.e., whether there is "good cause" as defined by the three factors previously contained in § 2.309(f)(2)).

[45] 10 C.F.R. § 2.309(c)(1) (2016).

[46] *Id.* § 2.309(f)(2) (2016). New or amended contentions must also satisfy the general contention-admissibility requirements applicable to all contentions regardless of the timing of their submission. *See id.* § 2.309(f)(1). The 2012 amendments did not change these requirements. *See* 77 Fed. Reg. at 46,591.

C. The Board's dismissal of Contention 23 as impermissibly late.

When Beyond Nuclear raised Contention 23 for the first time in 2012, it asserted that the anticipated transmission corridor for Unit 3 had been "inadequately assessed and analyzed" in the Draft EIS prepared by the NRC staff.[47] In LBP-12-12, the Board concluded that this contention was impermissibly late because Beyond Nuclear had not raised the contention in response to DTE's submission of its Environmental Report in 2008 and had not satisfied the standards for new or amended contentions applicable at that time.

In particular, the Board found that Contention 23 was not based on new or materially different information and thus did not satisfy section 2.309(f)(2) because the "issues that comprise[d] the subject matter" of Contention 23 had been discussed in DTE's Environmental Report and because Beyond Nuclear had not provided any information to show how the Draft EIS differed materially from the Environmental Report.[48] The Board noted that Beyond Nuclear had acknowledged as much, admitting that the Draft EIS's "treatment of the transmission corridor echoe[d]" the 2008 Environmental Report.[49] The Board also found that Beyond Nuclear had not justified the late submission of Contention 23 under section

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[47] LBP-12-12, 75 NRC at 775 (JA___).

[48] *Id.* at 775-76 (JA___).

[49] *Id.* at 776 (JA___).

2.309(c).[50] Given Beyond Nuclear's failure to satisfy the standards in section 2.309(c) and section 2.309(f)(2), the Board determined that it was precluded from admitting Contention 23.[51] It also recommended that the NRC staff consider the issues during the preparation of the Final EIS.[52]

In the resubmitted version of Contention 23 in 2013, Beyond Nuclear again challenged the staff's environmental review as having inadequately analyzed the environmental implications of the anticipated transmission corridor for Unit 3.[53] This time, consistent with its prior determination in LBP-12-12, the Board concluded that Contention 23 was impermissibly late because Beyond Nuclear had not satisfied the standard for new or amended contentions in section 2.309(c)(1). Specifically, the Board found that the contention was not based on new or

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[50] *Id.* at 776 (JA___).

[51] *Id.* at 780 (JA___).

[52] *Id.* Contrary to the characterization in Beyond Nuclear's brief (Br. 11), the Board did not state that the contention "would be admissible" but for its untimeliness; rather, the Board noted that the contention had raised "substantial questions" about the Draft EIS and might "have been admissible had [it] been filed in a timely manner." *See id.* at 776-78 (JA___); Memorandum and Order (Denying Intervenors' Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (Apr. 30, 2013), at 23 (unpublished) (JA___).

[53] Memorandum and Order (Denying Intervenors' Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (Apr. 30, 2013), at 19 (unpublished) (JA___).

materially different information because both DTE's Environmental Report and the Draft EIS had discussed impacts of the transmission corridor, and Beyond Nuclear had not provided any information to show how the Final EIS was materially different from either DTE's Environmental Report or the Draft EIS in its assessment of such impacts.[54]

The Board also rejected Beyond Nuclear's argument that it satisfied NRC's timeliness requirements because Contention 23 was based on the Board's recommendation in LBP-12-12 that the NRC staff further analyze the impacts of the anticipated transmission corridor. The Board explained that it had "not 'order[ed]' the [s]taff to make any changes in the [Final EIS] and simply [had] made a recommendation to further the agency's compliance with NEPA."[55] The Board concluded that its recommendation to the NRC staff did "not alter the timeliness analysis" or otherwise "cure" Beyond Nuclear's failure to submit Contention 23 at the outset of the proceeding.[56]

[54] *Id.* at 21 (JA___).

[55] *Id.* at 21-22 (JA___).

[56] *Id.* at 22 (JA___).

D. The Board's request to undertake *sua sponte* review of NEPA issues related to Contention 23.

Despite finding Contention 23 untimely, the Board requested that the parties submit briefs on whether the issues raised in the contention were appropriate for the Board to review *sua sponte*.[57] After considering the parties' briefs, the Board concluded in LBP-14-9 that two issues related to Contention 23 merited *sua sponte* review. Accordingly, it requested Commission approval to consider: (1) whether construction of the anticipated transmission corridor qualified as a "connected action" under NEPA such that its impacts should have been designated as direct impacts of constructing Fermi Unit 3; and (2) whether the NRC staff's consideration of the environmental impacts of the transmission corridor satisfied NEPA's hard look requirement.[58]

E. The Commission's denial of Beyond Nuclear's petition to review the dismissal of Contention 23 on timeliness grounds.

In CLI-15-1, the Commission denied Beyond Nuclear's petition to review the Board's dismissal of Contention 23.[59] With respect to the issue of timeliness,

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[57] *Id.* at 23-24 (JA___). Under 10 C.F.R. § 2.340(b)(1), a licensing board may request Commission approval to consider, on a *sua sponte* basis, a "serious" environmental issue not put into controversy by the parties.

[58] *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-14-9, 80 NRC 15, 27, 37 (2014) (JA___). Contrary to Beyond Nuclear's assertion in its brief (Br. 20), the Board did not resolve these issues in Beyond Nuclear's favor, but rather

the Commission explained that NRC regulations "require contentions to be raised at the earliest possible opportunity" and that Beyond Nuclear "acknowledge[d] that [it] could have raised Contention 23 at the outset of this proceeding."[60] The Commission also noted that the language in LBP-12-12, the Board's first decision on Contention 23, recommending further development of this issue "did not create a new reference point" for the "material difference" determination required by NRC's timeliness regulations.[61] The Commission thus declined to disturb the Board's ruling that Contention 23 was impermissibly late because Beyond Nuclear had failed to identify a material difference between DTE's or the NRC staff's environmental documents.[62]

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found that there were "serious question[s]" about these issues that merited *sua sponte* review. LBP-14-9, 80 NRC at 57, 65 (JA__).

[59] CLI-15-1, 81 NRC at 8 (JA___). Under 10 C.F.R. § 2.341(b)(4), the Commission may grant a petition for review, at its discretion, upon a showing that a petitioner has raised a substantial question as to whether (1) a "finding of material fact is clearly erroneous" or conflicts with a finding on the same fact in a different proceeding; (2) a "necessary legal conclusion is without governing precedent" or departs from established law; (3) a "substantial and important question of law, policy, or discretion has been raised"; (4) there was a "prejudicial procedural error" in the proceeding; or (5) any other consideration that the Commission deems to be in the public interest.

[60] CLI-15-1, 81 NRC at 7 (JA___).

[61] *Id.* at 7 (JA___).

[62] *Id.* at 7-8 (JA___).

In addition, the Commission rejected Beyond Nuclear's claim that specific language in the Final EIS was materially different from information in the Draft EIS.[63] The Commission observed that Beyond Nuclear had compared language from two distinct sections of the Draft EIS and Final EIS, and that when the same sections of these documents were aligned, the language was identical.[64] Accordingly, the Commission concluded that Beyond Nuclear had failed to demonstrate a substantial question warranting review of the Board's dismissal of Contention 23.[65]

F. The Commission's denial of the Board's *sua sponte* request.

In CLI-15-1, the Commission also denied the Board's request to review *sua sponte* NEPA issues related to the transmission corridor. The Commission noted that the authority for *sua sponte* review is to "be used only in extraordinary circumstances."[66] The Commission reasoned that the first issue identified by the Board—whether development of the anticipated transmission corridor was a "connected action" under NEPA—had no practical significance because, although

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[63] *Id.* at 7 (JA___).

[64] *Id.* at 8 (JA___) (comparing "Draft Environmental Impact Statement for Combined License for Combined License (COL) for Enrico Fermi Unit 3" (Draft Report for Comment), NUREG-2105, Vol. 1, at 2-45, 3-17 (Oct. 2011), with Final EIS, Vol. 1, at 2-46, 3-18 (JA___)).

[65] *Id.* at 8 (JA___).

[66] *Id.* at 9 (JA___).

the Final EIS referred to development of the corridor as a "pre-construction activity" and not technically part of the proposed action, the Final EIS discussed transmission corridor impacts together with the direct impacts of licensing Fermi Unit 3.[67] The Commission explained that the "Board's treatment of this issue d[id] not acknowledge that the Staff did discuss the proposed transmission corridor in the final EIS, across multiple chapters, together with the impacts of constructing and operating Fermi Unit 3," and that the Final EIS included "what appear[ed] to be a comprehensive analysis of transmission-corridor impacts."[68]

In addition, the Commission explained that the second issue identified by the Board—whether the Final EIS's consideration of transmission corridor impacts satisfied NEPA's hard look requirement—was in "essence a concern about the overall sufficiency of the [s]taff's transmission-corridor analysis" in the Final EIS, and that NRC adjudicatory procedures are "designed to avoid such an unfocused inquiry in contested proceedings."[69] The Commission further noted that the

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[67] *Id.* at 9-10 (JA___); *see* Final EIS, Vol. 4, at M-1 to M-2 (JA___) (identifying the many sections of the Final EIS discussing transmission corridor impacts, including impacts associated with land use, terrestrial ecology, aquatic ecology, historic and cultural resources, and nonradiological health).

[68] CLI-15-1, 81 NRC at 9-10 (JA___). The Commission specifically reserved judgment on the sufficiency of the staff's environmental review pending its consideration of the issue at the mandatory hearing. *See id.* at 9, 11 (JA___); CLI-15-13, 81 NRC at 559-61 (JA___).

[69] CLI-15-1, 81 NRC at 8, 10-11 (JA___).

mandatory hearing would provide the Commission with an opportunity to review the adequacy of the staff's consideration of transmission corridor impacts in the Final EIS.[70]

G. The Commission's consideration of NEPA issues related to Contention 23 as part of the mandatory hearing.

During the mandatory hearing for Fermi Unit 3, the Commission considered a number of environmental and safety issues associated with the staff's review of the application, including the adequacy of the staff's consideration of transmission corridor impacts.[71] In CLI-15-13—the order containing the Commission's findings following the mandatory hearing—the Commission explained that ordinarily the environmental impacts of building transmission lines are evaluated by NRC as part of its cumulative impacts analysis because building transmission lines is not within NRC's regulatory authority.[72] But, because the U.S. Army Corps of Engineers had been a cooperating agency in Fermi Unit 3's NEPA review and had "considered [transmission corridor impacts] to be within the direct impacts of the Fermi Unit 3 project," the NRC staff considered these impacts together with the direct impacts of the proposed action.[73] The staff also discussed mitigation measures associated

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[70] *Id.* at 11 (JA___).

[71] CLI-15-13, 81 NRC at 564-69, 582, 588-89 n.243 (JA___).

[72] *Id.* at 583 (JA___).

[73] *Id.* at 583-84 (JA___).

with the corridor and considered transmission corridor impacts in the alternatives analysis in the Final EIS.[74]

The Commission concluded that the staff performed its analysis of transmission corridor impacts "using the best available information," given that ITC*Transmission*, the proposed owner and operator of the transmission line, had not announced the final proposal for the corridor's route.[75] The Commission also noted that the U.S. Army Corps of Engineers and state agencies were expected to perform additional environmental analyses when ITC*Transmission* applies for permits needed to build transmission lines.[76] And, ultimately, the Commission concluded that it was "satisfied that the [s]taff took a hard look at the environmental impacts of the transmission-line corridor," no matter how they had been characterized.[77]

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[74] *Id.* at 584 (JA___).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 588 n.243 (JA__).

II. Factual background associated with Contention 15 – the challenge to DTE's quality assurance program.

A. DTE's maintenance of a quality assurance program for site-investigation activities.

Black and Veatch, a contractor for DTE, performed certain site-investigation activities (consisting primarily of geotechnical and hydrogeological investigations and seismic analyses) in support of DTE's development of its license application.[78] Although DTE did not have its own quality assurance program in place for Fermi Unit 3 at the time this work commenced in 2007, DTE required by contract that Black and Veatch maintain an NRC-compliant quality assurance program.[79] DTE also took additional steps to ensure that it maintain responsibility for the quality assurance program. Specifically, it formed an owner-engineer organization to perform quality assurance oversight of Black and Veatch's work; it established a quality assurance program for the Unit 3 project in February 2008; and it did not accept any safety-related work product from Black and Veatch until DTE had developed its own quality assurance program governing the receipt, review, and acceptance of such information.[80]

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[78] *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-14-7, 79 NRC 451, 478-80 (2014) (JA___).

[79] *Id.* at 480-81 (JA___).

[80] *Id.* at 481 (JA___).

The NRC staff issued a notice of violation to DTE in October 2009 based on, *inter alia*, an alleged failure to have a quality assurance program in place before February 2008.[81] However, it subsequently revised this notice, acknowledging that it could not issue a notice of violation against DTE based on actions or omissions undertaken prior to the date of the license application in September 2008.[82] The staff also subsequently determined that certain other issues it identified following the original notice of violation, including DTE's alleged failure to perform an evaluation of Black and Veatch's quality assurance program, had been resolved.[83]

B. <u>The Board's ruling on Contention 15.</u>

In Contention 15, Beyond Nuclear asserted that, beginning in March 2007, DTE failed to comply with its obligation under 10 C.F.R. Part 50, Appendix B, to establish and maintain a quality assurance program.[84] Beyond Nuclear contended that, as a result of the deficiencies in the quality assurance program, NRC could

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[81] *Id.* at 482 (JA___).

[82] *Id.* at 483-84 (JA___).

[83] *Id.* at 483-85 (JA___).

[84] Appendix B requires an applicant to "establish at the earliest practicable time . . . a quality assurance program which complies with the requirements of this appendix" and sets forth specific requirements for the program. Appendix B also states, however, that "[t]he applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility" for the program.

not rely upon the safety-related design information provided to support DTE's application and could not make the regulatory findings required to support issuance of a license.[85] The Board admitted the contention but divided it into two parts: (1) Contention 15A, which focused on the period of time prior to DTE's submission of its combined license application and centered on the work of Black and Veatch in support of the application; and (2) Contention 15B, which focused on DTE's alleged lack of commitment to NRC's quality assurance requirements after the license application had been filed.[86]

With respect to Contention 15A, the Board declined to find that NRC's quality assurance requirements did not apply at all to work performed prior to the submission of the combined license application.[87] The Board ruled that although DTE was not required to have its own program during the pre-application period, it was still required to ensure that all safety-related activities were performed in a manner consistent with the quality assurance requirements of Appendix B.[88] The Board concluded that DTE could satisfy this obligation by using a contractor that had its own quality assurance program that satisfied the requirements of Appendix

[85] LBP-10-9, 71 NRC at 503 (JA___).

[86] *Id.* at 510-11 (JA___).

[87] LBP-14-7, 79 NRC at 473-77 (JA___).

[88] *Id.* at 474-77 (JA___).

B, provided that DTE retained responsibility for the program.[89] The Board resolved this factual question in favor of DTE after finding that (1) DTE had required by contract that Black and Veatch maintain a quality assurance program that satisfied Appendix B's requirements; (2) DTE had reviewed an audit performed of this program; (3) DTE had provided oversight of Black and Veatch's activities onsite and through the use of an owner's engineer; and (4) DTE had not received any work product from Black and Veatch until it had its own program in place to govern the receipt, review, and acceptance of Black and Veatch's submissions.[90]

With respect to Contention 15B, the Board found that DTE's quality assurance program met the requirements of Appendix B and that there was no evidence, as Beyond Nuclear had asserted, of a pervasive failure to comply with NRC's quality assurance requirements.[91] The Board found that all issues related to the post-application period had been resolved, and that the violations identified by the staff had no effect on any safety-related activities performed during this

[89] *Id.* at 477, 485 (JA___).

[90] *Id.* at 485-86 (JA___); *see also id.* at 478-82 (JA___) (cataloguing specific findings of fact based on record evidence related to DTE's responsibility for Black and Veatch's quality assurance program).

[91] *Id.* at 486 (JA___).

period.[92] The Board ultimately concluded that there was reasonable assurance that Fermi Unit 3 could be constructed without endangering public health and safety in part because DTE had provided satisfactory evidence of a fully implemented quality assurance program.[93]

C. The Commission's denial of Beyond Nuclear's petition to review the Board's ruling on Contention 15.

In CLI-14-10, the Commission found that Beyond Nuclear had not presented a substantial question justifying review of the Board's ruling with respect to Contention 15.[94] The Commission noted that the evidence upon which Beyond Nuclear relied to support its views, including its challenge to the reliability of certain subsurface site investigations and certain statements DTE made to an industry working group about the lessons that DTE learned during the application process, did not undermine the Board's extensive factual findings concerning DTE's compliance with the requirements of Appendix B.[95] The Commission also rejected Beyond Nuclear's arguments that the Board committed prejudicial error by refusing to admit certain late-filed exhibits, noting that the exhibits "would not [have] add[ed] anything of significance to the record" and that the Board had

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[92] *Id.* at 482-86 (JA___).

[93] *Id.* at 486 (JA___).

[94] CLI-14-10, 80 NRC at 166 (JA___).

[95] *Id.* at 162-63 (JA___).

provided Beyond Nuclear with multiple opportunities to file exhibits and to cure its failure to comply with deadlines that the Board had set.[96]

STANDARD OF REVIEW

This Court's review is conducted pursuant to the Administrative Procedure Act, which provides that an agency order may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[97] Under this narrow and "highly deferential" standard,[98] a reviewing "'court is not to substitute its judgment for that of the agency,'"[99] and is instead obliged to "'defer to the wisdom of the agency, provided its decision is reasoned and rational.'"[100]

An agency's interpretation of its own regulations "is given controlling weight unless [the interpretation] is plainly erroneous or inconsistent with the regulation."[101] A reviewing court is "not at liberty to set aside an agency's

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[96] *Id.* at 163-65 (JA___) (internal quotation marks omitted).

[97] 5 U.S.C. § 706(2)(A); *Blue Ridge*, 716 F.3d at 195.

[98] *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981).

[99] *Fed. Commc'n Comm'n v. Fox Television Stations,* 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[100] *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (quoting *Chritton v. Nat'l Transp. Safety Bd.*, 888 F.2d 854, 856 (D.C. Cir. 1989)).

[101] *City of Idaho Falls v. Fed. Energy Regulatory Comm'n*, 629 F.3d 222, 228 (D.C. Cir. 2011) (internal quotation marks omitted) (quoting *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904-05 (D.C. Cir. 2010)).

interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations."[102] This Court has "long noted the *increased* deference due NRC procedural rules."[103]

Resolution of factual issues requiring a high level of technical expertise is also best left to "'the informed discretion of the responsible federal agencies.'"[104] Indeed, this Court's "general posture of deference toward agency decision-making is particularly marked with regards to NRC actions."[105] And when reviewing NRC technical judgments, "a reviewing court must generally be at its most deferential."[106]

SUMMARY OF ARGUMENT

The Court should deny Beyond Nuclear's petition for review.

With respect to Contention 23, the Commission reasonably concluded that Beyond Nuclear failed to comply with NRC's timeliness regulations. Even though NRC regulations require contentions based on challenges to NEPA compliance to be raised in response to an applicant's environmental report, Beyond Nuclear

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[102] *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986).

[103] *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990).

[104] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

[105] *Nat. Res. Def. Council v. NRC*, 823 F.3d 641, 648 (D.C. Cir. 2016).

[106] *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983).

chose not to do so here. Beyond Nuclear acknowledged before the Commission that it could have raised Contention 23 at the outset of the licensing proceeding but purposefully waited to see if the NRC staff would supplement the analysis in DTE's Environmental Report in the Draft EIS or the Final EIS. Beyond Nuclear risked the possibility that it would not meet the requirements in NRC regulations because Contention 23 was not based upon information that was "materially different" from information in DTE's Environmental Report or the Draft EIS. And while, to excuse its late submission, Beyond Nuclear pointed to a statement by the Board to the NRC staff during the adjudication recommending that the staff further analyze transmission corridor impacts, the Commission reasonably determined that this statement did not present a material difference within the meaning of its timeliness requirements.

Nor did the Commission abuse its discretion in deciding that the NEPA issues related to Contention 23, as proposed by the Board, did not merit *sua sponte* consideration in a contested proceeding and instead would be among the issues appropriately considered in the mandatory hearing for Fermi Unit 3. As the Commission noted, the question of whether transmission corridor impacts should have been designated as direct impacts in the Final EIS under NEPA had no practical significance because the staff treated transmission corridor impacts akin to direct impacts of the proposed action in the Final EIS, analyzing the corridor's

impacts all throughout the Final EIS. And with respect to the "hard look" question, the Commission reasonably determined that this issue was not well-suited to a contested adjudication. Finally, as the Commission observed, the mandatory hearing process would provide (and did in fact provide) an appropriate opportunity to determine whether the staff had undertaken a sufficient assessment of transmission corridor impacts.

With regard to Contention 15, Beyond Nuclear's challenge to the adequacy of DTE's quality assurance program, the Commission reasonably upheld the Board's ruling. After conducting a two-day evidentiary hearing, considering all the evidence, and making extensive factual findings, the Board properly reached a different conclusion than the one Beyond Nuclear advocated. The Board's findings that DTE's quality assurance program satisfied the applicable NRC regulation and that DTE could construct and operate Fermi Unit 3 without endangering public health and safety are amply supported by the record. Beyond Nuclear has offered no reason to disturb the Board's weighing of the evidence.

Further, the Commission properly recognized that the Board's decision is consistent with the plain terms of the applicable NRC regulation, which allows an applicant to "delegate to others," including contractors, the work of establishing and implementing a quality assurance program, so long as the applicant "retain[s] responsibility" for the program. The factual record here supports the Board's

finding that DTE retained the requisite level of responsibility for its contractor's quality assurance program consistent with this requirement.

ARGUMENT

I. The Commission reasonably decided not to allow consideration of NEPA issues related to the transmission corridor in a contested adjudicatory proceeding.

A. The Commission has broad discretion to apply its procedural rules governing hearing requests, and failure to comply with those rules forecloses any right to a hearing and to judicial review on the merits.

Pursuant to section 189a. of the AEA, 42 U.S.C. § 2239(a), "NRC must afford interested parties an opportunity to participate in a contested hearing subject to additional procedural requirements."[107] It is well settled, however, that "neither the AEA nor NEPA guarantees an absolute right to a hearing."[108] Rather, this Court has recognized that, in determining whether a litigant is entitled to a hearing, it must "defer to the operating procedures adopted by the agency."[109] As a consequence, this Court has routinely upheld NRC's reliance upon noncompliance with its procedural rules as a reason to deny a hearing request.[110]

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[107] *Blue Ridge*, 716 F.3d at 187.

[108] *Nat. Res. Def. Council*, 823 F.3d at 652; *see also Blue Ridge*, 716 F.3d at 187, 196; *Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169, 1173-74 (D.C. Cir. 1992); *Union of Concerned Scientists*, 920 F.2d at 53-54.

[109] *Nat. Res. Def. Council*, 823 F.3d at 652.

[110] *See, e.g., id.* at 654-55 (upholding denial of hearing request where a contention challenged an NRC regulation without a waiver, in violation of 10 C.F.R. § 2.335);

Of particular relevance to this case, this Court has recognized the validity of NRC's procedural rules concerning the need to raise challenges asserting noncompliance with NEPA in a timely manner. Specifically, in *Union of Concerned Scientists*, this Court held that a predecessor version of NRC's timeliness requirements (which, analogous to the ones at issue here, mandated that a litigant raise environmental contentions at the earliest possible time, including upon submission of an applicant's environmental report, and that a litigant point to a material difference to justify a late submission) did not violate the AEA or the Administrative Procedure Act and were consistent with NEPA.[111] The Court explained that nothing in the AEA guaranteed parties "the right to have [NRC] staff studies as a sort of pre-complaint discovery tool," and that it was "unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."[112]

Blue Ridge, 716 F.3d at 196-99 (upholding denial of hearing request based upon noncompliance with contention-admissibility requirements of 10 C.F.R. § 2.309(f)).

[111] 920 F.2d at 52, 56-57.

[112] *Id.* at 55-56; *see also N.J. Envtl. Fed'n v. NRC*, 645 F.3d 220, 230-32 (3d Cir. 2011) (affirming dismissal of late-filed contentions as untimely given that they could have been filed earlier).

As a result, given that the decisions under review related to the transmission corridor rest upon the application of NRC's procedural rules, the question properly before this Court is not whether, as Beyond Nuclear suggests at points in its brief, the agency's analysis of the environmental impacts of the anticipated transmission corridor complies with NEPA.[113] Indeed, that issue was never the subject of a decision in a contested proceeding and, were Beyond Nuclear permitted to raise it here (or, more generally, were parties simply able to seek judicial review of NRC's sufficiency determinations following a mandatory hearing), NRC's timeliness and contention admissibility requirements would serve little purpose. Rather, the issue presented by the petition for review is whether the Commission reasonably applied its procedural rules in the contested portion of the licensing proceeding[114]—specifically, (1) whether the Commission reasonably determined that Contention 23 was not timely raised; and, if so, (2) whether the Commission abused its discretion in determining that any arguments concerning the adequacy of NRC's

[113] *See Blue Ridge*, 716 F.3d at 199 (explaining that once NRC reasonably dismissed petitioners' contentions for failure to comply with NRC's contention-admissibility regulations, "there was no need for an additional contested hearing").

[114] *See id.* at 196 ("Because we have held that NRC's procedural rules . . . do not facially violate the Atomic Energy Act or the [Administrative Procedure Act] [and] they are also consistent with NEPA, *and because we find that NRC reasonably applied these rules in evaluating Petitioners' contentions*, we defer to NRC's rejection of Petitioners' contentions." (emphasis added; internal quotation marks and citation omitted)).

consideration of transmission corridor impacts did not warrant *sua sponte* review. We address each of these issues below.

B. The Commission reasonably determined that Beyond Nuclear failed to raise the arguments in Contention 23 in compliance with NRC's timeliness regulations.

Beyond Nuclear's arguments about the timeliness of Contention 23 fail for two simple reasons not contested in its brief (and uncontestable on reply): first, NRC regulations require contentions to be raised at the earliest possible opportunity; and, second, as Beyond Nuclear itself conceded before the Commission, it could have raised Contention 23 at the outset of the licensing proceeding but chose not to do so.[115]

Although the NRC regulations applicable to Contention 23 differed slightly when it was filed by Beyond Nuclear after the NRC staff's issuance of the Draft EIS and resubmitted after issuance of the Final EIS, the same basic requirements applied at each juncture. NRC regulations required a contention raising NEPA issues to be filed in response to the applicant's environmental report.[116] In addition, NRC regulations allowed for admission of a new or amended contention raising NEPA issues after the NRC staff's issuance of the draft or final EIS only if

[115] *See* CLI-15-1, 81 NRC at 7 (JA___).

[116] *See id.*; 10 C.F.R. § 2.309(f)(2) (2016); 10 C.F.R. § 2.309(f)(2) (2012).

the contention was based on information that was "materially different" from information previously available, including the applicant's environmental report.[117]

Beyond Nuclear did not comply with either requirement. It admitted before the Commission (and does not suggest otherwise now) that it could have raised Contention 23 at the outset of the proceeding based on DTE's Environmental Report, but that it purposefully did not do so out of a desire to wait and see if the NRC staff would supplement, in either the draft or final EIS, DTE's analysis on transmission corridor impacts.[118] As the Commission explained, "petitioners who choose to wait to raise contentions that could have been raised earlier do so at their peril"; "[t]hey risk the possibility that there will not be a material difference between the application and the Staff's review documents, thus rendering any newly proposed contentions on previously available information impermissibly late."[119] And Beyond Nuclear failed to provide any information showing a material difference between DTE's Environmental Report and the NRC staff's

[117] *See* CLI-15-1, 81 NRC at 7 (JA___); 10 C.F.R. § 2.309(c)(1), (f)(2) (2016); 10 C.F.R. § 2.309(f)(2) (2012).

[118] *See* CLI-15-1, 81 NRC at 7 (JA___); Intervenors' Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness, at 3-4, 6 (Oct. 6, 2014) (JA___).

[119] CLI-15-1, 81 NRC at 7 (JA___).

environmental documents.[120] Thus, the Commission reasonably concluded that Beyond Nuclear had not complied with NRC's timeliness regulations.[121]

Beyond Nuclear raises two arguments in its brief in an attempt to justify its late submission of Contention 23 (Br. 45-50), both of which the Commission considered and reasonably rejected in CLI-15-1. First, Beyond Nuclear points to two passages quoted from the Draft EIS and Final EIS that it claims show a material difference between the documents (Br. 47-48). However, in CLI-15-1, the Commission considered the same two passages and rejected the argument that they presented materially different information.[122] The Commission explained that Beyond Nuclear compared language from two distinct sections of the Draft EIS and Final EIS, and that when the same sections of the documents were aligned,

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[120] *Id.* at 7-8 (JA___).

[121] *Id.* at 8 (JA___).

[122] *Id.* at 8 (JA___) (comparing "Draft Environmental Impact Statement for Combined License for Combined License (COL) for Enrico Fermi Unit 3" (Draft Report for Comment), NUREG-2105, Vol. 1, at 2-45, 3-17 (Oct. 2011), with Final EIS, Vol. 1, at 2-46, 3-18 (JA___)); *see also* Applicant's Opposition to Petition for Review on Contention 23, at 12 (Oct. 31, 2014) (JA___) (providing a side-by-side comparison of the language from the same sections of the Draft EIS and Final EIS). The Draft EIS is available in NRC's Agencywide Documents and Access Management System (http://adams.nrc.gov/wba/) using accession numbers ML11287A108 and ML11287A109, and was noticed in the *Federal Register*. *See* Detroit Edison Company; Notice of Availability of Draft Environmental Impact Statement for a Combined License for Unit 3 at the Enrico Fermi Atomic Power Plant Site, 76 Fed. Reg. 66,998, 66,999 (Oct. 28, 2011).

there was "no difference . . . , let alone a material difference."[123] In fact, page 3-18 of the Final EIS includes the *exact same language* that Beyond Nuclear quotes from page 3-17 of the Draft EIS and page 3-17 of DTE's Environmental Report (*see* Br. 47-48): "By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary."[124] Beyond Nuclear does not dispute this point.

Second, Beyond Nuclear argues that it satisfied NRC's timeliness regulations when it resubmitted Contention 23 because the Board's recommendation in LBP-12-12 that the NRC staff further address transmission corridor impacts in the Final EIS, coupled with the analysis in the Final EIS, satisfied the "material difference" requirement allowing admission of Contention 23 at this stage (Br. 46). But the Commission reasonably rejected that argument in

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[123] CLI-15-1, 81 NRC at 8 (JA___).

[124] Final EIS, Vol. 1, at 3-18 (JA___). Even if the Final EIS and Draft EIS did not contain the same language when the passages are compared, the passages quoted in Beyond Nuclear's brief do not expose a material difference. The first passage quoted from the Final EIS (Br. 47) states that there "may" be a way to use the existing transmission infrastructure in a portion of the corridor without the need to build additional infrastructure. The second passage quoted from the Draft EIS (Br. 47) states that there "may" be a need for additional transmission infrastructure. These passages do not suggest any kind of progression from the Draft EIS to the Final EIS based upon the discovery of new, material information; they merely describe two sides of the same coin—that there "may" be a need for additional transmission infrastructure.

CLI-15-1, explaining that, to show a material difference, NRC regulations require a comparison between the information on which the contention is based and the information that was previously available—in this case, between DTE's Environmental Report and the Draft EIS, or between the Draft EIS and the Final EIS.[125] Accordingly, the Board's recommendation in LBP-12-12 to the NRC staff, even when coupled with the analysis in the Final EIS, does not demonstrate a material difference within the meaning of NRC's timeliness regulations. The Commission's interpretation regarding the comparison required by its timeliness regulations is entitled to controlling weight since the interpretation is consistent with the plain language of the regulation,[126] and this Court has "long noted the *increased* deference due NRC procedural rules."[127]

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[125] CLI-15-1, 81 NRC at 7 (JA___); *see also* 10 C.F.R. § 2.309(c)(1)(ii) (2016) (requiring that "[t]he information upon which the filing is based is materially different from information previously available"); 10 C.F.R. § 2.309(f)(2)(ii) (2012) (requiring that "[t]he information upon which the amended or new contention is based is materially different than information previously available").

[126] *See City of Idaho Falls*, 629 F.3d at 228; *San Luis Obispo Mothers for Peace*, 789 F.2d at 30.

[127] *Union of Concerned Scientists*, 920 F.2d at 54.

C. The Commission did not abuse its discretion in declining to allow the NEPA issues related to the transmission corridor to be considered *sua sponte* in a contested proceeding.

1. Litigants do not have a right to *sua sponte* review.

Litigants do not enjoy a right to have their arguments, or any argument proposed by the Board, considered *sua sponte* in a contested adjudicatory proceeding. Rather, as discussed above, litigants are expected to comply with NRC's procedural rules, and it is left to the Commission's discretion whether, after a litigant fails to comply with those rules, an issue merits *sua sponte* consideration in a contested adjudicatory proceeding (or whether it could and should be addressed through some other regulatory process).[128] Indeed, the Commission has explained that, to avoid providing an incentive for participants not to comply with its procedural rules and to prevent overuse of *sua sponte* review, such review should be permitted only in "extraordinary circumstances" for "serious" issues.[129] As set forth below, the Commission did not abuse its discretion in determining that

[128] *See* 10 C.F.R. § 2.340(b)(1) ("The presiding officer shall also make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341.").

[129] *See* CLI-15-1, 81 NRC at 9 & n.39 (JA___) (internal quotation marks omitted).

no extraordinary circumstances warranting *sua sponte* review existed in this case.[130]

2. The Commission did not abuse its discretion in finding that neither of the issues identified by the Board merited *sua sponte* review.

The Commission did not abuse its discretion in CLI-15-1 when it opted not to overlook its timeliness requirements and to permit *sua sponte* adjudicatory consideration of either of the two issues identified by the Board: (1) whether development of the anticipated transmission corridor was a "connected action" (i.e., part of the proposed action) such that its impacts should necessarily have been considered under NEPA as direct impacts of licensing Fermi Unit 3; and (2) whether the transmission corridor analysis in the Final EIS satisfied NEPA's hard look requirement.[131]

The Commission provided two rationales supporting its determination that *sua sponte* review of these issues was not merited, and Beyond Nuclear fails to explain how the Commission's reliance upon either of them constitutes an abuse of discretion. First, the Commission concluded that the issue whether the corridor's

[130] *Cf. Lorion v. NRC*, 785 F.2d 1038, 1042 (D.C. Cir. 1986) (finding that NRC did not abuse its discretion in declining to determine that the concern raised by petitioner was substantial and therefore required commencement of licensing proceeding).

[131] CLI-15-1, 81 NRC at 8-11 (JA___).

impacts should have been considered as direct impacts of licensing Unit 3 had no practical significance.[132] The Commission explained that, although the Final EIS labeled development of the corridor as a "pre-construction activity" and thus not technically part of the proposed action, the Board's "treatment of this issue d[id] not acknowledge that the Staff *did* discuss the proposed transmission corridor in the final EIS, across multiple chapters, together with the impacts of constructing and operating Fermi Unit 3."[133] The Commission also noted that the Final EIS included "what appear[ed] to be a comprehensive analysis of transmission-corridor

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[132] *See id.* at 9-10 (JA___) (characterizing the issue as "appear[ing] to be moot").

[133] *Id.* (emphasis added). Beyond Nuclear's arguments about the labeling of corridor development as a "pre-construction activity" (Br. 42-43) and about the "concept of 'major federal action'" (Br. 39-40) do not undermine the reasonableness of the Commission's determination. Indeed, just as the Commission noted the Board's failure to account for the discussion of transmission corridor impacts throughout the Final EIS, so too does Beyond Nuclear turn a blind eye to this discussion. Similarly, Beyond Nuclear asserts that in CLI-15-1, the Commission "upbraided [the Board] for improperly attempting, *sua sponte*, to challenge the NRC's Limited Work Authorization Rule" (Br. 42-44). *See* Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416, 57,426 (Oct. 9, 2007) (requiring NRC authorization "only . . . before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security"). The Commission did note that "much of the Board's request fundamentally challenged the agency's Limited Work Authorization Rule" and it would "not allow the Board" to challenge a rule without showing "special circumstances." *See* CLI-15-1, 81 NRC at 10 (JA___). But, again, the Commission's conclusion on this point does not provide any basis to call into question its determination that the impacts of the corridor, regardless of how they were labeled, were in fact analyzed during the agency's NEPA process. *See id.* at 9-11 (JA___).

impacts."[134] Simply stated, the Commission recognized that the first issue raised by the Board created, at best, a semantic distinction because the impacts of the transmission corridor had been examined throughout the Final EIS and were treated akin to direct impacts of the proposed action, despite corridor development being labeled as a "pre-construction activity."[135]

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[134] *See* CLI-15-1, 81 NRC at 9 (JA___). The Commission was careful not to speak to the sufficiency of the staff's environmental review in CLI-15-1, as it was aware that it would later have to evaluate the sufficiency of that review in the mandatory hearing. *See id.* at 9-11 (JA___).

[135] Beyond Nuclear places emphasis on comments provided by the U.S. Environmental Protection Agency ("EPA") stating that transmission corridor impacts should be analyzed as direct impacts and mitigated for in the Draft EIS and the Final EIS (Br. 17-19). However, as the Commission noted in CLI-15-1, the "[F]inal EIS itself is a source of minor confusion" because, although it states that pre-construction activities, including development of the corridor, are not part of the proposed action and are discussed in the context of cumulative impacts, it discusses transmission corridor impacts together with the direct impacts of the proposed action and states that these impacts were factored into the integrated evaluations in the Final EIS. CLI-15-1, 81 NRC at 9-10 (JA___). EPA's comments were affected by this confusion—not recognizing that the Final EIS discussed transmission corridor impacts along with direct impacts and described mitigation related to these impacts. The NRC staff touched on this point in response to one of EPA's comments on the Final EIS, explaining that transmission corridor impacts were discussed for various resource areas in the chapter of the Final EIS devoted to analyzing the direct impacts of constructing Fermi Unit 3. *See* Final EIS, Vol. 3, at E-101 to E-102 (JA___). The staff also noted in response to a comment from EPA that it had revised the Final EIS to present additional mitigation recommendations related to certain transmission corridor impacts. *Id.*, Vol. 3, at E-102 (JA___).

Beyond Nuclear's claims that the impacts of the anticipated transmission corridor were "undocumented and unanalyzed" (Br. 44) are simply not supported by the record. Indeed, ample evidence supported the Commission's determination that, regardless of how they were labeled, the impacts associated with the transmission corridor had already been analyzed. As the Commission recognized, the Final EIS included an analysis of the impacts anticipated from constructing and operating the corridor on land use, noise, terrestrial resources, aquatic ecology, soil, historic and cultural resources, air quality, and public and occupational health.[136] The staff also considered the corridor in its discussion of the affected environment, mitigation, alternatives, and cumulative impacts, as well as its final conclusions and recommendations.[137] Given this undisputed factual backdrop, it was not an abuse of discretion for the Commission to determine that no

[136] *See* Final EIS, Vol. 1, at 4-8 to 4-9, 4-28, 4-29 to 4-30, 4-44 to 4-45, 4-47, 4-51 to 4-61, 4-100 to 4-102, 4-109 to 4-110, 5-3 to 5-4, 5-22 to 5-23, 5-26 to 5-27, 5-41 to 5-54, 5-57, 5-59, 5-88 to 5-89, 5-91 to 5-92, 5-100 to 5-101, 5-104 to 5-105 (JA___).

[137] *See, e.g., id.*, Vol. 1, at 2-45 to 2-48, 2-61 to 2-65, 2-79 to 2-82, 2-100 to 2-111, 2-126, 2-208 to 2-209, 3-17 to 3-22, 3-28, 4-9, 4-25, 5-143 to 5-146, 7-7, 7-18 to 7-23, 7-31 to 7-33, 7-37, 7-46, 9-4, 9-7, 9-16, 9-22, 9-24, 9-27, 9-40, 9-42 to 9-43, 9-44, 9-50 to 9-51, 9-65 to 9-67, 9-94 to 9-98, 9-101 to 9-102, 9-104 to 9-106, 9-128, 9-132 to 9-133, 9-143 to 9-144, 9-150 to 9-154, 9-157 to 9-160, 9-181 to 9-185, 9-193, 9-200 to 9-203, 9-206 to 9-207, 9-209, 9-234 to 9-237, 9-246 to 9-247, 9-253 to 9-257, 9-260 to 9-263, 9-286 to 9-289 (JA___); *id.*, Vol. 4, at M-2 (JA___).

extraordinary circumstances warranting *sua sponte* review of the first issue were present.

Second, the Commission concluded that *sua sponte* review was not warranted because the issue of compliance with NEPA's "hard look" requirement was essentially a broad-reaching exploration of the sufficiency of the transmission corridor analysis in the Final EIS.[138] The Commission explained that this open-ended inquiry "d[id] not appear to lend itself well to a contested proceeding" and ran counter to the intent of NRC's contention-admissibility requirements, which are designed to ensure that contested proceedings are governed by a certain degree of specificity.[139] The Commission further observed that because the Commission is already tasked by statute and regulation with evaluating the sufficiency of the staff's environmental review in a mandatory hearing, the adequacy of the transmission corridor analysis would be appropriately considered there.[140]

The Commission's determination that the issues raised by the Board would be appropriately considered in the mandatory hearing reflects an awareness of both (1) the Commission's statutory and regulatory obligation to examine, and its demonstrated practice of examining, the sufficiency of its NEPA review before

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[138] CLI-15-1, 81 NRC at 10 (JA___).

[139] *See id.* at 10-11, 11 n.53 (JA___).

[140] *See id.* at 11 (JA___).

issuing a combined license, regardless of whether an adjudicatory hearing has been requested;[141] and (2) the fact that Beyond Nuclear had forfeited its right to litigate contentions related to transmission corridor impacts as a result of its untimeliness. As this Court recently explained, NEPA "does not mandate adoption of a particular process" or decision-making structure for taking a "hard look" at environmental impacts before approving a major federal action.[142] Given Beyond Nuclear's failure to identify any flaw in the Commission's assessments of the contested and mandatory hearing processes, there is simply no basis upon which to conclude that the Commission abused its discretion here.

Finally, we note that both the scope of the Commission's inquiry during the mandatory hearing process and its findings in CLI-15-13 only serve to confirm the reasonableness of the Commission's exercise of its discretion in CLI-15-1 not to permit *sua sponte* review. As ultimately reflected in CLI-15-13 (and as it committed to analyzing in CLI-15-1), the Commission considered during the mandatory hearing whether the characterization of transmission corridor impacts in any way adversely affected the sufficiency of the staff's NEPA analysis. The Commission noted in this regard that the U.S. Army Corps of Engineers was a cooperating agency in the environmental review for the Fermi Unit 3 application

[141] *See supra* note 14.

[142] *Nat. Res. Def. Council*, 823 F.3d at 642, 652.

and considered activities labeled as "pre-construction activities," including development of the corridor, to fall within the direct impacts of licensing Fermi Unit 3.[143] As a result, the Commission explained that the NRC staff considered transmission corridor impacts together with direct impacts in the Final EIS (a point that Beyond Nuclear simply ignores).[144] And, ultimately, the Commission relied on these considerations to conclude that, regardless of whether transmission corridor impacts were characterized as direct or cumulative impacts, they had been adequately and thoroughly addressed in the Final EIS.[145]

This conclusion, which is amply supported by the record, forecloses Beyond Nuclear's arguments that NRC improperly segmented the impacts of the corridor (*see* Br. 42, 45), or that the agency otherwise failed to perform the requisite "hard look" at them (*see* Br. 38). This Court has explained that an agency's fundamental obligation under the "hard look" doctrine is to adequately consider and disclose the

[143] CLI-15-13, 81 NRC at 583-84 (JA___).

[144] *Id.* at 584 (JA___). The Commission also noted that, at the mandatory hearing, the NRC staff explained that "there would have been no difference in its [Final EIS] analysis of transmission-corridor impacts had the Staff considered their development a 'direct impact' of licensing Fermi Unit 3." *Id.*

[145] *Id.* at 588 n.243 (JA___); *see also supra* notes 29-36 and accompanying text (cataloguing the evaluation of transmission corridor impacts throughout the Final EIS).

environmental impact of its actions.[146] Thus, even if the merits of the Commission's determination in CLI-15-13 that the agency had performed the hard look required by NEPA were properly before the Court, it is clear that the agency, by thoroughly examining these impacts throughout the Final EIS and considering alternatives and mitigation, satisfied that obligation here. And, of greater concern to this case, it is clear that the agency did not abuse its discretion in declining to permit the Board to consider the issue on a *sua sponte* basis in a contested adjudication and reserving the issue for the mandatory hearing.

The same is true to the extent that Beyond Nuclear has raised concerns about the preliminary nature of the transmission corridor analysis (*see* Br. 13-17, 36). In CLI-15-13, the Commission recognized that the NRC staff performed its analysis "using the best available information," given that ITC*Transmission* had not announced the final route of the corridor; and that the U.S. Army Corps of Engineers and state agencies were expected to perform additional analyses when ITC*Transmission* applies for the permits needed to construct any new transmission

[146] *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) ("The focus of the 'hard look' doctrine is to 'ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006))).

lines.[147] This Court has noted that an "agency does not engage in arbitrary or capricious decision-making by making 'predictive judgment[s]' or even by relying on '[i]ncomplete data.'"[148] Instead, it is well-established that a rule of reason applies under NEPA,[149] and agencies may make reasonable assumptions.[150] Beyond Nuclear's suggestion at points in its brief that the agency's analysis is flawed because the transmission line is not yet fixed (and its implication that the Commission should have permitted *sua sponte* consideration for this reason) fails to recognize that the NRC staff "us[ed] the best available information" and made reasonable assumptions given that the entity responsible for constructing and operating the corridor, ITC*Transmission*, had not announced the final route of the corridor.[151] Thus, again, even if they were properly before the Court, Beyond Nuclear's suggestions to the contrary are foreclosed under well-recognized NEPA principles.

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[147] CLI-15-13, 81 NRC at 584 (JA___).

[148] *New York v. NRC*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) (alteration in original) (quoting *New York v. EPA*, 413 F.3d 3, 31 (D.C. Cir. 2005)).

[149] *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) ("[I]nherent in NEPA and its implementing regulations is a ''rule of reason'' . . . ." (quoting *Marsh*, 490 U.S. at 373-74)).

[150] *See New York*, 824 F.3d at 1022-23.

[151] CLI-15-13, 81 NRC at 584 (JA___); *see supra* text accompanying note 36.

II. The Commission reasonably denied Beyond Nuclear's petition for review of the Board's ruling in favor of DTE on Contention 15.

A. The Commission reasonably upheld the Board's extensive factual findings because the findings were supported by evidence in the record and were entitled to substantial deference.

Beyond Nuclear's primary argument regarding Contention 15 is that the Board "ignored" undisputed evidence related to DTE's lack of a quality assurance program and that the Commission "ratified the [Board's] refusal to consider" this information (Br. 53-54). Beyond Nuclear's assertions rest primarily on evidence of various alleged shortcomings in DTE's program between 2007 and 2009 (Br. 54-55). It contends that these shortcomings run counter to the requirement that applicants for combined licenses maintain a quality assurance program that complies with Appendix B to 10 C.F.R. Part 50 (Br. 56).

Beyond Nuclear's arguments fail for several reasons. First and foremost, the question for this Court is not whether there was evidence in the record upon which the Board might have relied upon in order to support a different conclusion than the one it actually reached—i.e., that, given DTE's assumption of responsibility for Black and Veatch's quality assurance program and its curing of any deficiencies in the program that the NRC staff identified, there was reasonable assurance that Unit 3 could be constructed and operated safely. Rather, the relevant question is simply whether the Commission reasonably concluded that sufficient evidence in the

record supported the Board's conclusion.[152] And although Beyond Nuclear goes to great lengths (Br. 24-33) to narrate the evidence it presented to the Board with regard to Contention 15, it does not mention, let alone challenge the sufficiency of, the extensive factual findings made by the Board relating to DTE's quality assurance program and DTE's resolution of concerns identified by the NRC staff.[153]

Moreover, the record belies Beyond Nuclear's assertion that the lack of a quality assurance program was "undisputed" (*see* Br. 53-55). As the Commission found, the evidence demonstrated that DTE retained responsibility for its contractor's quality assurance program. This evidence included the contractual requirement that Black and Veatch maintain an NRC-compliant quality assurance program; DTE's review of an audit of that program; DTE's oversight of its contractor's program through the formation of an owner's engineer organization; and DTE's decision not to accept safety-related work from its contractor until DTE

[152] *See, e.g.*, *Carstens v. NRC*, 742 F.2d 1546, 1557 (D.C. Cir. 1984) ("Petitioners cannot be heard to challenge the Commission's findings as unsupported by substantial evidence merely by pointing to the evidence against the NRC's ruling, while ignoring the substantial evidence in its support.").

[153] LBP-14-7, 79 NRC at 478-85 (JA___).

had established its own quality assurance program to govern the receipt, review, and acceptance of such information.[154]

And contrary to Beyond Nuclear's assertions (Br. 54), the Board did not "ignore" the testimony of Beyond Nuclear's expert, Arnold Gundersen, concerning a "historical lack of a [quality assurance] program." The Board considered and reasonably rejected Mr. Gunderson's sweeping opinion that "the lack of any Detroit Edison personnel assigned to the Fermi design and engineering process, makes any and all quality assurance work during [a particular] period suspect and not in compliance with federal law" (*see* Br. 54). Specifically, the Board explained that, although Mr. Gunderson claimed that Appendix B required DTE to have a quality assurance program staffed by its own professionals during the pre-application period, Appendix B could, by its terms, be satisfied in other

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[154] CLI-14-10, 80 NRC at 162-63 (JA___) (citing LBP-14-7, 79 NRC at 485-86 (JA___)). The Board's conclusions in this regard were supported by its findings of fact, which in turn were supported by the testimony of George A. Lipscomb (Quality Assurance Inspector, NRC); Peter Smith (Director, Nuclear Development, Licensing and Engineering, DTE); Stanley Stasek (Director, Quality Management, DTE). *See* LBP-14-7, 79 NRC at 471-72, 478-82 (JA___); Initial Written Testimony of DTE Electric Company Witnesses Peter Smith, Stanley Stasek, Ronald Sacco, and Steven Thomas on Contention 15, at A22, A24-A25, A27, A29-A31, A35, A37, A39-A43, A55 (Apr. 30, 2013) (Ex. DTE000015) (JA___); Written Direct Testimony of George A. Lipscomb Concerning the Staff's Review of the Fermi 3 Quality Assurance Program as It Relates to Contention 15, at A18-A19, A23, A25 (Apr. 30, 2013) (Ex. NRC S23) (JA___); Transcript of Hearing, at 468-70, 473-74, 478, 480-81, 483-84, 488 (Oct. 30, 2013) (JA___); Transcript of Hearing, at 587-88, 617 (Oct. 31, 2013) (JA___).

ways.[155] The Board therefore concluded that it should consider "all relevant facts and circumstances" to determine whether the applicant maintained sufficient responsibility for the quality assurance program to satisfy Appendix B's requirements.[156] As its factual findings demonstrate, the Board engaged in precisely such an inquiry, and Beyond Nuclear neither offered to the Commission nor offers now a reason why the Board's resolution of any factual issues, including its weighing of conflicting evidence, does not warrant deference.

Moreover, Beyond Nuclear's identification of alleged program deficiencies (Br. 54-55) do not provide a basis to undermine the Board's ultimate conclusion that DTE could construct and operate Fermi Unit 3 in such a manner as to ensure adequate protection of public health and safety. In addition to finding that DTE maintained the requisite degree of responsibility for Black and Veatch's quality assurance program during the pre-application period, the Board specifically found that, as a result of the staff's dialogue with DTE through the enforcement process, all post-application quality assurance issues related to DTE's contract with Black and Veatch had been resolved.[157] The Board further found that any violations that the staff had identified during this period had no effect on any safety-related

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[155] LBP-14-7, 79 NRC at 477 (JA___).

[156] *Id.*

[157] *Id.* at 482-86 (JA___).

activities.[158] Beyond Nuclear has identified no basis to question the Board's ultimate determination that DTE's quality assurance program did not undermine the safety of the proposed facility. This highly technical conclusion should not be lightly disturbed.[159]

B. The Commission reasonably upheld the Board's interpretation of NRC regulations related to an applicant's quality assurance program.

In addition to challenging the factual basis for the Board's resolution of Contention 15, Beyond Nuclear also challenges the Board's legal determination that DTE could rely on the quality assurance program of a contractor throughout the pre-application period as long as DTE retained responsibility for that work (Br. 56-59). This argument likewise fails.

As an initial matter, NRC's interpretation of its own regulations is entitled to substantial deference.[160] Although the premise of Beyond Nuclear's argument appears to be that the level of "responsibility" mandated by Appendix B requires maintenance of an in-house quality assurance program throughout the pre-application period (Br. 56), it offers no textual basis to support its position, let

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[158] *Id.* at 486 (JA___).

[159] *See, e.g., Balt. Gas*, 462 U.S. at 103.

[160] *See, e.g.*, *Shieldalloy Metallurgical Corp. v. NRC*, 768 F.3d 1205, 1208 (D.C. Cir. 2014).

alone demonstrate that the Commission's interpretation is "plainly erroneous" or "inconsistent with" the text of Appendix B.[161]

The Board's legal interpretation is demonstrably correct. As the Commission noted in upholding the Board's analysis, "Criterion I of Appendix B expressly authorizes an applicant to 'delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the . . . program.'"[162] The Board properly focused on the factual issue raised by this criterion—whether DTE had retained responsibility for the program, a question that it resolved following a two-day evidentiary hearing—and Beyond Nuclear has failed to explain how the examination that the Board performed was inconsistent with the plain language in Appendix B.

Finally, Beyond Nuclear's suggestion (Br. 56-57) that DTE must comply with an industry template for quality assurance programs is unpersuasive. The fact that NRC has issued guidance approving a specific industry template as a means to comply with Appendix B does not mean that this template is the *only* way that

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[161] *See id.* (internal quotation marks omitted) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

[162] CLI-14-10, 80 NRC at 165-66 (JA___) (alteration in original) (quoting 10 C.F.R. pt. 50, app. B).

compliance can be established,[163] and it certainly does not alter the plain language of Criterion I expressly authorizing licensees to "delegate to others" the work associated with establishing and implementing a quality assurance program that complies with NRC regulations.[164]

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

[163] In fact, the NRC guidance approving use of this template acknowledges that the template is one, but not the only, means that "can be used" to establish a quality assurance program that complies with NRC regulations. *See* Final Safety Evaluation for Technical Report NEI 06-14, "Quality Assurance Program Description," Revision 9, at 1-2, 8 (July 13, 2010) (Ex. DTE000088) (JA___).

[164] Given the reasonableness of the Board's determination that DTE's quality assurance program complied with Appendix B, Beyond Nuclear's assertion (Br. 58-59) that the arrangement concerning the quality assurance program necessitated a formal exemption from NRC regulations misses the point. As the Commission explained, there is no reason to issue an exemption with respect to a requirement with which a licensee is in compliance. *See* CLI-14-10, 80 NRC at 165 (JA___).

Respectfully submitted,

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Dated: December 6, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(2)(C), which apply to this brief because the briefing schedule in this matter commenced before November 30, 2016, I hereby certify:

The foregoing Brief of Federal Respondents complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1), the Brief contains 13,376 words, according to the Microsoft Word 2013 software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface in 14-point Times New Roman font using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, the undersigned counsel for Respondent U.S. Nuclear Regulatory Commission filed the attached Brief of Federal Respondents with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system. That method is calculated to serve:

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ADDENDUM

Statutes Cited:

Regulations Cited:

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

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Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93–584, set out as a note under section 2321 of this title.

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42, The Public Health and Welfare. See, also, Transfer of Functions notes set out under those sections.

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. 89–554, § 4(e), Sept. 6, 1966, 80 Stat. 622; amended Pub. L. 93–584, § 4, Jan. 2, 1975, 88 Stat. 1917; Pub. L. 95–454, title II, § 206, Oct. 13, 1978, 92 Stat. 1144; Pub. L. 96–454, § 8(b)(2), Oct. 15, 1980, 94 Stat. 2021; Pub. L. 97–164, title I, § 137, Apr. 2, 1982, 96 Stat. 41; Pub. L. 98–554, title II, § 227(a)(4), Oct. 30, 1984, 98 Stat. 2852; Pub. L. 99–336, § 5(a), June 19, 1986, 100 Stat. 638; Pub. L. 100–430, § 11(a), Sept. 13, 1988, 102 Stat. 1635; Pub. L. 102–365, § 5(c)(2), Sept. 3, 1992, 106 Stat. 975; Pub. L. 103–272, § 5(h), July 5, 1994, 108 Stat. 1375; Pub. L. 104–88, title III, § 305(d)(5)–(8), Dec. 29, 1995, 109 Stat. 945; Pub. L. 104–287, § 6(f)(2), Oct. 11, 1996, 110 Stat. 3399; Pub. L. 109–59, title IV, § 4125(a), Aug. 10, 2005, 119 Stat. 1738; Pub. L. 109–304, § 17(f)(3), Oct. 6, 2006, 120 Stat. 1708.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1032.	Dec. 29, 1950, ch. 1189, § 2, 64 Stat. 1129.

HISTORICAL AND REVISION NOTES—CONTINUED

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
		Aug. 30, 1954, ch. 1073, § 2(b), 68 Stat. 961.

The words ''have exclusive jurisdiction'' are substituted for ''shall have exclusive jurisdiction''.

In paragraph (1), the word ''by'' is substituted for ''in accordance with''.

In paragraph (3), the word ''now'' is omitted as unnecessary. The word ''under'' is substituted for ''pursuant to the provisions of''. Reference to ''Federal Maritime Commission'' is substituted for ''Federal Maritime Board'' on authority of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 75 Stat. 840. Reference to the United States Maritime Commission is omitted because that Commission was abolished by 1950 Reorg. Plan No. 21, § 306, eff. May 24, 1951, 64 Stat. 1277, and any existing rights are preserved by technical sections 7 and 8.

REFERENCES IN TEXT

Section 812 of the Fair Housing Act, referred to in par. (6), is classified to section 3612 of Title 42, The Public Health and Welfare.

AMENDMENTS

2006—Par. (3)(A). Pub. L. 109–304, § 17(f)(3)(A), substituted ''section 50501, 50502, 56101–56104, or 57109 of title 46'' for ''section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a)''.

Par. (3)(B). Pub. L. 109–304, § 17(f)(3)(B), added subpar. (B) and struck out former subpar. (B) which read as follows:

''(B) the Federal Maritime Commission issued pursuant to—

''(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

''(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

''(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d));''.

2005—Par. (3)(A). Pub. L. 109–59 inserted '', subchapter III of chapter 311, chapter 313, or chapter 315'' before ''of title 49''.

1996—Par. (3)(A). Pub. L. 104–287 amended Pub. L. 104–88, § 305(d)(6). See 1995 Amendment note below.

1995—Par. (3)(A). Pub. L. 104–88, § 305(d)(6), as amended by Pub. L. 104–287, inserted ''or pursuant to part B or C of subtitle IV of title 49'' before the semicolon.

Pub. L. 104–88, § 305(d)(5), substituted ''or 41'' for ''41, or 43''.

Par. (3)(B). Pub. L. 104–88, § 305(d)(7), redesignated cls. (ii), (iv), and (v) as (i), (ii), and (iii), respectively, and struck out former cls. (i) and (iii) which read as follows:

''(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 822, 824, or 841a);

''(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b);''.

Par. (5). Pub. L. 104–88, § 305(d)(8), added par. (5) and struck out former par. (5) which read as follows: ''all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code;''.

1994—Par. (7). Pub. L. 103–272 substituted ''section 20114(c) of title 49'' for ''section 202(f) of the Federal Railroad Safety Act of 1970''.

1992—Par. (7). Pub. L. 102–365, which directed the addition of par. (7) at end, was executed by adding par. (7) after par. (6) and before concluding provisions, to reflect the probable intent of Congress.

1988—Par. (6). Pub. L. 100–430 added par. (6).

1986—Par. (3). Pub. L. 99–336 amended par. (3) generally. Prior to amendment, par. (3) read as follows: ''such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;''.

1984—Par. (5). Pub. L. 98–554 substituted ''11901(j)(2)'' for ''11901(i)(2)''.

1982—Pub. L. 97–164 inserted ''(other than the United States Court of Appeals for the Federal Circuit)'' after ''court of appeals'' in provisions preceding par. (1), and struck out par. (6) which had given the court of appeals jurisdiction in cases involving all final orders of the Merit Systems Protection Board except as provided for in section 7703(b) of title 5. See section 1295(a)(9) of this title.

1980—Par. (5). Pub. L. 96–454 inserted ''and all final orders of such Commission made reviewable under section 11901(i)(2) of title 49, United States Code'' after ''section 2321 of this title''.

1978—Par. (6). Pub. L. 95–454 added par. (6).

1975—Par. (5). Pub. L. 93–584 added par. (5).

EFFECTIVE DATE OF 1996 AMENDMENT

Pub. L. 104–287, §6(f), Oct. 11, 1996, 110 Stat. 3399, provided that the amendment made by that section is effective Dec. 29, 1995.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 1301 of Title 49, Transportation.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–430 effective on 180th day beginning after Sept. 13, 1988, see section 13(a) of Pub. L. 100–430, set out as a note under section 3601 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–336, §5(b), June 19, 1986, 100 Stat. 638, provided that: ''The amendment made by this section [amending this section] shall apply with respect to any rule, regulation, or final order described in such amendment which is issued on or after the date of the enactment of this Act [June 19, 1986].''

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95–454, set out as a note under section 1101 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93–584 not applicable to actions commenced on or before last day of first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93–584, set out as a note under section 2321 of this title.

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of Title 42, The Public Health and Welfare. See, also, Transfer of Functions notes set out under those sections.

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

(Added Pub. L. 89–554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1033.	Dec. 29, 1950, ch. 1189, §3, 64 Stat. 1130.

The section is reorganized for clarity and conciseness. The word ''is'' is substituted for ''shall be''. The word ''petitioner'' is substituted for ''party or any of the parties filing the petition for review'' in view of the definition of ''petitioner'' in section 2341 of this title.

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Pub. L. 89–554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1034.	Dec. 29, 1950, ch. 1189, §4, 64 Stat. 1130.

The section is reorganized, with minor changes in phraseology. The words ''as prescribed by section 1033 of this title'' are omitted as surplusage. The words ''of the United States'' following ''Attorney General'' are omitted as unnecessary.

§ 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

(Added Pub. L. 89–554, §4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1035.	Dec. 29, 1950, ch. 1189, §5, 64 Stat. 1130.

§ 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

(Added Pub. L. 89–554, §4(e), Sept. 6, 1966, 80 Stat. 623.)

known as the Atomic Energy Act of 1954, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

CODIFICATION

In subsecs. (b) and (c), ''section 558(c) of title 5'' and ''subchapter II of chapter 5 and chapter 7 of title 5'' substituted for ''section 9(b) of the Administrative Procedure Act [5 U.S.C. 1008(b)]'' and ''the Administration Procedure Act [5 U.S.C. 1001–1011]'', respectively, on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

§ 2237. Modification of license

The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this chapter or by reason of rules and regulations issued in accordance with the terms of this chapter.

(Aug. 1, 1946, ch. 724, title I, §187, as added Aug. 30, 1954, ch. 1073, §1, 68 Stat. 955; renumbered title I, Pub. L. 102–486, title IX, §902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 919, known as the Atomic Energy Act of 1954, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

§ 2238. Continued operation of facilities

Whenever the Commission finds that the public convenience and necessity or the production program of the Commission requires continued operation of a production facility or utilization facility the license for which has been revoked pursuant to section 2236 of this title, the Commission may, after consultation with the appropriate regulatory agency, State or Federal, having jurisdiction, order that possession be taken of and such facility be operated for such period of time as the public convenience and necessity or the production program of the Commission may, in the judgment of the Commission, require, or until a license for the operation of the facility shall become effective. Just compensation shall be paid for the use of the facility.

(Aug. 1, 1946, ch. 724, title I, §188, as added Aug. 30, 1954, ch. 1073, §1, 68 Stat. 955; renumbered title I, Pub. L. 102–486, title IX, §902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

§ 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections[1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

[1] So in original. Probably should be ''section''.

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

(Aug. 1, 1946, ch. 724, title I, § 189, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 955; amended Pub. L. 85–256, § 7, Sept. 2, 1957, 71 Stat. 579; Pub. L. 87–615, § 2, Aug. 29, 1962, 76 Stat. 409; Pub. L. 97–415, § 12(a), Jan. 4, 1983, 96 Stat. 2073; renumbered title I and amended Pub. L. 102–486, title IX, § 902(a)(8), title XXVIII, §§ 2802, 2804, 2805, Oct. 24, 1992, 106 Stat. 2944, 3120, 3121; Pub. L. 104–134, title III, § 3116(c), Apr. 26, 1996, 110 Stat. 1321–349.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(1)(A), (2)(A), was in the original ''this Act'', meaning act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 919, known as the Atomic Energy Act of 1954, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The effective date of this paragraph, referred to in subsec. (a)(2)(C), probably means the date of enactment of Pub. L. 97–415, which was approved Jan. 4, 1983.

The USEC Privatization Act, referred to in subsec. (b)(3), (4), is subchapter A (§§ 3101–3117) of chapter 1 of title III of Pub. L. 104–134, Apr. 26, 1996, 110 Stat. 1321–335, which is classified principally to subchapter VIII (§ 2297h et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title of 1996 Amendment note set out under section 2011 of this title and Tables.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104–134 amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''Any final order entered in any proceeding of the kind specified in subsection (a) of this section or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.''

1992—Subsec. (a)(1). Pub. L. 102–486, § 2802, designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (a)(2)(A), (C). Pub. L. 102–486, § 2804, inserted ''or any amendment to a combined construction and operating license'' after ''any amendment to an operating license''.

Subsec. (b). Pub. L. 102–486, § 2805, inserted ''or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license'' before ''shall be subject to judicial review''.

1983—Subsec. (a). Pub. L. 97–415 designated existing provisions as par. (1) and added par. (2).

1962—Subsec. (a). Pub. L. 87–615 substituted ''construction permit for a facility'' and ''construction permit for a testing facility'' for ''license for a facility'' and ''license for a testing facility'' respectively, and authorized the commission in cases where a permit has been issued following a hearing, and in the absence of a request therefor by anyone whose interest may be affected, to issue an operating license or an amendment to a construction permit or an operating license without a hearing upon thirty days' notice and publication once in the Federal Register of its intent to do so, and to dispense with such notice and publication with respect to any application for an amendment to a construction permit or to an operating license upon its determination that the amendment involves no significant hazards consideration.

1957—Subsec. (a). Pub. L. 85–256 required the Commission to hold a hearing after 30 days notice and publication once in the Federal Register on an application for a license for a facility or a testing facility.

EFFECTIVE DATE OF 1992 AMENDMENT

Subsec. (a)(1)(B) of this section, as added by section 2802 of Pub. L. 102–486, applicable to all proceedings in-

the service method used to deliver the entire document, excluding courtesy copies, to all of the other participants in the proceeding. The presiding officer may determine the calculation of additional days when a participant is not entitled to receive an entire filing served by multiple methods.

(4) In mixed service proceedings when all participants are not using the same filing and service method, the number of days for service will be determined by the presiding officer based on considerations of fairness and efficiency.

(c) To be considered timely, a document must be served:

(1) By 5 p.m. Eastern Time for a document served in person or by expedited service; and

(2) By 11:59 p.m. Eastern Time for a document served by the E-Filing system.

[72 FR 49151, Aug. 28, 2007]

§ 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to safeguards information (as defined in § 73.2 of this chapter) or to sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 10980, Feb. 29, 2008]

§ 2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter.

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) *General requirements.* Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors

in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing.* Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

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

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) *Nontimely filings.* (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) *Standing.* (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the

proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in §2.309(d)(1)–(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

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

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

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

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further,* that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie,* that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (*i.e.*, fails to contain the necessary information required by §52.99(c)). If the requestor identifies a specific portion of the §52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The 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. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that—

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

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

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

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures.* A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of § 2.310. If a request/petition relies upon § 2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) *Answers to requests for hearing and petitions to intervene.* Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene—

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) *Decision on request/petition.* In all proceedings other than a proceeding under 10 CFR 52.103, the presiding officer shall, within 45 days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission. The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 CFR 52.103. The Commission's decision may not be the subject of any appeal under 10 CFR 2.311.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49474, Aug. 28, 2007; 73 FR 44620, July 31, 2008]

§ 2.310 Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses

in the proceeding. The presiding officer may determine the calculation of additional days when a participant is not entitled to receive an entire filing served by multiple methods.

(4) In mixed service proceedings when all participants are not using the same filing and service method, the number of days for service will be determined by the presiding officer based on considerations of fairness and efficiency.

(c) To be considered timely, a document must be served:

(1) By 5 p.m. Eastern Time for a document served in person or by expedited service; and

(2) By 11:59 p.m. Eastern Time for a document served by the E-Filing system.

[72 FR 49151, Aug. 28, 2007]

§ 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to safeguards information (as defined in § 73.2 of this chapter) or to sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 10980, Feb. 29, 2008]

§ 2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under § 2.313(a) to rule on the matter.

§ 2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.

(a) *General requirements.* Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing.* Unless specified elsewhere in this chapter or otherwise provided by the Commission, the request or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

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

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at *http://www.nrc.gov/public-involve/major-actions.html*, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(c) *Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions*—(1) *Determination by presiding officer.* Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

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

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

(2) *Applicability of §§ 2.307 and 2.323.* (i) Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.

(ii) Section 2.323 does not apply to hearing requests, intervention petitions, or motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section.

(3) *New petitioner.* A hearing request or intervention petition filed after the deadline in paragraph (b) of this section must include a specification of contentions if the petitioner seeks admission as a party, and must also demonstrate that the petitioner meets the applicable standing and contention admissibility requirements in paragraphs (d) and (f) of this section.

(4) *Party or participant.* A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section. If the party or participant has already satisfied the requirements for standing under paragraph (d) of this section in the same proceeding in which the new or amended contentions are filed, it does not need to do so again.

(d) *Standing.* (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) *Rulings.* In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

(3) *Standing in enforcement proceedings.* In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

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

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

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

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or

fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (*i.e.*, fails to contain the necessary information required by §52.99(c)). If the requestor identifies a specific portion of the §52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures.* A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of §2.310. If a request/petition relies upon §2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) *Requirements applicable to States, local governmental bodies, and Federally-recognized Indian Tribes seeking party status.* (1) If a State, local governmental body (county, municipality or other subdivision), or Federally-recognized Indian Tribe seeks to participate as a party in a proceeding, it must submit a request for hearing or a petition to intervene containing at least one admissible contention, and must designate a single representative for the hearing. If a request for hearing or petition to intervene is granted, the Commission, the presiding officer or the Atomic Safety and Licensing Board ruling on the request will admit as a party to the proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each Federally-recognized Indian

Tribe. Where a State's constitution provides that both the Governor and another State official or State governmental body may represent the interests of the State in a proceeding, the Governor and the other State official/government body will be considered separate participants.

(2) If the proceeding pertains to a production or utilization facility (as defined in § 50.2 of this chapter) located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, no further demonstration of standing is required. If the production or utilization facility is not located within the boundaries of the State, local governmental body, or Federally-recognized Indian Tribe seeking to participate as a party, the State, local governmental body, or Federally-recognized Indian Tribe also must demonstrate standing.

(3) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(i) *Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline.* Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request, petition, or motion—

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding may file an answer to a hearing request, intervention petition, or motion for leave to file amended or new contentions filed after the deadline in § 2.309(b) within 25 days after service of the request, petition, or motion. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under § 52.103 of this chapter, the participant who filed the hearing request, intervention petition, or motion for leave to file new or amended contentions after the deadline may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(j) *Decision on request/petition.* (1) In all proceedings other than a proceeding under § 52.103 of this chapter, the presiding officer shall issue a decision on each request for hearing or petition to intervene within 45 days of the conclusion of the initial pre-hearing conference or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies under paragraph (i) of this section. With respect to a request to admit amended or new contentions, the presiding officer shall issue a decision on each such request within 45 days of the conclusion of any pre-hearing conference that may be conducted regarding the proposed amended or new contentions or, if no pre-hearing conference is conducted, within 45 days after the filing of answers and replies, if any. In the event the presiding officer cannot issue a decision within 45 days, the presiding officer shall issue a notice advising the Commission and the parties, and the notice shall include the expected date of when the decision will issue.

(2) The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under § 52.103 of this chapter. The Commission's decision may not be the subject of any appeal under § 2.311.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49474, Aug. 28, 2007; 73 FR 44620, July 31, 2008; 77 FR 46591, Aug. 3, 2012]

(c) An Atomic Safety and Licensing Board has the duties and may exercise the powers of a presiding officer as granted by § 2.319 and otherwise in this part. Any time when a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Judge may be exercised with respect to the proceeding by the chairman of the board having jurisdiction over it. Two members of an Atomic Safety and Licensing Board constitute a quorum if one of those members is the member qualified in the conduct of administrative proceedings.

§ 2.322 Special assistants to the presiding officer.

(a) In consultation with the Chief Administrative Judge, the presiding officer may, at his or her discretion, appoint personnel from the Atomic Safety and Licensing Board Panel established by the Commission to assist the presiding officer in taking evidence and preparing a suitable record for review. The appointment may occur at any appropriate time during the proceeding but must, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.313. The special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. The interrogators shall study the written testimony and sit with the presiding officer to hear the presentation and, where permitted in the proceeding, the cross-examination by the parties of all witnesses on the issues of the interrogators' expertise. The interrogators shall take a leading role in examining the witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, special masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special masters may rule on evidentiary issues brought before them, in accordance with § 2.333. Appeals from special masters' rulings may be taken to the presiding officer in accordance with procedures established in the presiding officer's order appointing the special master. Special masters' reports are advisory only; the presiding officer retains final authority with respect to the issues heard by the special master;

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer retains final authority on the issue for which the alternate member was designated; or

(4) Discovery master to rule on the matters specified in § 2.1018(a)(2).

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of members of the Atomic Safety and Licensing Board Panel to brief the presiding officer on the general technical background of subjects involving complex issues that the presiding officer might otherwise have difficulty in quickly grasping. These briefings take place before the hearing on the subject involved and supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in § 2.313.

§ 2.323 Motions.

(a) *Scope and general requirements*—(1) *Applicability to § 2.309(c).* Section 2.309 motions for new or amended contentions filed after the deadline in § 2.309(b) are not subject to the requirements of this section. For the purposes of this section the term ''all motions'' includes any motion *except* § 2.309 motions for new or amended contentions filed after the deadline.

(2) *Presentation and disposition.* All motions must be addressed to the Commission or other designated presiding officer. All motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises. All written motions must be filed with the Secretary and served on all parties to the proceeding.

(b) *Form and content.* Unless made orally on-the-record during a hearing, or the presiding officer directs otherwise, or under the provisions of subpart

N of this part, a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

(c) *Answers to motions.* Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

(d) *Accuracy in filing.* All parties are obligated, in their filings before the presiding officer 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, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party.

(e) *Motions for reconsideration.* Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. A motion must be filed within ten (10) days of the action for which reconsideration is requested. The motion and any responses to the motion are limited to ten (10) pages.

(f) *Referral and certifications to the Commission.* (1) If, in the judgment of the presiding officer, the presiding officer's decision raises significant and novel legal or policy issues, or prompt decision by the Commission is necessary to materially advance the orderly disposition of the proceeding, then the presiding officer may promptly refer the ruling to the Commission. This standard also applies to matters certified to the Commission. The presiding officer shall notify the parties of the referral or certification either by announcement on-the-record or by written notice if the hearing is not in session.

(2) A party may petition the presiding officer to certify a question to the Commission for early review. The presiding officer shall apply the criteria in § 2.341(f)(1) in determining whether to grant the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

(g) *Effect of filing a motion, petition, or certification of question to the Commission.* Unless otherwise ordered, neither the filing of a motion, the filing of a petition for certification, nor the certification of a question to the Commission stays the proceeding or extends the time for the performance of any act.

(h) *Motions to compel discovery.* Parties may file answers to motions to compel discovery in accordance with paragraph (c) of this section. The presiding officer, in his or her discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than in writing. If responses are given over the telephone, the presiding officer shall issue a written order on the motion summarizing the views presented by the parties. This does not preclude the presiding officer from issuing a prior oral ruling on the matter effective at the time of the ruling, if the terms of the ruling are incorporated in the subsequent written order.

[69 FR 2236, Jan. 14, 2004, as amended at 77 FR 46593, Aug. 3, 2012]

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A participant to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception be made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other participant may file a response by counter-affidavit or otherwise.

(c) If, on the basis of the petition, affidavit, and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning participant has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima facie* showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a participant to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

[69 FR 2236, Jan. 14, 2004, as amended at 77 FR 46593, Aug. 3, 2012]

§ 2.336 General discovery.

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this part shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and provide:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a

(2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the consent order;

(3) A statement that the order has the same force and effect as an order made after full hearing; and

(4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.

(i) *Approval of settlement agreement.* Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement or compromise must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

§ 2.339 Expedited decisionmaking procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered under paragraph (a) of this section is subject to review by the Commission on its own motion within forty (40) days after its date.

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter, when:

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance of a limited work authorization under 10 CFR 50.10, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization, a combined license under subpart C of part 52 of this chapter, or a manufacturing license under subpart F of part 52.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49475, Aug. 28, 2007]

§ 2.340 Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses.

(a) *Initial decision—production or utilization facility operating license.* (1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for an operating license or renewed license (including an amendment to or renewal of an operating license or renewed license) for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also make findings of fact and conclusions of law on any matter not put into controversy by the parties,

but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) *Presiding officer initial decision and issuance of permit or license.* (i) In a contested proceeding for the initial issuance or renewal of a construction permit, operating license, or renewed license, or the amendment of an operating or renewed license where the NRC has not made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the amendment of a construction permit, operating license, or renewed license where the NRC has made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate (appropriate official), after making the requisite findings and complying with any applicable provisions of § 2.1202(a) or § 2.1403(a), may issue the amendment before the presiding officer's initial decision becomes effective. Once the presiding officer's initial decision becomes effective, the appropriate official shall take action with respect to that amendment in accordance with the initial decision. If the presiding officer's initial decision becomes effective before the appropriate official issues the amendment, then the appropriate official, after making the requisite findings, shall issue, deny, or appropriately condition the amendment in accordance with the presiding officer's initial decision.

(b) *Initial decision—combined license under 10 CFR part 52.* (1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a combined license under part 52 of this chapter (including an amendment to or renewal of combined license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) *Presiding officer initial decision and issuance of permit or license.* (i) In a contested proceeding for the initial issuance or renewal of a combined license under part 52 of this chapter, or the amendment of a combined license where the NRC has not made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the amendment of a combined license under part 52 of this chapter where the NRC has made a determination of no significant hazards consideration, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate (appropriate official), after making the requisite findings and complying with any applicable provisions of § 2.1202(a) or § 2.1403(a), may issue the amendment before the presiding officer's initial decision becomes effective. Once the presiding officer's initial decision becomes effective, the appropriate official shall take action with respect to that amendment in accordance with

the initial decision. If the presiding officer's initial decision becomes effective before the appropriate official issues the amendment, then the appropriate official, after making the requisite findings, shall issue, deny, or appropriately condition the amendment in accordance with the presiding officer's initial decision.

(c) *Initial decision on findings under 10 CFR 52.103 with respect to acceptance criteria in nuclear power reactor combined licenses.* In any initial decision under § 52.103(g) of this chapter with respect to whether acceptance criteria have been or will be met, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties, and any matter designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties, but identified by the presiding officer as matters requiring further examination, shall be referred to the Commission for its determination; the Commission may, in its discretion, treat any of these referred matters as a request for action under § 2.206 and process the matter in accordance with § 52.103(f) of this chapter.

(d) *Initial decision—manufacturing license under 10 CFR part 52.* (1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a manufacturing license under subpart C of part 52 of this chapter (including an amendment to or renewal of a manufacturing license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer also shall make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341.

(2) *Presiding officer initial decision and issuance of permit or license.* (i) In a contested proceeding for the initial issuance or renewal of a manufacturing license under subpart C of part 52 of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, after making the requisite findings, shall issue, deny, or appropriately condition the permit or license in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding for the initial issuance or renewal of a manufacturing license under subpart C of part 52 of this chapter, or the amendment of a manufacturing license, the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, may issue the license, permit, or license amendment in accordance with § 2.1202(a) or § 2.1403(a) before the presiding officer's initial decision becomes effective. If, however, the presiding officer's initial decision becomes effective before the license, permit, or license amendment is issued under § 2.1202 or § 2.1403, then the Commission, the Director, Office of Nuclear Reactor Regulation, or the Director, Office of New Reactors, as appropriate, shall issue, deny, or appropriately condition the license, permit, or license amendment in accordance with the presiding officer's initial decision.

(e) *Initial decision—other proceedings not involving production or utilization facilities*—(1) *Matters in controversy; presiding officer consideration of matters not put in controversy by parties.* In a proceeding not involving production or utilization facilities, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties, but identified by the presiding officer as requiring further examination, must be referred to the Director, Office of Nuclear Material Safety and Safeguards, or as appropriate. Depending on the

resolution of those matters, the Director, Office of Nuclear Material Safety and Safeguards or as appropriate, after making the requisite findings, shall issue, deny, revoke or appropriately condition the license, or take other action as necessary or appropriate.

(2) *Presiding officer initial decision and issuance of permit or license.* (i) In a contested proceeding under this paragraph (e), the Commissionor the Director, Office of Nuclear Material Safety and Safeguards, or as appropriate, shall issue, deny, or appropriately condition the permit, license, or license amendment in accordance with the presiding officer's initial decision once that decision becomes effective.

(ii) In a contested proceeding under this paragraph (e), the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or as appropriate, may issue the permit, license, or amendment in accordance with § 2.1202(a) or § 2.1403(a) before the presiding officer's initial decision becomes effective. If, however, the presiding officer's initial decision becomes effective before the permit, license, or amendment is issued under § 2.1202 or § 2.1403, then the Commission, the Director, Office of Nuclear Material Safety and Safeguards, or as appropriate, shall issue, deny, or appropriately condition the permit, license, or amendment in accordance with the presiding officer's initial decision.

(f) *Immediate effectiveness of certain presiding officer decisions.* A presiding officer's initial decision directing the issuance or amendment of a limited work authorization under § 50.10 of this chapter, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under part 50 of this chapter, a combined license under subpart C of part 52 of this chapter, a manufacturing license under subpart F of part 52 of this chapter, a renewed license under part 54, or a license under part 72 of this chapter to store spent fuel in an independent spent fuel storage facility (ISFSI) or a monitored retrievable storage installation (MRS), an initial decision directing issuance of a license under part 61 of this chapter, or an initial decision under § 52.103(g) of this chapter that acceptance criteria in a combined license have been met, is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective.

(g)–(h) [Reserved]

(i) *Issuance of authorizations, permits, and licenses—production and utilization facilities.* The Commission, the Director, Office of New Reactors, or the Director, Office of Nuclear Reactor Regulation, as appropriate, shall issue a limited work authorization under § 50.10 of this chapter, an early site permit under subpart A of part 52 of this chapter, a construction permit or construction authorization under part 50 of this chapter, an operating license under part 50 of this chapter, a combined license under subpart C of part 52 of this chapter, or a manufacturing license under subpart F of part 52 of this chapter within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the authorization, permit or license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.

(j) *Issuance of finding on acceptance criteria under 10 CFR 52.103.* The Commission, the Director of the Office of New Reactors, or the Director of the Office of Nuclear Reactor Regulation, as appropriate, shall make the finding under 10 CFR 52.103(g) that acceptance criteria in a combined license are met within 10 days from the date of the presiding officer's initial decision:

(1) If the Commission or the appropriate director is otherwise able to make the finding under 10 CFR 52.103(g) that the prescribed acceptance criteria are met for those acceptance criteria not within the scope of the initial decision of the presiding officer;

(2) If the presiding officer's initial decision—with respect to contentions that the prescribed acceptance criteria

have not been met—finds that those acceptance criteria have been met, and the Commission or the appropriate director thereafter is able to make the finding that those acceptance criteria are met;

(3) If the presiding officer's initial decision—with respect to contentions that the prescribed acceptance criteria will not be met—finds that those acceptance criteria will be met, and the Commission or the appropriate director thereafter is able to make the finding that those acceptance criteria are met; and

(4) Notwithstanding the pendency of a petition for reconsideration under 10 CFR 2.345, a petition for review under 10 CFR 2.341, or a motion for stay under 10 CFR 2.342, or the filing of a petition under 10 CFR 2.206.

(k) *Issuance of other licenses.* The Commissionor the Director, Office of Nuclear Material Safety and Safeguards, or as appropriate, shall issue a license, including a license under part 72 of this chapter to store spent fuel in either an independent spent fuel storage facility (ISFSI) located away from a reactor site or at a monitored retrievable storage installation (MRS), within 10 days from the date of issuance of the initial decision:

(1) If the Commission or the appropriate Director has made all findings necessary for issuance of the license, not within the scope of the initial decision of the presiding officer; and

(2) Notwithstanding the pendency of a petition for reconsideration under §2.345, a petition for review under §2.341, or a motion for stay under §2.342, or the filing of a petition under §2.206.

[77 FR 46594, Aug. 3, 2012, as amended at 77 FR 51891, Aug. 28, 2012;79 FR 75739, Dec. 19, 2014]

§2.341 Review of decisions and actions of a presiding officer.

(a)(1) Review of decisions and actions of a presiding officer are treated under this section; provided, however, that no party may request further Commission review of a Commission determination to allow a period of interim operation under §52.103(c) of this chapter. This section does not apply to appeals under §2.311 or to appeals in the high-level waste proceeding, which are governed by §2.1015.

(2) Within 120 days after the date of a decision or action by a presiding officer, or within 120 days after a petition for review of the decision or action has been served under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within 25 days after service of a full or partial initial decision by a presiding officer, and within 25 days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.

(2) A petition for review under this paragraph may not be longer than twenty-five (25) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within 25 days after service of a petition for review, file an answer supporting or opposing Commission review. This answer may not be longer than 25 pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party may file a reply brief within 10 days of service of any answer. This reply brief may not be longer than 5 pages.

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy, or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c)(1) If within 120 days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition is deemed to be denied, unless the Commission, in its discretion, extends the time for its consideration of the petition and any answers to the petition.

(2) If a petition for review is granted, the Commission may issue an order specifying the issues to be reviewed and designating the parties to the review proceeding. The Commission may, in its discretion, decide the matter on the basis of the petition for review or it may specify whether any briefs may be filed.

(3) Unless the Commission orders otherwise, any briefs on review may not exceed 30 pages in length, exclusive of pages containing the table of contents, table of citations, and any addendum containing appropriate exhibits, statutes, or regulations. A brief in excess of 10 pages must contain a table of contents with page references and a table of cases (alphabetically arranged), cited statutes, regulations, and other authorities, with references to the pages of the brief where they are cited.

(d) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies. However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided. Any petition for reconsideration will be evaluated against the standard in § 2.323(e).

(e) Neither the filing nor the granting of a petition under this section stays the effect of the decision or action of the presiding officer, unless the Commission orders otherwise.

(f) *Interlocutory review.* (1) A ruling referred or question certified to the Commission under §§ 2.319(l) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding.

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49476, Aug. 28, 2007; 77 FR 46596, Aug. 3, 2012]

§ 2.342 Stays of decisions.

(a) Within ten (10) days after service of a decision or action of a presiding officer, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay may be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties must be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer may not be longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. Further replies to answers will not be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g., electronic or facsimile transmission, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by electronic or facsimile transmission message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

§ 2.343 Oral argument.

In its discretion, the Commission may allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative.

§ 2.344 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

(b) The Commission may adopt, modify, or set aside the findings, conclusions and order in the initial decision, and will state the basis of its action. The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

(2) All facts officially noticed;

(3) The ruling on each material issue; and

(4) The appropriate ruling, order, or denial of relief, with the effective date.

§ 2.345 Petition for reconsideration.

(a)(1) Any petition for reconsideration of a final decision must be filed by a party within ten (10) days after the date of the decision.

capability to permit appropriate periodic inspection and testing of components important to safety, (2) with suitable shielding for radiation protection, (3) with appropriate containment, confinement, and filtering systems, (4) with a residual heat removal capability having reliability and testability that reflects the importance to safety of decay heat and other residual heat removal, and (5) to prevent significant reduction in fuel storage coolant inventory under accident conditions.

Criterion 62—Prevention of criticality in fuel storage and handling. Criticality in the fuel storage and handling system shall be prevented by physical systems or processes, preferably by use of geometrically safe configurations.

Criterion 63—Monitoring fuel and waste storage. Appropriate systems shall be provided in fuel storage and radioactive waste systems and associated handling areas (1) to detect conditions that may result in loss of residual heat removal capability and excessive radiation levels and (2) to initiate appropriate safety actions.

Criterion 64—Monitoring radioactivity releases. Means shall be provided for monitoring the reactor containment atmosphere, spaces containing components for recirculation of loss-of-coolant accident fluids, effluent discharge paths, and the plant environs for radioactivity that may be released from normal operations, including anticipated operational occurrences, and from postulated accidents.

[36 FR 3256, Feb. 20, 1971, as amended at 36 FR 12733, July 7, 1971; 41 FR 6258, Feb. 12, 1976; 43 FR 50163, Oct. 27, 1978; 51 FR 12505, Apr. 11, 1986; 52 FR 41294, Oct. 27, 1987; 64 FR 72002, Dec. 23, 1999; 72 FR 49505, Aug. 28, 2007]

APPENDIX B TO PART 50—QUALITY ASSURANCE CRITERIA FOR NUCLEAR POWER PLANTS AND FUEL REPROCESSING PLANTS

Introduction. Every applicant for a construction permit is required by the provisions of §50.34 to include in its preliminary safety analysis report a description of the quality assurance program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Every applicant for an operating license is required to include, in its final safety analysis report, information pertaining to the managerial and administrative controls to be used to assure safe operation. Every applicant for a combined license under part 52 of this chapter is required by the provisions of §52.79 of this chapter to include in its final safety analysis report a description of the quality assurance applied to the design, and to be applied to the fabrication, construction, and testing of the structures, systems, and components of the facility and to the managerial and administrative controls to be used to assure safe operation. For applications submitted after September 27, 2007, every applicant for an early site permit under part 52 of this chapter is required by the provisions of §52.17 of this chapter to include in its site safety analysis report a description of the quality assurance program applied to site activities related to the design, fabrication, construction, and testing of the structures, systems, and components of a facility or facilities that may be constructed on the site. Every applicant for a design approval or design certification under part 52 of this chapter is required by the provisions of 10 CFR 52.137 and 52.47, respectively, to include in its final safety analysis report a description of the quality assurance program applied to the design of the structures, systems, and components of the facility. Every applicant for a manufacturing license under part 52 of this chapter is required by the provisions of 10 CFR 52.157 to include in its final safety analysis report a description of the quality assurance program applied to the design, and to be applied to the manufacture of, the structures, systems, and components of the reactor. Nuclear power plants and fuel reprocessing plants include structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. This appendix establishes quality assurance requirements for the design, manufacture, construction, and operation of those structures, systems, and components. The pertinent requirements of this appendix apply to all activities affecting the safety-related functions of those structures, systems, and components; these activities include designing, purchasing, fabricating, handling, shipping, storing, cleaning, erecting, installing, inspecting, testing, operating, maintaining, repairing, refueling, and modifying.

As used in this appendix, ''quality assurance'' comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. Quality assurance includes quality control, which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.

I. ORGANIZATION

The applicant[1] shall be responsible for the establishment and execution of the quality assurance program. The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the quality assurance program. The authority and duties of persons and organizations performing activities affecting the safety-related functions of structures, systems, and components shall be clearly established and delineated in writing. These activities include both the performing functions of attaining quality objectives and the quality assurance functions. The quality assurance functions are those of (1) assuring that an appropriate quality assurance program is established and effectively executed; and (2) verifying, such as by checking, auditing, and inspecting, that activities affecting the safety-related functions have been correctly performed. The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. There persons and organizations performing quality assurance functions shall report to a management level so that the required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. Because of the many variables involved, such as the number of personnel, the type of activity being performed, and the location or locations where activities are performed, the organizational structure for executing the quality assurance program may take various forms, provided that the persons and organizations assigned the quality assurance functions have the required authority and organizational freedom. Irrespective of the organizational structure, the individual(s) assigned the responsibility for assuring effective execution of any portion of the quality assurance program at any location where activities subject to this appendix are being performed, shall have direct access to the levels of management necessary to perform this function.

II. QUALITY ASSURANCE PROGRAM

The applicant shall establish at the earliest practicable time, consistent with the schedule for accomplishing the activities, a quality assurance program which complies with the requirements of this appendix. This program shall be documented by written policies, procedures, or instructions and shall be carried out throughout plant life in accordance with those policies, procedures, or instructions. The applicant shall identify the structures, systems, and components to be covered by the quality assurance program and the major organizations participating in the program, together with the designated functions of these organizations. The quality assurance program shall provide control over activities affecting the quality of the identified structures, systems, and components, to an extent consistent with their importance to safety. Activities affecting quality shall be accomplished under suitably controlled conditions. Controlled conditions include the use of appropriate equipment; suitable environmental conditions for accomplishing the activity, such as adequate cleanness; and assurance that all prerequisites for the given activity have been satisfied. The program shall take into account the need for special controls, processes, test equipment, tools, and skills to attain the required quality, and the need for verification of quality by inspection and test. The program shall provide for indoctrination and training of personnel performing activities affecting quality as necessary to assure that suitable proficiency is achieved and maintained. The applicant shall regularly review the status and adequacy of the quality assurance program. Management of other organizations participating in the quality assurance program shall regularly review the status and adequacy of that part of the quality assurance program which they are executing.

III. DESIGN CONTROL

Measures shall be established to assure that applicable regulatory requirements and the design basis, as defined in §50.2 and as specified in the license application, for those structures, systems, and components to which this appendix applies are correctly translated into specifications, drawings, procedures, and instructions. These measures shall include provisions to assure that appropriate quality standards are specified and included in design documents and that deviations from such standards are controlled. Measures shall also be established for the selection and review for suitability of application of materials, parts, equipment, and

[1] While the term ''applicant'' is used in these criteria, the requirements are, of course, applicable after such a person has received a license to construct and operate a nuclear power plant or a fuel reprocessing plant or has received an early site permit, design approval, design certification, or manufacturing license, as applicable. These criteria will also be used for guidance in evaluating the adequacy of quality assurance programs in use by holders of construction permits, operating licenses, early site permits, design approvals, combined licenses, and manufacturing licenses.

processes that are essential to the safety-related functions of the structures, systems and components.

Measures shall be established for the identification and control of design interfaces and for coordination among participating design organizations. These measures shall include the establishment of procedures among participating design organizations for the review, approval, release, distribution, and revision of documents involving design interfaces.

The design control measures shall provide for verifying or checking the adequacy of design, such as by the performance of design reviews, by the use of alternate or simplified calculational methods, or by the performance of a suitable testing program. The verifying or checking process shall be performed by individuals or groups other than those who performed the original design, but who may be from the same organization. Where a test program is used to verify the adequacy of a specific design feature in lieu of other verifying or checking processes, it shall include suitable qualifications testing of a prototype unit under the most adverse design conditions. Design control measures shall be applied to items such as the following: reactor physics, stress, thermal, hydraulic, and accident analyses; compatibility of materials; accessibility for inservice inspection, maintenance, and repair; and delineation of acceptance criteria for inspections and tests.

Design changes, including field changes, shall be subject to design control measures commensurate with those applied to the original design and be approved by the organization that performed the original design unless the applicant designates another responsible organization.

IV. Procurement Document Control

Measures shall be established to assure that applicable regulatory requirements, design bases, and other requirements which are necessary to assure adequate quality are suitably included or referenced in the documents for procurement of material, equipment, and services, whether purchased by the applicant or by its contractors or subcontractors. To the extent necessary, procurement documents shall require contractors or subcontractors to provide a quality assurance program consistent with the pertinent provisions of this appendix.

V. Instructions, Procedures, and Drawings

Activities affecting quality shall be prescribed by documented instructions, procedures, or drawings, of a type appropriate to the circumstances and shall be accomplished in accordance with these instructions, procedures, or drawings. Instructions, procedures, or drawings shall include appropriate quantitative or qualitative acceptance criteria for determining that important activities have been satisfactorily accomplished.

VI. Document Control

Measures shall be established to control the issuance of documents, such as instructions, procedures, and drawings, including changes thereto, which prescribe all activities affecting quality. These measures shall assure that documents, including changes, are reviewed for adequacy and approved for release by authorized personnel and are distributed to and used at the location where the prescribed activity is performed. Changes to documents shall be reviewed and approved by the same organizations that performed the original review and approval unless the applicant designates another responsible organization.

VII. Control of Purchased Material, Equipment, and Services

Measures shall be established to assure that purchased material, equipment, and services, whether purchased directly or through contractors and subcontractors, conform to the procurement documents. These measures shall include provisions, as appropriate, for source evaluation and selection, objective evidence of quality furnished by the contractor or subcontractor, inspection at the contractor or subcontractor source, and examination of products upon delivery. Documentary evidence that material and equipment conform to the procurement requirements shall be available at the nuclear power plant or fuel reprocessing plant site prior to installation or use of such material and equipment. This documentary evidence shall be retained at the nuclear power plant or fuel reprocessing plant site and shall be sufficient to identify the specific requirements, such as codes, standards, or specifications, met by the purchased material and equipment. The effectiveness of the control of quality by contractors and subcontractors shall be assessed by the applicant or designee at intervals consistent with the importance, complexity, and quantity of the product or services.

VIII. Identification and Control of Materials, Parts, and Components

Measures shall be established for the identification and control of materials, parts, and components, including partially fabricated assemblies. These measures shall assure that identification of the item is maintained by heat number, part number, serial number, or other appropriate means, either on the item or on records traceable to the item, as required throughout fabrication, erection, installation, and use of the item. These identification and control measures

shall be designed to prevent the use of incorrect or defective material, parts, and components.

IX. Control of Special Processes

Measures shall be established to assure that special processes, including welding, heat treating, and nondestructive testing, are controlled and accomplished by qualified personnel using qualified procedures in accordance with applicable codes, standards, specifications, criteria, and other special requirements.

X. Inspection

A program for inspection of activities affecting quality shall be established and executed by or for the organization performing the activity to verify conformance with the documented instructions, procedures, and drawings for accomplishing the activity. Such inspection shall be performed by individuals other than those who performed the activity being inspected. Examinations, measurements, or tests of material or products processed shall be performed for each work operation where necessary to assure quality. If inspection of processed material or products is impossible or disadvantageous, indirect control by monitoring processing methods, equipment, and personnel shall be provided. Both inspection and process monitoring shall be provided when control is inadequate without both. If mandatory inspection hold points, which require witnessing or inspecting by the applicant's designated representative and beyond which work shall not proceed without the consent of its designated representative are required, the specific hold points shall be indicated in appropriate documents.

XI. Test Control

A test program shall be established to assure that all testing required to demonstrate that structures, systems, and components will perform satisfactorily in service is identified and performed in accordance with written test procedures which incorporate the requirements and acceptance limits contained in applicable design documents. The test program shall include, as appropriate, proof tests prior to installation, preoperational tests, and operational tests during nuclear power plant or fuel reprocessing plant operation, of structures, systems, and components. Test procedures shall include provisions for assuring that all prerequisites for the given test have been met, that adequate test instrumentation is available and used, and that the test is performed under suitable environmental conditions. Test results shall be documented and evaluated to assure that test requirements have been satisfied.

XII. Control of Measuring and Test Equipment

Measures shall be established to assure that tools, gages, instruments, and other measuring and testing devices used in activities affecting quality are properly controlled, calibrated, and adjusted at specified periods to maintain accuracy within necessary limits.

XIII. Handling, Storage and Shipping

Measures shall be established to control the handling, storage, shipping, cleaning and preservation of material and equipment in accordance with work and inspection instructions to prevent damage or deterioration. When necessary for particular products, special protective environments, such as inert gas atmosphere, specific moisture content levels, and temperature levels, shall be specified and provided.

XIV. Inspection, Test, and Operating Status

Measures shall be established to indicate, by the use of markings such as stamps, tags, labels, routing cards, or other suitable means, the status of inspections and tests performed upon individual items of the nuclear power plant or fuel reprocessing plant. These measures shall provide for the identification of items which have satisfactorily passed required inspections and tests, where necessary to preclude inadvertent bypassing of such inspections and tests. Measures shall also be established for indicating the operating status of structures, systems, and components of the nuclear power plant or fuel reprocessing plant, such as by tagging valves and switches, to prevent inadvertent operation.

XV. Nonconforming Materials, Parts, or Components

Measures shall be established to control materials, parts, or components which do not conform to requirements in order to prevent their inadvertent use or installation. These measures shall include, as appropriate, procedures for identification, documentation, segregation, disposition, and notification to affected organizations. Nonconforming items shall be reviewed and accepted, rejected, repaired or reworked in accordance with documented procedures.

XVI. Corrective Action

Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. In the case of significant conditions adverse to quality, the measures shall assure that the cause of the condition

is determined and corrective action taken to preclude repetition. The identification of the significant condition adverse to quality, the cause of the condition, and the corrective action taken shall be documented and reported to appropriate levels of management.

XVII. Quality Assurance Records

Sufficient records shall be maintained to furnish evidence of activities affecting quality. The records shall include at least the following: Operating logs and the results of reviews, inspections, tests, audits, monitoring of work performance, and materials analyses. The records shall also include closely-related data such as qualifications of personnel, procedures, and equipment. Inspection and test records shall, as a minimum, identify the inspector or data recorder, the type of observation, the results, the acceptability, and the action taken in connection with any deficiencies noted. Records shall be identifiable and retrievable. Consistent with applicable regulatory requirements, the applicant shall establish requirements concerning record retention, such as duration, location, and assigned responsibility.

XVIII. Audits

A comprehensive system of planned and periodic audits shall be carried out to verify compliance with all aspects of the quality assurance program and to determine the effectiveness of the program. The audits shall be performed in accordance with the written procedures or check lists by appropriately trained personnel not having direct responsibilities in the areas being audited. Audit results shall be documented and reviewed by management having responsibility in the area audited. Followup action, including reaudit of deficient areas, shall be taken where indicated.

[35 FR 10499, June 27, 1970, as amended at 36 FR 18301, Sept. 11, 1971; 40 FR 3210, Jan. 20, 1975; 72 FR 49505, Aug. 28, 2007]

Appendix C to Part 50—A Guide for the Financial Data and Related Information Required To Establish Financial Qualifications for Construction Permits and Combined Licenses

General Information

This appendix is intended to appraise applicants for construction permits and combined licenses for production or utilization facilities of the types described in §50.21(b) or §50.22, or testing facilities, of the general kinds of financial data and other related information that will demonstrate the financial qualification of the applicant to carry out the activities for which the permit or license is sought. The kind and depth of information described in this guide is not intended to be a rigid and absolute requirement. In some instances, additional pertinent material may be needed. In any case, the applicant should include information other than that specified, if the information is pertinent to establishing the applicant's financial ability to carry out the activities for which the permit or license is sought.

It is important to observe also that both §50.33(f) and this appendix distinguish between applicants which are established organizations and those which are newly-formed entities organized primarily for the purpose of engaging in the activity for which the permit is sought. Those in the former category will normally have a history of operating experience and be able to submit financial statements reflecting the financial results of past operations. With respect, however, to the applicant which is a newly formed company established primarily for the purpose of carrying out the licensed activity, with little or no prior operating history, somewhat more detailed data and supporting documentation will generally be necessary. For this reason, the appendix describes separately the scope of information to be included in applications by each of these two classes of applicants.

In determining an applicant's financial qualification, the Commission will require the minimum amount of information necessary for that purpose. No special forms are prescribed for submitting the information. In many cases, the financial information usually contained in current annual financial reports, including summary data of prior years, will be sufficient for the Commission's needs. The Commission reserves the right, however, to require additional financial information at the construction permit stage, particularly in cases in which the proposed power generating facility will be commonly owned by two or more existing companies or in which financing depends upon long-term arrangements for sharing of the power from the facility by two or more electrical generating companies.

Applicants are encouraged to consult with the Commission with respect to any questions they may have relating to the requirements of the Commission's regulations or the information set forth in this appendix.

I. Applicants Which Are Established Organizations

A. Applications for Construction Permits or Combined Licenses

1. *Estimate of construction costs.* For electric utilities, each applicant's estimate of the total cost of the proposed facility should be broken down as follows and be accompanied by a statement describing the bases from which the estimate is derived:

PRELIMINARY PROCEDURES

CLASSIFICATION OF LICENSING AND REGULATORY ACTIONS

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

(3) Issuance of a permit to construct or a design capacity license to operate or renewal of a design capacity license to operate an isotopic enrichment plant pursuant to part 50 of this chapter.

(4) Conversion of a provisional operating license for a nuclear power reactor, testing facility or fuel reprocessing plant to a full term or design capacity license pursuant to part 50 of this chapter if a final environmental impact statement covering full term or design capacity operation has not been previously prepared.

(5)–(6) [Reserved]

(7) Issuance of a license to possess and use special nuclear material for processing and fuel fabrication, scrap recovery, or conversion of uranium hexafluoride pursuant to part 70 of this chapter.

(8) Issuance of a license to possess and use source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter.

(9) Issuance of a license pursuant to part 72 of this chapter for the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at a site not occupied by a nuclear power reactor, or for the storage of spent fuel or high-level radioactive waste in a monitored retrievable storage installation (MRS).

(10) Issuance of a license for a uranium enrichment facility.

(11) Issuance of renewal of a license authorizing receipt and disposal of radioactive waste from other persons pursuant to part 61 of this chapter.

(12) Issuance of a license amendment pursuant to part 61 of this chapter authorizing (i) closure of a land disposal site, (ii) transfer of the license to the disposal site owner for the purpose of institutional control, or (iii) termination of the license at the end of the institutional control period.

(13) Issuance of a construction authorization and license pursuant to part 60 or part 63 of this chapter.

(14) Any other action which the Commission determines is a major Commission action significantly affecting the quality of the human environment. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental impact statement on an action covered by a categorical exclusion.

[49 FR 9381, Mar. 12, 1984, as amended at 53 FR 31681, Aug. 19, 1988; 53 FR 24052, June 27, 1988; 54 FR 15398, Apr. 18, 1989; 54 FR 27870, July 3, 1989; 57 FR 18392, Apr. 30, 1992; 66 FR 55790, Nov. 2, 2001; 72 FR 49509, Aug. 28, 2007]

§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in

§ 51.50 Environmental report—construction permit, early site permit, or combined license stage.

(a) *Construction permit stage.* Each applicant for a permit to construct a production or utilization facility covered by § 51.20 shall submit with its application a separate document, entitled ''Applicant's Environmental Report—Construction Permit Stage,'' which shall contain the information specified in §§ 51.45, 51.51, and 51.52. Each environmental report shall identify procedures for reporting and keeping records of environmental data, and any conditions and monitoring requirements for protecting the non-aquatic environment, proposed for possible inclusion in the license as environmental conditions in accordance with § 50.36b of this chapter. As stated in § 51.23, no discussion of the environmental impacts of the continued storage of spent fuel is required in this report.

(b) *Early site permit stage.* Each applicant for an early site permit shall submit with its application a separate document, entitled ''Applicant's Environmental Report—Early Site Permit Stage,'' which shall contain the information specified in §§ 51.45, 51.51, and 51.52, as modified in this paragraph.

(1) The environmental report must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed.

(2) The environmental report may address one or more of the environmental effects of construction and operation of a reactor, or reactors, which have design characteristics that fall within the site characteristics and design parameters for the early site permit application, provided however, that the environmental report must address all environmental effects of construction and operation necessary to determine whether there is any obviously superior alternative to the site proposed. The environmental report need not include an assessment of the economic, technical, or other benefits (for example, need for power) and costs of the proposed action or an evaluation of alternative energy sources. As stated in § 51.23, no discussion of the environmental impacts of the continued storage of spent fuel is required in this report.

(3) For other than light-water-cooled nuclear power reactors, the environmental report must contain the basis for evaluating the contribution of the environmental effects of fuel cycle activities for the nuclear power reactor.

(4) Each environmental report must identify the procedures for reporting and keeping records of environmental data, and any conditions and monitoring requirements for protecting the non-aquatic environment, proposed for possible inclusion in the license as environmental conditions in accordance with § 50.36b of this chapter.

(c) *Combined license stage.* Each applicant for a combined license shall submit with its application a separate document, entitled ''Applicant's Environmental Report—Combined License Stage.'' Each environmental report shall contain the information specified in §§ 51.45, 51.51, and 51.52, as modified in this paragraph. For other than light-water-cooled nuclear power reactors, the environmental report shall contain the basis for evaluating the contribution of the environmental effects of fuel cycle activities for the nuclear power reactor. Each environmental report shall identify procedures for reporting and keeping records of environmental data, and any conditions and monitoring requirements for protecting the non-aquatic environment, proposed for possible inclusion in the license as environmental conditions in accordance with § 50.36b of this chapter. The combined license environmental report may reference information contained in a final environmental document previously prepared by the NRC staff. As stated in § 51.23, no discussion of the environmental impacts of the continued storage of spent fuel is required in this report.

(1) *Application referencing an early site permit.* If the combined license application references an early site permit, then the ''Applicant's Environmental Report—Combined License Stage'' need not contain information or analyses submitted to the Commission in ''Applicant's Environmental Report—Early Site Permit Stage,'' or resolved in the Commission's early site permit environmental impact statement, but must

contain, in addition to the environmental information and analyses otherwise required:

(i) Information to demonstrate that the design of the facility falls within the site characteristics and design parameters specified in the early site permit;

(ii) Information to resolve any significant environmental issue that was not resolved in the early site permit proceeding;

(iii) Any new and significant information for issues related to the impacts of construction and operation of the facility that were resolved in the early site permit proceeding;

(iv) A description of the process used to identify new and significant information regarding the NRC's conclusions in the early site permit environmental impact statement. The process must use a reasonable methodology for identifying such new and significant information; and

(v) A demonstration that all environmental terms and conditions that have been included in the early site permit will be satisfied by the date of issuance of the combined license. Any terms or conditions of the early site permit that could not be met by the time of issuance of the combined license, must be set forth as terms or conditions of the combined license.

(2) *Application referencing standard design certification.* If the combined license references a standard design certification, then the combined license environmental report may incorporate by reference the environmental assessment previously prepared by the NRC for the referenced design certification. If the design certification environmental assessment is referenced, then the combined license environmental report must contain information to demonstrate that the site characteristics for the combined license site fall within the site parameters in the design certification environmental assessment.

(3) *Application referencing a manufactured reactor.* If the combined license application proposes to use a manufactured reactor, then the combined license environmental report may incorporate by reference the environmental assessment previously prepared by the NRC for the underlying manufacturing license. If the manufacturing license environmental assessment is referenced, then the combined license environmental report must contain information to demonstrate that the site characteristics for the combined license site fall within the site parameters in the manufacturing license environmental assessment. The environmental report need not address the environmental impacts associated with manufacturing the reactor under the manufacturing license.

[72 FR 49511, Aug. 28, 2007, as amended at 79 FR 56260, Sept. 19, 2014]

§51.51 Uranium fuel cycle environmental data—Table S–3.

(a) Under §51.50, every environmental report prepared for the construction permit stage or early site permit stage or combined license stage of a light-water-cooled nuclear power reactor, and submitted on or after September 4, 1979, shall take Table S–3, Table of Uranium Fuel Cycle Environmental Data, as the basis for evaluating the contribution of the environmental effects of uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials and management of low-level wastes and high-level wastes related to uranium fuel cycle activities to the environmental costs of licensing the nuclear power reactor. Table S–3 shall be included in the environmental report and may be supplemented by a discussion of the environmental significance of the data set forth in the table as weighed in the analysis for the proposed facility.

(b) Table S–3.

(2) If the limited work authorization is for activities to be conducted at a site for which the Commission has previously prepared an environmental impact statement for the construction and operation of a nuclear power plant, and a construction permit was issued but construction of the plant was never completed, then in making the determinations in paragraph (c)(1) of this section, the presiding officer shall be limited to a consideration whether there is, with respect to construction activities encompassed by the environmental impact statement which are analogous to the activities to be conducted under the limited work authorization, new and significant information on the environmental impacts of those activities, such that the limited work authorization should not be issued as proposed.

(3) The presiding officer's determination in this paragraph shall be made in a partial initial decision to be issued separately from, and in advance of, the presiding officer's decision in paragraph (a) of this section.

[72 FR 49516, Aug. 28, 2007, as amended at 72 FR 57446, Oct. 9, 2007; 73 FR 5724, Jan. 31, 2008]

§ 51.105a Public hearings in proceedings for issuance of manufacturing licenses.

In addition to complying with applicable requirements of § 51.31(c), in a proceeding for the issuance of a manufacturing license, the presiding officer will determine whether, in accordance with the regulations in this subpart, the manufacturing license should be issued as proposed by the NRC's Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate.

[73 FR 5724, Jan. 31, 2008]

§ 51.106 Public hearings in proceedings for issuance of operating licenses.

(a) Consistent with the requirements of this section and as appropriate, the presiding officer in an operating license hearing shall comply with any applicable requirements of §§ 51.104 and 51.105.

(b) During the course of a hearing on an application for issuance of an operating license for a nuclear power reactor, or a testing facility, the presiding officer may authorize, pursuant to § 50.57(c) of this chapter, the loading of nuclear fuel in the reactor core and limited operation within the scope of § 50.57(c) of this chapter, upon compliance with the procedures described therein. In any such hearing, where any party opposes such authorization on the basis of matters covered by subpart A of this part, the provisions of §§ 51.104 and 51.105 will apply, as appropriate.

(c) The presiding officer in an operating license hearing shall not admit contentions proffered by any party concerning need for power or alternative energy sources or alternative sites for the facility for which an operating license is requested.

(d) The presiding officer in an operating license hearing shall not raise issues concerning alternative sites for the facility for which an operating license is requested *sua sponte*.

§ 51.107 Public hearings in proceedings for issuance of combined licenses; limited work authorizations.

(a) In addition to complying with the applicable requirements of § 51.104, in a proceeding for the issuance of a combined license for a nuclear power reactor under part 52 of this chapter, the presiding officer will:

(1) Determine whether the requirements of Sections 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the combined license should be issued as proposed by the NRC's Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate.

(b) If a combined license application references an early site permit, then the presiding officer in the combined license hearing shall not admit any contention proffered by any party on environmental issues which have been accorded finality under §52.39 of this chapter, unless the contention:

(1) Demonstrates that the nuclear power reactor proposed to be built does not fit within one or more of the site characteristics or design parameters included in the early site permit;

(2) Raises any significant environmental issue that was not resolved in the early site permit proceeding; or

(3) Raises any issue involving the impacts of construction and operation of the facility that was resolved in the early site permit proceeding for which new and significant information has been identified.

(c) If the combined license application references a standard design certification, or proposes to use a manufactured reactor, then the presiding officer in a combined license hearing shall not admit contentions proffered by any party concerning severe accident mitigation design alternatives unless the contention demonstrates that the site characteristics fall outside of the site parameters in the standard design certification or underlying manufacturing license for the manufactured reactor.

(d)(1) In any proceeding for the issuance of a combined license where the applicant requests a limited work authorization under §50.10(d) of this chapter, the presiding officer, in addition to complying with any applicable provision of §51.104, shall:

(i) Determine whether the requirements of Section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met, with respect to the activities to be conducted under the limited work authorization;

(ii) Independently consider the balance among conflicting factors with respect to the limited work authorization which is contained in the record of the proceeding, with a view to determining the appropriate action to be taken;

(iii) Determine whether the redress plan will adequately redress the activities performed under the limited work authorization, should limited work activities be terminated by the holder or the limited work authorization be revoked by the NRC, or upon effectiveness of the Commission's final decision denying the combined license application;

(iv) In an uncontested proceeding, determine whether the NEPA review conducted by the NRC staff for the limited work authorization has been adequate; and

(v) In a contested proceeding, determine whether, in accordance with the regulations in this subpart, the limited work authorization should be issued as proposed by the Director of New Reactors or the Director of Nuclear Reactor Regulation, as applicable.

(2) If the limited work authorization is for activities to be conducted at a site for which the Commission has previously prepared an environmental impact statement for the construction and operation of a nuclear power plant, and a construction permit was issued but construction of the plant was never completed, then in making the determinations in paragraph (c)(1) of this section, the presiding officer shall be limited to a consideration whether there is, with respect to construction activities encompassed by the environmental impact statement which are analogous to the activities to be conducted under the limited work authorization, new and significant information on the environmental impacts of those activities, so that the limited work authorization should not be issued as proposed by the Director of New Reactors or the Director of Nuclear Reactor Regulation, as applicable.

(3) In making the determination required by this section, the presiding officer may not address or consider the sunk costs associated with the limited work authorization.

(4) The presiding officer's determination in this paragraph shall be made in

a partial initial decision to be issued separately from, and in advance of, the presiding officer's decision in paragraph (a) of this section on the combined license.

[72 FR 49517, Aug. 28, 2007, as amended at 72 FR 57446, Oct. 9, 2007; 73 FR 5724, Jan. 31, 2008]

§ 51.108 Public hearings on Commission findings that inspections, tests, analyses, and acceptance criteria of combined licenses are met.

In any public hearing requested under 10 CFR 52.103(b), the Commission will not admit any contentions on environmental issues, the adequacy of the environmental impact statement for the combined license issued under subpart C of part 52, or the adequacy of any other environmental impact statement or environmental assessment referenced in the combined license application. The Commission will not make any environmental findings in connection with the finding under 10 CFR 52.103(g).

[72 FR 49517, Aug. 28, 2007]

MATERIALS LICENSES

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

(a)(1) In a proceeding for issuance of a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 and 63 of this chapter, and in a proceeding for issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area under parts 60 and 63 of this chapter, the NRC staff shall, upon the publication of the notice of hearing in the FEDERAL REGISTER, present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, or as soon thereafter as may be practicable. In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect within thirty (30) days after the publication of the notice of hearing in the FEDERAL REGISTER. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.326 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of a construction authorization and license for such repository.

(c) The presiding officer will find that it is practicable to adopt any environmental impact statement prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

the information and analyses otherwise required, information sufficient to demonstrate that the characteristics of the site fall within the site parameters specified in the design approval. In addition, the plant-specific PRA information must use the PRA information for the design approval and must be updated to account for site-specific design information and any design changes or departures.

(2) The final safety analysis report must demonstrate that all terms and conditions that have been included in the final design approval will be satisfied by the date of issuance of the combined license.

(d) If the combined license application references a standard design certification, then the following requirements apply:

(1) The final safety analysis report need not contain information or analyses submitted to the Commission in connection with the design certification, *provided, however,* that the final safety analysis report must either include or incorporate by reference the standard design certification final safety analysis report and must contain, in addition to the information and analyses otherwise required, information sufficient to demonstrate that the site characteristics fall within the site parameters specified in the design certification. In addition, the plant-specific PRA information must use the PRA information for the design certification and must be updated to account for site-specific design information and any design changes or departures.

(2) The final safety analysis report must demonstrate that the interface requirements established for the design under § 52.47 have been met.

(3) The final safety analysis report must demonstrate that all requirements and restrictions set forth in the referenced design certification rule, other than those imposed under § 50.36b, must be satisfied by the date of issuance of the combined license. Any requirements and restrictions set forth in the referenced design certification rule that could not be satisfied by the time of issuance of the combined license, must be set forth as terms or conditions of the combined license.

(e) If the combined license application references the use of one or more manufactured nuclear power reactors licensed under subpart F of this part, then the following requirements apply:

(1) The final safety analysis report need not contain information or analyses submitted to the Commission in connection with the manufacturing license, *provided, however,* that the final safety analysis report must either include or incorporate by reference the manufacturing license final safety analysis report and must contain, in addition to the information and analyses otherwise required, information sufficient to demonstrate that the site characteristics fall within the site parameters specified in the manufacturing license. In addition, the plant-specific PRA information must use the PRA information for the manufactured reactor and must be updated to account for site-specific design information and any design changes or departures.

(2) The final safety analysis report must demonstrate that the interface requirements established for the design have been met.

(3) The final safety analysis report must demonstrate that all terms and conditions that have been included in the manufacturing license, other than those imposed under § 50.36b, will be satisfied by the date of issuance of the combined license. Any terms or conditions of the manufacturing license that could not be met by the time of issuance of the combined license, must be set forth as terms or conditions of the combined license.

(f) Each applicant for a combined license under this subpart shall protect Safeguards Information against unauthorized disclosure in accordance with the requirements in §§ 73.21 and 73.22 of this chapter, as applicable.

[72 FR 49517, Aug. 28, 2007, as amended at 73 FR 63571, Oct. 24, 2008; 74 FR 13970, Mar. 27, 2009; 74 FR 28147, June 12, 2009; 76 FR 72600, Nov. 23, 2011; 78 FR 34249, June 7, 2013]

§ 52.80 Contents of applications; additional technical information.

The application must contain:

(a) The proposed inspections, tests, and analyses, including those applicable to emergency planning, that the licensee shall perform, and the acceptance criteria that are necessary and sufficient to provide reasonable assurance that, if the inspections, tests, and analyses are performed and the acceptance criteria met, the facility has been constructed and will be operated in conformity with the combined license, the provisions of the Act, and the Commission's rules and regulations.

(1) If the application references an early site permit with ITAAC, the early site permit ITAAC must apply to those aspects of the combined license which are approved in the early site permit.

(2) If the application references a standard design certification, the ITAAC contained in the certified design must apply to those portions of the facility design which are approved in the design certification.

(3) If the application references an early site permit with ITAAC or a standard design certification or both, the application may include a notification that a required inspection, test, or analysis in the ITAAC has been successfully completed and that the corresponding acceptance criterion has been met. The FEDERAL REGISTER notification required by § 52.85 must indicate that the application includes this notification.

(b) An environmental report, either in accordance with 10 CFR 51.50(c) if a limited work authorization under 10 CFR 50.10 is not requested in conjunction with the combined license application, or in accordance with §§ 51.49 and 51.50(c) of this chapter if a limited work authorization is requested in conjunction with the combined license application.

(c) If the applicant wishes to request that a limited work authorization under 10 CFR 50.10 be issued before issuance of the combined license, the application must include the information otherwise required by 10 CFR 50.10, in accordance with either 10 CFR 2.101(a)(1) through (a)(4), or 10 CFR 2.101(a)(9).

(d) A description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter.

[72 FR 49517, Aug. 28, 2007, as amended at 72 FR 57447, Oct. 9, 2007; 74 FR 13970, Mar. 27, 2009]

§ 52.81 Standards for review of applications.

Applications filed under this subpart will be reviewed according to the standards set out in 10 CFR parts 20, 50, 51, 54, 55, 73, 100, and 140.

§ 52.83 Finality of referenced NRC approvals; partial initial decision on site suitability.

(a) If the application for a combined license under this subpart references an early site permit, design certification rule, standard design approval, or manufacturing license, the scope and nature of matters resolved for the application and any combined license issued are governed by the relevant provisions addressing finality, including §§ 52.39, 52.63, 52.98, 52.145, and 52.171.

(b) While a partial decision on site suitability is in effect under 10 CFR 2.617(b)(2), the scope and nature of matters resolved in the proceeding are governed by the finality provisions in 10 CFR 2.629.

§ 52.85 Administrative review of applications; hearings.

A proceeding on a combined license is subject to all applicable procedural requirements contained in 10 CFR part 2, including the requirements for docketing (§ 2.101 of this chapter) and issuance of a notice of hearing (§ 2.104 of this chapter). If an applicant requests a Commission finding on certain ITAAC with the issuance of the combined license, then those ITAAC will be identified in the notice of hearing. All hearings on combined licenses are governed by the procedures contained in 10 CFR part 2.

§ 52.87 Referral to the Advisory Committee on Reactor Safeguards (ACRS).

The Commission shall refer a copy of the application to the ACRS. The

ACRS shall report on those portions of the application that concern safety and shall apply the standards referenced in § 52.81, in accordance with the finality provisions in § 52.83.

§ 52.89 [Reserved]

§ 52.91 Authorization to conduct limited work authorization activities.

(a) If the application does not reference an early site permit which authorizes the holder to perform the activities under 10 CFR 50.10(d), the applicant may not perform those activities without obtaining the separate authorization required by 10 CFR 50.10(d). Authorization may be granted only after the presiding officer in the proceeding on the application has made the findings and determination required by 10 CFR 50.10(e), and the Director of New Reactors or the Director of Nuclear Reactor Regulation makes the determination required by 10 CFR 50.10(e).

(b) If, after an applicant has performed the activities permitted by paragraph (a) of this section, the application for the combined license is withdrawn or denied, then the applicant shall implement the approved site redress plan.

[72 FR 57447, Oct. 9, 2007]

§ 52.93 Exemptions and variances.

(a) Applicants for a combined license under this subpart, or any amendment to a combined license, may include in the application a request for an exemption from one or more of the Commission's regulations.

(1) If the request is for an exemption from any part of a referenced design certification rule, the Commission may grant the request if it determines that the exemption complies with any exemption provisions of the referenced design certification rule, or with § 52.63 if there are no applicable exemption provisions in the referenced design certification rule.

(2) For all other requests for exemptions, the Commission may grant a request if it determines that the exemption complies with § 52.7.

(b) An applicant for a combined license who has filed an application referencing an early site permit issued under subpart A of this part may include in the application a request for a variance from one or more site characteristics, design parameters, or terms and conditions of the permit, or from the site safety analysis report. In determining whether to grant the variance, the Commission shall apply the same technically relevant criteria as were applicable to the application for the original or renewed site permit. Once a construction permit or combined license referencing an early site permit is issued, variances from the early site permit will not be granted for that construction permit or combined license.

(c) An applicant for a combined license who has filed an application referencing a nuclear power reactor manufactured under a manufacturing license issued under subpart F of this part may include in the application a request for a departure from one or more design characteristics, site parameters, terms and conditions, or approved design of the manufactured reactor. The Commission may grant a request only if it determines that the departure will comply with the requirements of 10 CFR 52.7, and that the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the departure.

(d) Issuance of a variance under paragraph (b) or a departure under paragraph (c) of this section is subject to litigation during the combined license proceeding in the same manner as other issues material to that proceeding.

§ 52.97 Issuance of combined licenses.

(a)(1) After conducting a hearing in accordance with § 52.85 and receiving the report submitted by the ACRS, the Commission may issue a combined license if the Commission finds that:

(i) The applicable standards and requirements of the Act and the Commission's regulations have been met;

(ii) Any required notifications to other agencies or bodies have been duly made;

(iii) There is reasonable assurance that the facility will be constructed and will operate in conformity with the

license, the provisions of the Act, and the Commission's regulations.

(iv) The applicant is technically and financially qualified to engage in the activities authorized; and

(v) Issuance of the license will not be inimical to the common defense and security or to the health and safety of the public; and

(vi) The findings required by subpart A of part 51 of this chapter have been made.

(2) The Commission may also find, at the time it issues the combined license, that certain acceptance criteria in one or more of the inspections, tests, analyses, and acceptance criteria (ITAAC) in a referenced early site permit or standard design certification have been met. This finding will finally resolve that those acceptance criteria have been met, those acceptance criteria will be deemed to be excluded from the combined license, and findings under § 52.103(g) with respect to those acceptance criteria are unnecessary.

(b) The Commission shall identify within the combined license the inspections, tests, and analyses, including those applicable to emergency planning, that the licensee shall perform, and the acceptance criteria that, if met, are necessary and sufficient to provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the Act, and the Commission's rules and regulations.

(c) A combined license shall contain the terms and conditions, including technical specifications, as the Commission deems necessary and appropriate.

§ 52.98 Finality of combined licenses; information requests.

(a) After issuance of a combined license, the Commission may not modify, add, or delete any term or condition of the combined license, the design of the facility, the inspections, tests, analyses, and acceptance criteria contained in the license which are not derived from a referenced standard design certification or manufacturing license, except in accordance with the provisions of § 52.103 or § 50.109 of this chapter, as applicable.

(b) If the combined license does not reference a design certification or a reactor manufactured under a subpart F of this part manufacturing license, then a licensee may make changes in the facility as described in the final safety analysis report (as updated), make changes in the procedures as described in the final safety analysis report (as updated), and conduct tests or experiments not described in the final safety analysis report (as updated) under the applicable change processes in 10 CFR part 50 (e.g., §§ 50.54, 50.59, or 50.90 of this chapter).

(c) If the combined license references a certified design, then—

(1) Changes to or departures from information within the scope of the referenced design certification rule are subject to the applicable change processes in that rule; and

(2) Changes that are not within the scope of the referenced design certification rule are subject to the applicable change processes in 10 CFR part 50, unless they also involve changes to or noncompliance with information within the scope of the referenced design certification rule. In these cases, the applicable provisions of this section and the design certification rule apply.

(d) If the combined license references a reactor manufactured under a subpart F of this part manufacturing license, then—

(1) Changes to or departures from information within the scope of the manufactured reactor's design are subject to the change processes in § 52.171; and

(2) Changes that are not within the scope of the manufactured reactor's design are subject to the applicable change processes in 10 CFR part 50.

(e) The Commission may issue and make immediately effective any amendment to a combined license upon a determination by the Commission that the amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. The amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. The amendment will be processed in accordance with the procedures specified in 10 CFR 50.91.