UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

June 29, 2012

COMMISSION VOTING RECORD

DECISION ITEM: SECY-12-0004

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

The Commission (with Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff approving and Chairman Jaczko approving in part and disapproving in part) acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of June 29, 2012.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:
1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-12-0004

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X	X			X	3/30/12
COMR. SVINICKI	X				X	5/29/12
COMR. APOSTOLAKIS	X				X	5/16/12
COMR. MAGWOOD	X				X	5/4/12
COMR. OSTENDORFF	X				X	3/19/12

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

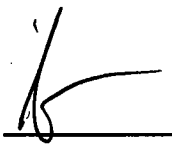
FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-12-0004 – FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (RIN 3150-AI43)

Approved X(in part) Disapproved X(in part) Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached X None ___



SIGNATURE

3/3/12

DATE

Entered on "STARS" Yes x No ___

Chairman Jaczko's Comments on SECY-12-0004,
"Final Rule—10 CFR Parts 2, 12, 51, 54, and 61 "Amendments to
Adjudicatory Process Rules and Related Requirements (RIN 3150-AI43)

I approve the publication of the draft final rule subject to the following comments. I appreciate the comprehensive analysis and outreach that supported this effort and believe these changes will improve and clarify our adjudicatory processes for all participants. I agree, in large part, with OGC's recommendations with the following exceptions.

I do not approve revising 10 C.F.R. § 2.346 to authorize the Secretary to take action on "other minor matters" in addition to "minor procedural matters" allowed under the current language. The recent orders cited in the FRN show the complexity and disparity of the matters that have been issued by the Secretary. In my view, this highlights the need to provide guidance on how to define these terms and apply these criteria. I am concerned that this change would do the opposite, by effectively removing one of two defining criteria – "procedural" - in the regulation. This will place the Secretary in a position of determining whether a matter is within his or her authority based on an assessment of its precedential or policy significance. In my view, we should not delegate this potentially difficult and consequential decision over substantive matters.

Regarding interlocutory appeals, I recommend Option 1, allowing any party to appeal an order granting a hearing request or intervention petition. I believe the efficiency of our adjudicatory processes would be served by resolving these matters before the hearing process begins. Additionally, this would serve to make our hearing process more equitable by allowing all parties to appeal the denial of proposed contentions.

Gregory B. Jaczko 3/30/12
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER SVINICKI

SUBJECT: SECY-12-0004 – FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (RIN 3150-AI43)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below __ Attached XX None ___

SIGNATURE

5/29/12
DATE

Entered on "STARS" Yes ✓ No ___

Commissioner Svinicki's Comments on SECY-12-0004
Final Rule—10 CFR Parts 2, 12, 51, 54, and 61 "Amendments to Adjudicatory Process Rules and Related Requirements" (RIN 3150-AI43)

I approve publication of the *Federal Register* notice for the Part 2 final rule (Enclosure 1 to SECY-12-0004), subject to the following comments, the attached edits, and the edits of Commissioner Ostendorff. I certify, under the Regulatory Flexibility Act, that this rule will not have a significant impact on a substantial number of small entities. Additionally, the Commission recently affirmed the final ITAAC Maintenance Rule, which included changes to 10 CFR 2.340(j). The Office of the General Counsel (OGC) should ensure that the rule language approved in the ITAAC rule is incorporated into the Part 2 final rule before publication in the *Federal Register.*

In my vote on the Part 2 proposed rule (SECY-10-0106), I approved a modification to 2.346(j) to expand the Secretary's authority to take action on "procedural and other minor matters." Here, the draft final rule would instead modify this provision to allow the Secretary to take action on "other minor matters." I appreciate receiving additional information from OGC regarding the past uses of the Secretary's authority, which helped put in perspective the ways in which 2.346(j) has been interpreted. Based on OGC's explanation that this revision is meant solely to clarify the existing language without altering its intended meaning, I will support proceeding with the revised language. Clarity of our procedural rules is important and I believe that this change may relieve ambiguity in this area. My support for this revision continues to be rooted in the Secretary's current practice of notifying the Commission – via a "negative-consent" process – before taking action under her authority.

In my vote on the proposed rule, I supported soliciting stakeholder input on proposed changes to 2.309(c) that would make good cause the sole factor to be considered when evaluating whether to review the admissibility of a new or amended contention, petition, or hearing request. I believed then that the Statements of Consideration should further explain the basis for eliminating the other factors. The sole comment received on this point was in opposition to eliminating the other factors, citing the potential for the granting of requests for hearing/petitions to intervene that are thinly supported or would otherwise be denied. I do not find that the Statements of Consideration submitted with the final Part 2 rule has sufficiently responded to this comment. Elimination of the other factors represents a significant change to NRC's rules of practice. Consequently, the Statements of Consideration should more fully substantiate the agency's basis for making this change.

On the subject of the time allowed for the Commission to act on a decision of a presiding officer or a petition for review, the draft final rule would expand this period from 40 days to 120 days. Although I have long believed that the 40 day period was clearly insufficient, the tripling of the time allowed is a substantial change. I support the expansion to 120 days in the hope that it will provide a fully adequate window for Commission action and that the Commission's habitual granting of extensions to itself for time to act will now occur only in rare and extraordinary circumstances.

Regarding interlocutory appeals, I agree with OGC and continue to believe that no changes to the current process are warranted. Although the Commission specifically sought comments on this issue during the proposed rule stage, only one comment was received. I appreciate the different perspectives that Commissioners, the Atomic Safety and Licensing Board Panel, the Office of Commission Appellate Adjudication (OCAA), and OGC have brought to this issue. However, on balance, given the steady pace of the Commission's current adjudicatory workload and its considerable, non-adjudicatory work, I remain unconvinced that significant efficiencies would be gained by altering the process. As noted in the paper, "[t]he lack of comments on this issue suggests that there is not a clamor for a change in the standards" and "allowing any party to appeal an order granting a hearing request or intervention petition, in whole or in part, would have significant resource implications for the Commission, OCAA, and OGC." These factors,

combined with existing mechanisms to consider questions of contention admissibility (such as Licensing Boards certifying or referring questions to the Commission), leave me unconvinced that the benefits of modifying the standards for interlocutory appeals outweigh its disadvantages. Therefore, I do not support exploration of a pilot program to examine potential changes to the existing interlocutory appeals process.

In a similar vein, I do not believe we should revisit the issue of staff participation in adjudicatory proceedings, which is not a new issue and has been evaluated by Commissions periodically over the years, at least as far back as 1981. Time and again, the Commission confirmed its support for staff participation in adjudicatory proceedings. Our current rules of procedure allow the staff, with some exceptions, to exercise discretion when determining whether it should participate as a party to a proceeding and to what extent it should participate. In my time on the Commission, I have observed the staff using this discretion appropriately and I trust in the staff's continued good judgment going forward. As Chairman Meserve observed in 2001, regarding staff participation in Subpart J proceedings: "The Commission believes that the staff's participation as a party is useful to the Atomic Safety and Licensing Board, the other parties, and the public as it will provide an independent regulatory perspective for the record." I agree. The NRC staff comes at its participation from the standpoint of public servants, serving the public interest. I have observed nothing in their conduct as a party to any proceeding that would suggest otherwise.

Similarly, I am not convinced that other areas of the adjudicatory process warrant further study by OGC, at this time. I appreciate Commissioner Magwood's thoughtful vote and the issues he brought forward for Commission consideration. Although I see no need for a notation vote paper on the matter, I agree with Commissioner Magwood that special attention should be paid by the staff in explaining the NRC's adjudicatory process to the public. The staff should ensure that it fully and effectively communicates the discipline demanded by participation in the agency's adjudicatory processes.

Finally, I do not support the staff developing a notation vote paper with suggested regulatory or policy changes regarding a more formal approach to tracking "failed" contentions. A contention is deemed inadmissible because it does not satisfy the standards set forth in our rules of practice. An inadmissible contention does not preclude the staff – apart from the adjudicatory process – from looking into an issue arising from an inadmissible contention. The staff is expected to use sound technical judgment in its safety and environmental reviews, and to pursue action on issues, including those resulting from failed contentions, when warranted.

Kristine L. Svinicki 5/ 29 /12

NEPA analysis to initiate the challenge. However, a participant may file a contention based on a significant difference between the environmental report and the draft or final NRC NEPA document if the participant files a timely contention after the NRC NEPA document's issuance and the contention is based on new information that is materially different from previously available information; thus, the contention would satisfy the standards in final § 2.309(c)(1) for new or amended contentions.

Finally, the NRC disagrees with the commenter that proposed § 2.309(c)(5) or a similar standard should apply to SERs. It is well-established in NRC case law that safety contentions must challenge the adequacy of the application, not the adequacy of the staff's review. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472 (2001); *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995). Generally, any information in the SER that could provide material support for a new contention is in the application (or the applicant's responses to requests for additional information), and is, thus, available prior to publication of the SER. Conversely, intervenors are expected to challenge the NRC's NEPA process, which means that contentions can challenge the adequacy of the staff's NEPA review. Section 2.309(f)(2) merely states that when possible, NEPA contentions must be based on the applicant's environmental report. Therefore, the rationale for allowing new or amended contentions filed after the deadline based on a significant difference between the environmental report and a draft or final NRC NEPA document does not apply to NRC SERs.

Comment: The current process places undue focus on the procedural technicalities of § 2.309(f), which destroys the public's ability to participate in the process. The proposed amendments do little to address the fundamental problems with part 2. The rules should be

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

Comment: The commenter does not believe that the NRC has a "compelling rationale" for expanding the time allowed for the Commission to act on a decision of a presiding officer or a petition for review. The commenter believes that 90 days is more appropriate than the 120 days proposed by the NRC because the Commission should be expected to act quickly if it has reason to review a presiding officer's decision on its own motion. (NEI-9)

NRC Response: The NRC disagrees with the commenter. The 120 days in the proposed rule is a reasonable amount of time for Commission review. The 40-day time frame in current § 2.341(a)(2) has necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs), which often leaves the Commission insufficient time for an effective review of the filings. A 120-day Commission review period provides for a reasonable time period to review the filings without the unintended consequence of frequent or lengthy extensions. As has always been the case, the Commission may act before the end of the 120-day review period if the review takes less time. ~~In cases where time is of the essence, the Commission may act before 120 days have passed.~~ The NRC has retained the 120-day review period in the final rule.

Comment: The commenter supports the NRC's proposal to add a "deemed denied" provision to part 2, but believes that 120 days for Commission review is too long. Instead, the commenter believes that the Commission review period should be 90 days. (NEI-8)

NRC Response: The NRC disagrees with the commenter. The 120 days in the proposed rule is

challenging a draft or final NRC NEPA document to show that there is a significant difference between the applicant's environmental report and the NRC NEPA document. This proposed section would have treated the "significant difference" language in current § 2.309(f)(2) as an additional requirement, beyond the proposed § 2.309(c) requirements, for environmental contentions filed after the deadline. After further consideration, the NRC has decided not to adopt proposed § 2.309(c)(5) and instead is clarifying that the "significant difference" language in current § 2.309(f)(2) is not a separate standard, but is captured by the three factors in final § 2.309(c)(1). Under the final rule, participants are still required to file their initial environmental contentions on the applicant's environmental report, even though the NRC staff's NEPA documents are the subject of the environmental portion of the hearing. New or amended environmental contentions filed after the deadline, like new or amended safety contentions filed after the deadline, need to satisfy the requirements in final § 2.309(c). The NRC does not believe that there should be an additional requirement that must be satisfied for new or amended environmental contentions filed after the deadline.

However, as previously specified in current § 2.309(f)(2), participants may file a new or amended contention after the deadline in § 2.309(b) based on a draft or final NRC NEPA document if the participant demonstrates good cause by 1) showing that the information that is the subject of the new or amended contention was not previously available; 2) showing that there is information in the draft or final NRC NEPA document (i.e., environmental impact statement, environmental assessment, or any supplements to these documents) that differs significantly (i.e., is "materially different") from the information in the applicant's documents; and 3) filing the contention in a timely manner after the NRC NEPA document's issuance.

c. Section 2.309(d)—Standing.

Current § 2.309(d) sets forth the standing requirements and also contains some

also extends the time for action by the presiding officer, and provides that if the presiding officer cannot issue a decision on each hearing request or intervention petition within 45 days of the conclusion of the pre-hearing conference, the presiding officer shall issue a notice advising the Commission and the parties as to when the decision will issue. If no pre-hearing conference is conducted, the 45-day period begins after the filing of answers and replies under current § 2.309.

3. Section 2.311—Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information (SUNSI) and safeguards information (SGI).

Current § 2.311(b) allows parties to appeal orders of the presiding officer to the Commission concerning a request for hearing, petition to intervene, or a request to access SUNSI or SGI within ten days after the service of the order. Any party who opposes the appeal may file a brief in opposition within ten days after service of the appeal. Experience has demonstrated that the filing time provided under this section is unnecessarily short, and sometimes results in superficial appellate briefs. Most adjudicatory bodies allow substantially more time for litigants to frame appellate arguments and to perform the necessary research and analysis. Well-considered briefs enable the appellate body, here the Commission, to make faster and better-reasoned decisions. The NRC is therefore extending the time to file an appeal and a brief in opposition to an appeal from ten to 25 days. The NRC does not expect the change in appeal deadlines to result in any delays in making licensing decisions. Some Commission appeals of presiding officer initial decisions are completed before there is a final decision on the proposed action, and thus would not affect the timing of the final agency action. For example, this could occur when an appeal on the contested portion of a reactor licensing hearing (part 52 COL or

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

Current § 2.340(a) and (b) currently imply that the presiding officer must reach a decision prior to the issuance of a license or license amendment, but this is not necessarily always the case. For operating licenses associated with production and utilization facilities, both the Atomic Energy Act and the NRC's regulations allow for the issuance of a license amendment upon a determination of "no significant hazards consideration." *See, e.g.*, 42 U.S.C. § 2239, 10 CFR 50.91. Further, 10 CFR Part 2 Subparts L and N allow the staff to act on certain applications prior to the completion of any contested hearing, assuming that all other relevant regulatory requirements are met. *See* 10 CFR 2.1202(a), 2.1210(c)(3), and 2.1403(a). The NRC is revising § 2.340 to clarify that production and utilization facility applications for license amendment—to amend a construction permit, operating license, or renewed license—where the NRC has made a determination of no significant hazards consideration may be acted upon prior to the completion of a contested hearing. The NRC also revised § 2.340 to clarify that the NRC may not act on the application until the presiding officer issues an initial decision in contested proceedings for the initial issuance or renewal of a construction permit, operating license, or renewed license, and in proceedings for the amendment of an operating or renewed license where the NRC has not made a determination of no significant hazards consideration. The NRC is also making conforming amendments to paragraphs (d) and (e) of this section to clarify that in proceedings involving a manufacturing license under 10 CFR Part 52 subpart C, and in proceedings not involving production and utilization facilities, the NRC staff—provided it is able to make all of the necessary findings associated with the licensing action—may act on a license, permit, or license amendment prior to the completion of a contested hearing.

c. Section 2.341(c)—Petitions for review not acted upon deemed denied.

As stated in the 2004 part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786 (*see* 69 FR 2225; January 14, 2004). But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. Accordingly, the NRC is adding a new § 2.341(c)(1); current § 2.341(c)(1) is redesignated as § 2.341(c)(2), and current § 2.341(c)(2) is redesignated as § 2.341(c)(3). Final § 2.341(c)(1) adopts the deemed denied provisions of the former § 2.786(c) with the exception of the 30-day time limit, which is extended to allow 120 days for Commission review. As a practical matter, the 30-day time frame necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs). A 120-day Commission review period allows sufficient time to review the filings at the outset, without the unintended consequence of frequently needing extensions. The NRC therefore is adopting the deemed denied provisions of former § 2.786 with a 120-day time limit as final § 2.341(c)(1).

d. Section 2.341(f)—Standards for Atomic Safety and Licensing Board certifications and referrals.

The NRC is revising paragraph (f) of this section to address a perceived inconsistency in the standards for Atomic Safety and Licensing Board certifications and referrals to the Commission and Commission review of these issues. Current § 2.323(f) allows a presiding officer to refer a ruling to the Commission if a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, *or* if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. By contrast, current § 2.341(f) states that referred or certified rulings "will be

reviewed" by the Commission only if the referral or certification "raises significant and novel legal or policy issues, *and* resolution of the issues would materially advance the orderly disposition of the proceeding" (emphasis added). In essence, the current rules set forth different standards for presiding officers to apply when determining whether to certify a question or refer a ruling, from those that the Commission will use to determine whether it will accept review of a certified question or referred ruling. Further, this language has been interpreted to allow the Commission to accept referrals or certifications only if *both* standards in current § 2.341(f) are met, even though current § 2.323(f) allows a presiding officer to refer or certify a ruling if any of the criteria in current § 2.323(f) is met. *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009). To remedy the inconsistency between the two regulations, as discussed with respect to § 2.323(f), the standards for referral by the presiding officer are revised to parallel the standards the Commission will consider in determining whether to take review of a certified question or referred ruling. Final § 2.341(f) provides the Commission with maximum flexibility by allowing, but not requiring, the Commission to review an issue if it raises significant legal or policy issues, or if resolution of the issue would materially advance the orderly disposition of the proceeding.

12. Section 2.346—Authority of the Secretary.

Current § 2.346(j) authorizes the Secretary to "[t]ake action on minor procedural matters." Section 2.346(j) has served an important function because the need for the Commission to issue orders and hold affirmation sessions to dispose of adjudicatory matters can sometimes result in undesirable delays in resolving minor matters before the Commission. Many of these minor matters, by their very nature, do not have the precedential or policy significance that reasonably warrants Commission attention. Thus, by delegating authority to the

licensing board, would conduct the remainder of the proceeding. *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-19, 70 NRC 864 (2009).

- June 5, 2008 order in the High-Level Waste Repository proceeding denying a motion to disqualify a law firm from representing the applicant due to conflicts of interest. Resolving the motion to disqualify required Commission analysis on whether the claimed conflicts of interest jeopardized the NRC's statutory responsibility to protect public health and safety. *See U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-11, 67 NRC 379 (2008).

When exercising ~~her~~ the authority delegated ~~authority~~ to issue orders under § 2.346(j), the Secretary provides the Commissioners' offices with a draft of the order (generally three business days before the Secretary's action on the order). Internal Commission Procedures at I-2 (ADAMS Accession No. ML11269A125). This prior notification provides the Commission with an opportunity to issue the order itself if the Commission disagrees with the Secretary's determination that the matter at issue is "minor."

In addition to amending § 2.346(j) to clarify the Secretary's authority over minor matters, the NRC is removing the reference to § 2.311 in § 2.346(e). Moreover, there are no deadlines for Commission action on appeals under final § 2.311.

13. Section 2.347—*Ex parte* communications.

Section 2.347 prohibits what are known as *ex parte* communications between persons outside the NRC and NRC adjudicatory personnel on matters relevant to the merits of an ongoing hearing; this section currently applies to § 2.204 demands for information. Unlike the

timeline in final § 2.341(c)(1).

c. Interlocutory review.

Final § 2.341(f) allows, but does not require, the Commission to review certifications or referrals that meet any of the standards in this paragraph.

15. Section 2.346—Authority of the Secretary.

This section clarifies ~~that~~ the Secretary's authority under § 2.346(j). For matters that fall within § 2.346(j), the Secretary may decide them without further Commission action, thus avoiding the need for formal Commission orders and affirmation sessions. Under current § 2.346(j), the Secretary's authority covers "minor procedural matters." To clarify the broader intent of this rule, the NRC proposed replacing "minor procedural matters" with "procedural and other minor matters." After further consideration, the NRC has decided to adopt a modified version of the proposed rule, which will now authorize the Secretary to take action on "other minor matters" (not covered by the other provisions in § 2.346). The final rule retains the same meaning as the proposed rule, but avoids any misleading impressions that the proposed rule might have created. Also, the reference to § 2.311 is removed from § 2.346(e) because appeals under § 2.311 do not have deadlines for Commission action.

16. Sections 2.347 and 2.348—*Ex parte* communications; Separation of functions.

These sections currently reference § 2.204 demands for information, which are not orders and do not entail hearing rights. Because demands for information are not adjudicatory matters, the restrictions on *ex parte* communications and the separation-of-functions limitations do not apply. The references to § 2.204 are removed from both sections.

3. Section 2.709—Discovery against NRC staff.

a. Section 2.709(a)(6)—Initial disclosures.

This new paragraph requires the NRC staff to provide initial disclosures within 45 days after the issuance of a prehearing conference order following the initial prehearing conference. The NRC staff disclosures include all NRC staff documents relevant to disputed issues alleged with particularity in the proceedings (except for those documents, data compilations, or other tangible things, for which there is a claim of privilege or protected status), including any Office of Investigations Report and supporting Exhibits, and any Office of Enforcement documents regarding the order. The staff is also required to file a monthly disclosure update, with the disclosure due date to be selected by the presiding officer; however, the parties to a proceeding may agree to a different due date or disclosure frequency. These disclosure updates include all disclosable documents not included in a prior update. Documents that are discovered, obtained, or developed in the two weeks prior to a disclosure update may be included in the next update. Parties not disclosing any documents are expected to file an update informing the presiding officer and the other parties that that party is disclosing no documents for the period covered by that update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that disputed issue, or as specified by the presiding officer or the Commission. The staff is also required to provide, with initial disclosures and disclosure updates, a privilege log that lists the withheld documents and includes sufficient information to assess the claim of privilege or protected status. These requirements parallel the final § 2.704 requirements for parties other than the NRC staff.

4. Section 2.710—Motions for summary disposition.

(ii) Part two shall include or be accompanied by the remaining information required by §§ 50.30(f), 50.33, and 52.79(a)(1) of this chapter.

(iii) Part three shall include the remaining information required by §§ 52.79 and 52.80 of this chapter.

(iv) The information required for part two or part three shall be submitted during the period the partial decision on part one is effective. Submittal of the information required for part three may precede by no more than 6 months or follow by no more than 6 months the submittal of the information required for part two.

(b) After the application has been docketed, each applicant for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except applicants under part 61 of this chapter, which must comply with paragraph (f) of this section, shall serve a copy of the application and environmental report, as appropriate, on the chief executive of the municipality in which the activity is to be conducted or, if the activity is not to be conducted within a municipality on the chief executive of the county, and serve a notice of availability of the application or environmental report on the chief executives of the municipalities or counties which have been identified in the application or environmental report as the location of all or part of the alternative sites, containing the docket number of the application; a brief description of the proposed site and facility; the location of the site and facility as primarily proposed and alternatively listed; the name, address, telephone number, and e-mail address (if available) of the applicant's representative who may be contacted for further information; notification that a draft environmental impact statement will be issued by the Commission and will be made available upon request to the Commission; and notification that if a request is received from the appropriate chief executive, the applicant will transmit a copy of the application and environmental report, and any changes to such

documents which affect the alternative site location, to the executive who makes the request. In complying with the requirements of this paragraph the applicant should not make public distribution of those parts of the application subject to § 2.390(d). The applicant shall submit to the Director, Office of Nuclear Material Safety and Safeguards or Director, Office of Federal and State Materials and Environmental Management Programs, as appropriate, an affidavit that service of the notice of availability of the application or environmental report has been completed along with a list of names and addresses of those executives upon whom the notice was served.

* * *

* *

(d) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will give notice of the docketing of the public health and safety, common defense and security, and environmental parts of an application for a license for a facility or for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee, except that for applications pursuant to part 61 of this chapter, paragraph (f) of this section applies to the Governor or other appropriate official of the State in which the facility is to be located or the activity is to be conducted and will publish in the *Federal Register* a notice of docketing of the application, which states the purpose of the application and specifies the location at which the proposed activity would be conducted.

* * *

* *

(f) * *

and a proposed finding that inspections, tests, analyseis, and acceptance criteria for a combined license under subpart C of part 52 have been or will be met, or a notice of proposed action with respect to an application for:

* * *

* *

(b) A notice of proposed action published in the *Federal Register* will set forth:

* * *

* *

(d) The notice of proposed action will provide that, within the time period provided under § 2.309(b):

* * *

* *

8. In § 2.106, paragraphs (a) and (d) are revised to read as follows:

§ 2.106 Notice of issuance.

(a) The Director, Office of New Reactors, Director, Office of Nuclear Reactor Regulation, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will inform the State and local officials specified in § 2.104(c) and publish a document in the Federal Register announcing the issuance of:

* * *

* *

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the Federal Register notice of, and will inform the State, local, and Tribal officials specified in § 2.104(c) of any action with respect to an application for construction authorization

(6)(i) The NRC staff shall, except to the extent otherwise stipulated or directed by order of the presiding officer or the Commission, provide to the other parties within 45 days after the issuance of a prehearing conference order following the initial prehearing conference specified in § 2.329 and without awaiting a discovery request:

(A) Except for those documents-, data compilations, or other tangible things for which there is a claim of privilege or protected status, all NRC staff documents, data compilations, or other tangible things in possession, custody, or control of the NRC staff that are relevant to disputed issues alleged with particularity in the pleadings, including any Office of Investigations report and supporting exhibits, and any Office of Enforcement documents, data compilations, or other tangible things regarding the order. When any document-, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as the NRC website, http://www.nrc.gov, or the NRC Public Document Room, a sufficient disclosure would be the location, the title, and a page reference to the relevant document, data compilation, or tangible thing; and

(B) A list of all documents, data compilations, or other tangible things otherwise responsive to paragraph (a)(6)(i)(A) of this section for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(ii) The duty of disclosure under this section is continuing. A disclosure update must be made every month after initial disclosures on a due date selected by the presiding officer, unless the parties agree upon a different due date or frequency. The disclosure update shall be limited to documents subject to disclosure under this section and does not need to include documents that are developed, obtained, or discovered during the two weeks before the due date. Disclosure updates shall include any documents subject to disclosure that were not

included in any previous disclosure update. The duty to update disclosures relevant to a disputed issue ends when the presiding officer issues a decision resolving that dispute issue, or at such other time as may be specified by the presiding officer or the Commission.

(7) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http://www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would ~~be~~ identify the location (including the ADAMS accession number, when available), the title and a page reference to the relevant document, data compilation, or tangible thing.

* * * * *

31. In § 2.710, paragraph (a) is revised to read as follows:

§ 2.710 Motions for summary disposition.

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. Summary disposition motions must be filed no later than 20 days after the close of discovery. The moving party shall attach to the motion a short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within 20 days after service of the motion. The party shall attach to any answer opposing the motion a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. The opposing party may, within 10 days after service, respond in writing to new facts and arguments presented in any statement

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

56. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, 95, 92 Stat. 2951 (42 U.S.C. 2021a and 5851) and 102, sec 2902, 106 Stat. 3123, (42 U.S.C. 5851); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Sec. 651(e), Pub. L. 109-58, 119 Stat. 806-810 (42 U.S.C. 2014, 2021, 2021b, 2111).

57. In § 61.25, paragraph (c) is revised to read as follows:

§ 61.25 Changes.

* * *

* *

(c) The Commission shall provide a copy of the notices ~~for~~ of opportunity for hearing provided in paragraph (a)(1) of this section to State and local officials or tribal governing bodies specified in § 2.104(c) of part 2 of this chapter.

Dated at Rockville, Maryland this XX day of MONTH 2012.

For the Nuclear Regulatory Commission.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Apostolakis

SUBJECT: SECY-12-0004 – FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (RIN 3150-AI43)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___

SIGNATURE

5/16/12
DATE

Entered on "STARS" Yes √ No ___

Commissioner Apostolakis' Comments on SECY-12-0004,
"Final Rule -- 10 CFR Parts, 2, 12, 51, 54, and 61
"Amendments to Adjudicatory Process Rules and Related Requirements"

I approve publication of the draft final rule subject to Commissioner Ostendorff's clarifying edits and the following comments. I appreciate the substantial staff effort that led to the submission of this draft final rule. The staff has addressed a broad array of issues. The final rule will improve the clarity and efficiency of our rules of practice in several areas.

I concur with the General Counsel's recommendation that the final rule not include any change in the provisions that govern interlocutory appeals. Although the Commission specifically requested public comment on two alternative approaches and their resource implications, the Commission received only one public comment on these alternatives and no public comment in support for a change in the current requirements. This response is somewhat surprising in light of past expressions of concern about the fairness and efficiency of the current requirements. A fulsome discussion of the potential benefits and potential disadvantages of the alternatives would have been of interest. As I stated in my vote (dated December 30, 2010) on the draft proposed rule, whether or not the Commission ultimately decides to adopt either option in the final rule, "stakeholder input would be beneficial and might inform a decision to pursue a different course of action, such as pilot to try option 1 or 2 in one or more cases."

Although I do not support Option 1, the potential benefits and costs of this option warrant an effort to gain further data and insights. By allowing any party to appeal in whole or in part an order granting a hearing, Option 1 could allow early resolution of issues that otherwise may surface late in a proceeding or percolate in several proceedings before reaching the Commission. Option 1 would also allow intervenors and other parties to obtain early review of rulings on individual contentions when a hearing is granted, and it might reduce incentives for appeals that challenge all admitted contentions. At the same time, Option 1 might introduce countervailing inefficiencies. Contentions that might be appealed and require additional resources under Option 1 may become moot during the course of a proceeding under current requirements, or the basis for the concern may be diminished as a hearing on one or more admitted contentions is conducted. Moreover, adoption of Option 1 could increase the adjudicatory workload of the Commission, the Office of Commission Appellate Adjudication, and the Office of General Counsel.

Given these uncertainties, I support Commissioner Magwood's proposal for development of a pilot program for the Commission's review and approval that would provide data and support a more informed analysis of the likely resource impacts of Option 1. The resulting analysis should assess the extent to which potential benefits of early interlocutory appeal may be limited or diminished by the frequency with which denied environmental and other contentions become moot or for other reason are not appealed to the Commission under the current regime. While it may be challenging to obtain data of significance, the experience gained through such a program, for instance a program involving several consecutive petitions for intervention, should shed light on the costs and value of Option 1.

I am not persuaded, however, that the Commission should direct the staff to conduct a review and prepare an analysis and separate voting paper on the additional issues that Commissioner Magwood identifies for review and development of possible policy or regulatory changes. In general, these issues fall into areas in which I expect NRC managers to exercise sound judgment and undertake initiatives as appropriate. For instance, I understand that the staff is already enhancing communication with the public about the hearing process as it relates to particular proceedings. Also, while two of the issues question whether the staff should exercise greater restraint with regard to participation in certain proceedings or on certain issues, the staff's perspective in adjudicatory matters is of high value to me and should be of value to the licensing boards, other parties, and the public. The NRC staff brings an independent perspective into the mix that is grounded in long experience with our procedural rules and extensive knowledge of related technical issues and licensing processes. Moreover, the staff does exercise its discretion not to participate on occasion. The staff needs to participate in the consideration of environmental issues, which appear to be the most common type of contention in our adjudicatory proceedings.

George Apostolakis 5/16/12

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MAGWOOD

SUBJECT: SECY-12-0004 – FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (RIN 3150-AI43)

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached X None ___

SIGNATURE

4 May 2012

DATE

Entered on "STARS" Yes X No ___

Commissioner Magwood's Comments on SECY-12-0004,
"Final Rule—10 CFR Parts 2, 12, 51, 54, and 61
'Amendments to Adjudicatory Process Rules and Related Requirements'"

I approve the subject draft final rule for publication in the *Federal Register*, subject to Commissioner Ostendorff's clarifying edits and the additional comments below. I commend the staff for its hard work in bringing this issue to closure, and, in particular, for its efforts to engage affected stakeholders including representatives of industry, members of the public, and the Atomic Safety and Licensing Board Panel.

With respect to interlocutory review of Board decisions related to petitions for hearing and leave to intervene, I am sympathetic to the concerns expressed by some members of the Panel that the current system has the practical effect of encouraging the applicant to oppose every proffered contention, regardless of its merit, because that is the only way to preserve an applicant's "automatic" appeal right. I have also perceived an inequity in the current system, which allows applicants and the staff to file an interlocutory appeal of a partial loss in arguing for dismissal of all contentions, but fails to provide a similar method for intervenors to pursue an appeal of a denied contention until the completion of the proceeding. These comments have been echoed by intervenor groups in various discussions with them.

Nevertheless, no such concerns were placed into the record during the rulemaking process. Given the dearth of public comment on the proposed revisions, I support OGC's recommendation to refrain from revising 10 C.F.R. § 2.311 at this time.

However, I believe this is a matter that could benefit from additional study. In particular, the agency would benefit from the development of concrete information regarding the resources the Commission, OCAA, and OGC might need to expend under a revised regime. To address this information need, I suggest a pilot program be developed to study the resource implications of a revised § 2.311 as envisioned in Option 1 of SECY-12-0004. To pursue this, OGC should provide the Commission a program proposal for its review and approval. The proposed pilot program should anticipate appropriate engagement with the public.

If such a program is approved and implemented, staff should use the results of this effort to provide the Commission with an analysis that compares the resource requirements of a regime such as suggested in Option 1 to those associated with the current rule. In addition to information obtained from the pilot program, staff's analysis may consider other relevant information associated with the NRC's experience with long, complex litigation as well as any lessons learned from the High Level Waste

proceeding (where appeals were governed by 10 C.F.R. § 2.1015 rather than § 2.311). Staff should provide a range of options for Commission review and approval.

In a separate matter, some intervenor groups have expressed concern that the staff often appears to be aligned with licensees and license applicants in our adjudicatory proceedings. In my discussions with various groups, they have stated that they feel they must fight on two fronts. The view that staff and licensees are unified against interventions may be more an issue of perception and a result of the fact that we typically hold our contested hearings after the staff has completed its review. However, it is also true that the agency could take some steps to improve both the perception and reality of balance.

Outside of the effort associate with this current rulemaking, and separately from the pilot program discussed above, I suggest that OGC, with the support of OCAA, SECY, and the EDO, review the issues outlined below. Following its consideration of these issues, OGC should provide its analysis to the Commission in a voting paper, along with any suggested policy or regulatory changes:

1) Subpart L of 10 C.F.R. Part 2 affords the staff the option, seldom if ever used, of determining that it will not participate in certain proceedings or on certain issues. Staff should consider whether the agency should exercise greater restraint with regard to its participation in such proceedings and instead focus its attention solely on environmental issues and novel or technically complex safety issues.

2) Staff should analyze whether the agency should decline to file a pleading on every procedural question that arises during an adjudication, instead focusing its resources on novel procedural issues and on its own technical and environmental reviews.

3) Staff should consider how the agency can improve its communications with the public regarding the NRC's adjudicatory process in general as well as in particular adjudicatory proceedings. I recognize that the level of public communication will differ based on the stage of the proceeding. For example, during a contested proceeding, the staff and the Commission's communications with intervenors are limited by rules on *ex parte communica*tions. This limitation is well-understood, and the staff should continue its efforts to keep intervenors informed of new publicly-available documents and to facilitate their participation in or observation of communications between the staff and applicants.

However, I believe the public would benefit from further outreach and education related to hearing rights, roles, and responsibilities. This is both a generic and a specific problem. Generically, the agency as a whole can work better to publicize hearing processes and inform and educate the public on the processes. For example, it might be useful to have representatives from OGC accompany the technical staff to any pre-docketing meetings on all applications subject to a Notice of Opportunity for a Hearing so that they can explain the hearing process to members of the public prior to the deadlines for intervention.

4) Finally, intervenor groups have expressed a particular frustration regarding what happens to "failed" contentions. Often contentions will be rejected on procedural grounds or for a lack of factual support. While this may be the correct outcome legally, sometimes these contentions may raise legitimate safety questions. It is my understanding that the staff will often, in fact, incorporate any issues highlighted by "failed" contentions into the scope of their technical review. However, this process is not readily transparent to the public; intervenors have expressed that they feel like their issues, if not admitted as contentions, seem to fall into a black hole.

   The staff should consider developing a more formal approach to consider "failed" contentions in technical reviews and inspections and establish practices to communicate to the public regarding its efforts to follow up on such issues.

I believe the staff does an excellent job in addressing issues raised by public groups and responding to these issues in a careful, procedural manner. But I also believe that we, as public servants, should attempt to go that extra mile to assure that the public understands what we decide and what actions we take. I hope the reviews recommended above will provide the Commission with the information needed to consider improvements to our processes in pursuit of that objective.

5/4/12

William D. Magwood, IV Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER OSTENDORFF

SUBJECT: SECY-12-0004 – FINAL RULE—10 CFR PARTS 2, 12, 51, 54, AND 61 "AMENDMENTS TO ADJUDICATORY PROCESS RULES AND RELATED REQUIREMENTS (RIN 3150-AI43)

Approved _X_ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _X_ None ___

_____
SIGNATURE

3/19/12
DATE

Entered on "STARS" Yes _x_ No ___

Commissioner Ostendorff's Comments on SECY-12-0004, "Final Rule—10 CFR Parts 2, 12, 52, 54, and 61 'Amendments to Adjudicatory Process Rules and Related Requirements' (RIN 3150-A143)"

I approve publication of the draft final rule in the *Federal Register*, subject to the attached clarifying edits. I thank the staff for their hard work in bringing this draft final rule to completion and commend them for their thoughtful consideration of the public comments. I also appreciate their concerted outreach to the Atomic Safety and Licensing Board Panel (ASLBP). The revisions contained in the draft final rule not only correct and clarify 10 C.F.R. Part 2, but also improve upon our adjudicatory process.

I approve OGC's recommendation to retain the current Commission standards for interlocutory appeals. Although I can understand some of the ASLBP members' concerns regarding potential inefficiencies and inequities in the current system, I agree with OGC that there is no compelling reason to amend the current process.

I also approve OGC's revised proposed 10 C.F.R. § 2.346(j), which delegates authority to the Secretary to take action on "other minor matters." The narrower scope of the final rule's language, along with the examples provided in the draft *Federal Register* notice, provide clear limits on the extent of the Secretary's delegated authority.

need to be accompanied by or included in a motion for leave to file. The petitioner must, however, still show standing and demonstrate that it has satisfied the three factors in final § 2.309(c)(1) before its contentions will be considered.

The revisions to § 2.309 do not affect participants' ability to request modifications to deadlines under § 2.307, including the deadline in § 2.309(b) for filing a hearing request, intervention petition, or new or amended contention. A participant may file such a request under § 2.307 in advance of a deadline—for example, if the participant is unable to meet a deadline because of health issues—or shortly after a deadline—for example, if unanticipated events, such as a weather event or unexpected health issues, prevented the participant from filing for a reasonable period of time after the deadline. The NRC notes that "good cause" in § 2.307 does not share the same definition that is used for "good cause" in final § 2.309(c), so certain extraordinary circumstances such as a weather event or health issues might meet the definition of "good cause" in § 2.307 (even though these circumstances would not satisfy the definition of "good cause" in final § 2.309(c)). Final § 2.309(c)(2) makes clear that participants should file such requests for extending a filing deadline due to reasons not related to the substance of the filing under § 2.307, not § 2.309. It should be emphasized that the weather events and health issues described in this paragraph are examples that might satisfy the "good cause" standard in § 2.307. The presiding officer will ultimately determine on a case-by-case basis whether a participant has demonstrated good cause for a § 2.307 request to extend a filing deadline.

After a § 2.307 request~~ed~~ to extend~~sion of~~ a filing deadline ~~under § 2.307~~ is granted, ~~if~~ assuming the participant files by the new deadline (i.e., the extended date), ~~then the participant's filing will be treated as if the participant filed by the deadline that was extended—in other words,~~ the participant ~~would need to~~must only satisfy the requirements that would have applied had the participant filed by the original deadline (i.e., the deadline that was extended). ~

In other words, if a participant is granted a § 2.307 extension and files by the new deadline, the participant's filing is treated as if it were filed by the original deadline. Therefore, as an example, a participant would not need to satisfy final § 2.309(c)(1)~~So,~~ if ~~a~~the participant requested under § 2.307 to extend the applicable deadline in § 2.309(b), this request was granted, and the participant filed by the new deadline. The participant would not need to satisfy final § 2.309(c)(1) under these circumstances ~~extended date, then the participant would not need to satisfy final § 2.309(c)(1)~~ because the participant's filing would be treated as if it were filed before the ~~applicable~~ deadline in § 2.309(b) and thus final § 2.309(c)(1) would not be triggered. ~~However~~In contrast, a participant would need to satisfy final § 2.309(c)(1) if ~~a~~the participant requested under § 2.307 to extend a specific deadline set by the presiding officer that was later than the deadline in § 2.309(b) (such as a specific deadline set by the presiding officer for contentions based on a newly issued NRC NEPA document), this request was granted, and the participant filed by the new deadline. ~~extended date, then the participant would need to satisfy final § 2.309(c)(1) since~~The participant would need to satisfy final § 2.309(c)(1) under these circumstances because the § 2.309(b) deadline would have passed with or without the § 2.307 extension.

Final § 2.309(c) requires all filings after the deadline in § 2.309(b) to satisfy the current § 2.309(f)(2)(i)-(iii) factors. In the proposed rule, the NRC proposed making good cause the sole factor in § 2.309(c) for filings after the deadline and adopting the three factors found in current § 2.309(f)(2) as the standard for determining whether good cause exists under § 2.309(c). After further consideration, the NRC has decided that while the three factors from current § 2.309(f)(2) will be the sole bases for deciding whether to consider filings after the deadline with respect to the substance of the filing; a clarification will be added to final § 2.309(c)(2) to make it clear that requests to change the deadline itself should be made under § 2.307.

file new or amended environmental contentions after the deadline in § 2.309(b) (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 final § 2.309(c).

As part of the proposed rule, the NRC included a new § 2.309(c)(5), which would have required (similar to the language in current § 2.309(f)(2)) new or amended contentions challenging a draft or final NRC NEPA document to show that there is a significant difference between the applicant's environmental report and the NRC NEPA document. This proposed section would treat the "significant difference" language in current § 2.309(f)(2) as an additional requirement, beyond the proposed § 2.309(c) requirements, for environmental contentions filed after the deadline. After further consideration, the NRC has decided not to adopt proposed § 2.309(c)(5) and instead is clarifying that the "significant difference" language in current § 2.309(f)(2) is not a separate standard, but is captured by the three factors in final § 2.309(c)(1). Under the final rule, participants are still required to file their initial environmental contentions on the applicant's environmental report, even though the NRC staff's NEPA documents are the subject of the environmental portion of the hearing. New or amended environmental contentions filed after the deadline, like new or amended safety contentions filed after the deadline, need to satisfy the requirements in final § 2.309(c). The NRC does not believe that there should be an additional requirement that must be satisfied for new or amended environmental contentions filed after the deadline.

~~However, a~~As previously specified in current § 2.309(f)(2), participants may file a new or amended contention after the deadline in § 2.309(b) based on a draft or final NRC NEPA document if the participant demonstrates good cause by 1) showing that the information that is the subject of the new or amended contention was not previously available; 2) showing that

The NRC is therefore amending § 2.336(b) to limit the scope of the staff's mandatory disclosure obligations to documents relevant to the initially admitted contentions and admitted new or amended contentions filed after the deadline in § 2.309(b). As a general matter, § 2.336(b) applies to all documents meeting the description in that provision whenever they're created, whether that be before or after the submission of the application.

Current § 2.336(d) requires parties to update their mandatory disclosures every 14 days. Experience with adjudications since early 2004 has demonstrated that the current disclosure provisions are much more burdensome for litigants than was initially anticipated. Part of the burden is the frequency of required updates to the mandatory disclosures. The NRC is therefore replacing the requirement to disclose information or documents within 14 days of discovery with *a continuing duty to provide a monthly disclosure update. Final § 2.336(d) directs the presiding* officer to select a day during the month (e.g., the first day of the month or the first Thursday in the month) when disclosure updates will be due. Alternatively, the parties may agree to a different due date or frequency for the disclosure updates.

Each disclosure update under final § 2.336(d) includes documents subject to disclosure under this section that have not been disclosed in a prior update. Documents that are developed, obtained, or discovered during the two weeks before the due date are not required to be included in that update (but if they are not included in the first update after they are discovered, then they must be included in the next update).

This change to § 2.336(d) will reduce the burden and increase the usefulness of updated disclosures. The NRC is also adding a sentence to the end of § 2.336(d), to clarify that the duty to update disclosures relevant to an admitted contention ends when the presiding officer issues a decision resolving the contention, or when otherwise specified by the presiding officer or the Commission.

c. Section 2.341(c)—Petitions for review not acted upon deemed denied.

As stated in the 2004 part 2 revisions, § 2.341 was intended to essentially restate the provisions of former § 2.786 (*see* 69 FR 2225; January 14, 2004). But the provisions of former § 2.786(c), under which petitions for Commission review not acted upon were deemed denied, were inadvertently omitted from § 2.341. Accordingly, the NRC is adding a new § 2.341(c)(1); current § 2.341(c)(1) is redesignated as § 2.341(c)(2), and current § 2.341(c)(2) is redesignated as § 2.341(c)(3). Final § 2.341(c)(1) adopts the deemed denied provisions of the former § 2.786(c) with the exception of the 30-day time limit, which is extended to allow 120 days for Commission review. As a practical matter, the 30-day time frame necessitated extensions of time in most proceedings, as 30 days is provided for the briefing period (i.e., for petitions for review, answers, and reply briefs). A 120-day Commission review period allows sufficient time to review the filings at the outset, without the unintended consequence of frequently needing extensions. The NRC therefore is adopting the deemed denied provisions of former § 2.786 with a 120-day time limit as final § 2.341(c)(1).

d. Section 2.341(f)—Standards for Atomic Safety and Licensing Board certifications and referrals.

The NRC is revising paragraph (f) of this section to address a perceived inconsistency in the standards for Atomic Safety and Licensing Board certifications and referrals to the Commission and Commission review of these issues. Current § 2.323(f) allows a presiding officer to refer a ruling to the Commission if a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, *or* if the presiding officer determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity. By contrast, current § 2.341(f) states that referred or certified rulings "will be reviewed" by the

Commission only if the referral or certification "raises significant and novel legal or policy issues, *and* resolution of the issues would materially advance the orderly disposition of the proceeding" (emphasis added). In essence, the current rules set forth different standards for presiding officers to apply when determining whether to certify a question or refer a ruling, from those that the Commission will use to determine whether it will accept review of a certified question or referred ruling. Further, this language has been interpreted to allow the Commission to accept referrals or certifications only if *both* standards in current § 2.341(f) are met, even though current § 2.323(f) allows a presiding officer to refer or certify a ruling if any of the criteria in current § 2.323(f) is met. *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 72 (2009). To remedy the inconsistency between the two regulations, as discussed with respect to § 2.323(f), the standards for referral by the presiding officer are revised to parallel the standards the Commission will consider in determining whether to take review of a certified question or referred ruling. Final § 2.341(f) provides the Commission with maximum flexibility by allowing, but not requiring, the Commission to review an issue if it raises significant legal or policy issues, or if resolution of the issue would materially advance the orderly disposition of the proceeding.

12. Section 2.346—Authority of the Secretary.

Current § 2.346(j) authorizes the Secretary to "[t]ake action on minor procedural matters." Section 2.346(j) has served an important function because the need for the Commission to issue orders and hold affirmation sessions to dispose of adjudicatory matters can sometimes result in undesirable delays in resolving minor matters before the Commission. Many of these minor matters, by their very nature, do not have the precedential or policy significance that reasonably warrants Commission attention. Thus, by delegating authority to the Secretary to

licensing board, would conduct the remainder of the proceeding. *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-19, 70 NRC 864 (2009).

- June 5, 2008 order in the High-Level Waste Repository proceeding denying a motion to disqualify a law firm from representing the applicant due to conflicts of interest. Resolving the motion to disqualify required Commission analysis on whether the claimed conflicts of interest jeopardized the NRC's statutory responsibility to protect public health and safety. *See U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-11, 67 NRC 379 (2008).

When exercising ~~her~~ the authority delegated ~~authority~~ to issue orders under § 2.346(j), the Secretary provides the Commissioners' offices with a draft of the order (generally three business days before the Secretary's action on the order). Internal Commission Procedures at I-2 (ADAMS Accession No. ML11269A125). This prior notification provides the Commission with an opportunity to issue the order itself if the Commission disagrees with the Secretary's determination that the matter at issue is "minor."

In addition to amending § 2.346(j) to clarify the Secretary's authority over minor matters, the NRC is removing the reference to § 2.311 in § 2.346(e). Moreover, there are no deadlines for Commission action on appeals under final § 2.311.

13. Section 2.347—*Ex parte* communications.

Section 2.347 prohibits what are known as *ex parte* communications between persons outside the NRC and NRC adjudicatory personnel on matters relevant to the merits of an ongoing hearing; this section currently applies to § 2.204 demands for information. Unlike the