April 30, 1993

MEMORANDUM FOR: William C. Parler
General Counsel

FROM: Samuel J. Chilk, Secretary /s/

SUBJECT: SECY-92-381 - RULEMAKING PROCEDURES FOR DESIGN CERTIFICATION

The Commission has reviewed the recommendations in SECY-92-381 and the relevant background material regarding rulemaking procedures for design certification (DC). The Commission approves the OGC recommendations in SECY-92-381, with the exceptions and clarifications set forth below.

The Role of the Licensing Board

The Commission (with all Commissioners agreeing) has decided that the licensing boards should serve as "limited magistrates" in DC rulemaking hearings. In addition, the licensing boards will not have sua sponte authority to raise new issues for discussion at any hearings. In this "limited magistrate" role, the boards should focus their efforts on compiling a record on the issues placed in controversy by the parties. However, consistent with a licensing board's responsibilities in any matter in which it presides, if, during the course of the hearing, the board does identify issues not raised by the parties, but which the board believes are significant enough to warrant the attention of the Commission, the board should identify those matters to the Commission along with its certification of the record.

Consistent with its decision that the licensing boards should serve as "limited magistrates" in DC rulemaking hearings, the Commission (with all Commissioners agreeing) adopts OGC's original recommendation in SECY-92-170 that establishment of special licensing boards is unnecessary if the licensing boards are to act as "limited magistrates".

SECY NOTE: THIS SRM, SECY-92-381, AND THE VOTE SHEETS OF ALL COMMISSIONERS WILL BE MADE PUBLICLY AVAILABLE 10 WORKING DAYS FROM THE DATE OF THIS SRM

Separation of Functions/Ex Parte Restrictions

The Commission (with the Chairman and Commissioners Rogers and de Planque agreeing) has approved the position that unless the formal procedures of Subpart G are invoked, the staff should not be treated as a party to any proceeding and should not be subject to any separation of functions limitations. To the extent any informal hearings are held, the staff may assist in the hearings in order to answer questions about the SER or the proposed rule or provide additional information or documentation or provide such other assistance as the licensing board may request without the staff's assuming the role of an adversary party in the proceeding. Commissioners Curtiss and Remick would have preferred to follow OGC's recommendation that the staff be a full party in any formal hearing, and that in any informal hearing the staff be permitted opportunities to respond to commenting parties' motions, presentations, and requests, including requests for informal hearings and initial requests for additional procedures or formal hearings.

The application of limited ex parte restrictions should occur only after the NRC receives a request for a DC rulemaking hearing. The ex parte restrictions should be no broader than the restrictions contained in 10 CFR § 2.780(a). Under such ex parte restrictions, the Commission as a whole would communicate with interested persons on the DC rulemaking issues only through docketed, publicly available written communications and public meetings. Individual Commissioners could communicate privately with interested persons but the substance of the communication would be memorialized in a document that would be placed in the PDR and distributed to the licensing board and parties to the DC rulemaking hearing. In an informal hearing, the staff would be able to communicate with interested outsiders on rulemaking hearing issues. However, to the extent the communication is used by the staff in the rulemaking, the communication will be treated the same way a private communication between an individual commissioner and interested persons is treated.

Requirements for Hearings

The Commission (with all Commissioners agreeing) has approved the following OGC recommendations:

1. The use of a two-part threshold for obtaining an informal hearing, wherein the requester must submit written presentations to be included in the record of the hearing and must demonstrate appropriate knowledge or qualifications to contribute significantly to the

development of a hearing record. The criteria for determining when a requestor has "appropriate knowledge or qualifications to enable them to contribute significantly to the development of the hearing record" should be included in the notice of proposed rulemaking. The Commission will decide the hearing requests and specify the controverted matters on which the licensing board is to compile a record.

2. The Commission accepts the proposed criteria to be applied by the licensing board in ruling on requests for oral presentations and questions, as well as in ruling on the timing and standards for requesting additional hearing procedures, discovery, and formal hearings. The licensing board will not be given sua sponte authority to request additional hearing procedures or formal hearings.

3. Parties should be required to file their findings directly with the Commission within 30 days after the close of the rulemaking hearing record.

4. The failure of a party to file findings on a controverted issue should not result in "dismissal" of that issue from the rulemaking.

5. The Commission will not take the position upon appeal of a DC rule that appellants have not exhausted their administrative remedies because they either did not request an informal hearing, or have not participated fully in a hearing which they requested and were granted.

Additionally, the Commission (Commissioners Curtiss, Remick and de Planque agreeing) has concluded that the licensing board, acting as a "limited magistrate," should certify the record to the Commission 30 days after the rulemaking hearing record is closed. The Chairman and Commissioner Rogers would have preferred a 15 day period.

Treatment of Proprietary Information

The Commission (with all Commissioners agreeing) has approved the proposal to keep all proprietary information out of the DC rule (both Tier 1 and Tier 2) and the staff's SER would contain the necessary and sufficient nonproprietary information to justify the safety determinations reached. Residual proprietary information in the application could be either: (1) referenced as additional supporting basis for one or both tiers, but not included in the tiers themselves, and/or (2) approved by the

staff in a topical report as an acceptable means for complying with some ITAAC. In the latter case, there would be no issue preclusion and the matter could be litigated in the COL hearing.

Under these circumstances, the Commission (with all Commissioners agreeing) has approved the process that limits access to proprietary information to parties to the rulemaking hearing upon a showing that: 1) nonproprietary information is not adequate to prepare for the hearing; 2) information sought is relevant to issues to be considered in the hearing; and 3) the party has the expertise to use the information and make a significant contribution to the hearing record.

However, should it become necessary to rely upon proprietary information to form the basis for part or all of the DC rule, the commenters should be provided access to the information with any necessary limits (e.g., non-disclosure agreement) on the commenters' ability to further disseminate the proprietary information. The commenters should first seek access to proprietary information directly from the DC applicant. If the person seeking access is unable to obtain the information from the DC applicant or believes that the terms of the applicant's non-disclosure agreement are unreasonable, the person could seek resolution of the matter from the Commission or from the DC rulemaking licensing board.

Mechanisms for Early Public Participation

The Commission (with all Commissioners agreeing) has approved the proposal that the NRC should provide ample opportunity for early public participation in the DC review. These opportunities should include publication in the Federal Register of notices of availability of SECY papers and draft and final SERs, notice of key FDA/DC events, and the use of ANPRs and public workshops in the early stages of the design review. On a case-by-case basis, the use of alternative dispute resolution techniques to resolve DC rulemaking issues should be considered. However, the Commission opposes the use of negotiated rulemaking for DC under Part 52.

Funding of Public Participants

The Commission (with all Commissioners agreeing) has disapproved the proposal to provide funding for people who desire to participate in the DC process.

Timing of the Rulemaking Process and Comment Period

The Commission (with all Commissioners agreeing) has approved the proposal that the Notice of Proposed Rulemaking (NPR) for the DC be published within 90 days after the issuance of the Final Design Approval (FDA) for the design. In addition, the subsequent public comment period for the NPR should be set at 120 days and run concurrently with the period for requesting an informal hearing.

Generic Rulemaking Procedures

The Commission (with all Commissioners agreeing) has approved the proposal to delay codification of generic procedures for conducting DC rulemakings until the first two DC rulemakings have been conducted.

Other Recommendations

In addition, the Commission (with all Commissioners agreeing) has approved the proposals that:

1. the staff continue its practice of docketing design certification applications, and publication of a notice of docketing in the Federal Register,

2. parties not be permitted to participate as parties on issues which they did not controvert (though parties may submit written information and written arguments on such issues),

3. design certification hearings be held in the Washington DC metropolitan area, but that requests for hearing sessions in other locations will be considered by the Commission upon a demonstration of special circumstances by a requestor or upon the Commission's discretion, and

4. the final DC rule be based only upon information in the DC rulemaking docket.

cc: The Chairman
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
Commissioner de Planque
EDO

OIG
Office Directors, Regions, ACRS, ACNW (via E-Mail)
OP, SDBU/CR, ASLBP (via FAX)