

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ZECH

SUBJECT: SECY-85-227 - PROPOSED RULE ON INFORMAL HEARING PROCEDURES FOR MATERIALS LICENSING ADJUDICATIONS

APPROVED _____ DISAPPROVED X (w/comments) ABSTAIN _____

NOT PARTICIPATING _____ REQUEST DISCUSSION _____

COMMENTS: See attached comments.

Lardo w. Zech Jr.

SIGNATURE

7-17-85 ALB

DATE

YES

NO

Entered on "AS"

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

Comments:

As I have indicated in two prior votes, I support the objective of informal hearing procedures. I also support closing this project out as soon as possible. Although I agree with much of the proposed rule, I cannot support it in its present form.

My principal areas of concern are:

1. Although the staff has had practically all of the experience in this area and will have to implement the procedures, I am not aware of the EDO's and ELD's views on the proposed rules. I would like to have the paper coordinated with the staff before I vote.
2. The proposed rules cover enforcement actions against material licenses. I do not believe that enforcement proceedings should be grouped with licensing actions in procedures for informal hearings. Although it may be true that this could be done legally, I am inclined to believe that any hearing in an enforcement proceeding should follow acceptable procedures for a formal adjudication. In any event, I am informed that the objective here over the years has been to develop informal hearing procedures for materials licensing adjudications. I am not aware that materials license enforcement adjudications have ever been considered as needing the development of informal procedures.
3. I do not know whether, and if so to what degree, including enforcement proceedings in the proposed rule may have resulted in the procedures being more formal than otherwise might be necessary.
4. It seems to me that the proposed rules unnecessarily introduce into the informal hearing procedures elements of the legal concepts of separation of functions and ex parte communications. Instead of doing this, why doesn't the proposed rule simply provide that any informal adjudication shall be based on information in the public record and with respect to which all parties have been given reasonable prior notice?

(Incidentally, if the concept of the ex parte prohibition is retained for informal adjudications (which I do not recommend) then the procedures will have to consider what impact this would have on internal staff communications, whether or not the staff is a party to the proceeding. The staff cannot act as a conduit for what would otherwise be an improper ex parte communication.

5. It seems to me that the proposed rules may in some areas of the proceeding impose unnecessarily inflexible constraints so that no discretion could be exercised to deal with special

circumstances. Why, for example, should discovery and cross-examination be prohibited no matter how important either might be for a sound, informed decision to be rendered in the proceeding. I agree that typically, procedures such as these would not be proper. However, some safety valve provision should be included for special circumstances.

In addition to these principal concerns, I have the following comments:

1. The proposed rule would limit petitions for hearing to 30 days after the petitioner received actual notice of the matter involved or 1 year after completion of the agency action, whichever first occurs.

To avoid any misunderstanding on these limitations, I believe that the proposed rule should distinguish the time constraints on these petitions for hearings with the right which any person already has under our rules to petition the NRC to take certain actions. These latter rights are not bounded by time constraints.

2. Petitioners would not be required to provide the support for the issues which they are seeking to raise in the proceeding. It would seem useful to me to have the petitioners submit a summary of the facts and arguments (known to them at the time) concerning the issues on which they seek a hearing.
3. Proposed rule 2.1211 states that a limited appearance statement is not "evidence" in the hearing. Although this statement is meaningful in the context of a formal trial-type adjudication, its meaning and implications for an informal adjudication is not self-evident.
4. Proposed rule 2.1239 uses the words "contested proceedings". These words have been long associated with formal trial-type adjudications. I suggest the words: "The fair and reasonable settlement of issues in the proceeding is encouraged."
5. Under 2.1213, the NRC staff would have the discretion to decide whether or not it will participate as a party. Shouldn't there be some provision for the special circumstances case in which the presiding officer decides that the staff should participate in the proceeding?