Cunningham 3

seeking release of the highlighted sections on pages 8-10, 12, 18-20 & 23 only (total = ca 3½ pp out of 87 pp) Copies provided to NRC, JL

RULEMAKING ISSUE

(Notation Vote)

October 15, 1985 SECY-85-328

To: The Commissioners

From: Herzel H. E. Plaine, General Counsel

Subject: DRAFT FEDERAL REGISTER NOTICE PROPOSING REVISIONS TO THE COMMISSION'S EX PARTE AND SEPARATION OF FUNCTIONS RULES

Summary: The Commission requested that OGC draft proposed revisions to the Commission's ex parte and separation of functions rules based upon a March 20, 1985 proposal by Commissioner Zech and an OGC proposal of April 6, 1984. The attached draft Federal Register notice (Attachment 1) would revise the ex parte rule to conform it to the Sunshine Act's revisions to section 557 of the Administrative Procedure Act and to limit the application of that rule to communications between adjudicators and interested persons

CONTACT:
Paul Bollwerk, OGC
4-3224

A/4

[redacted]

outside the agency. The proposed separation of functions rule, which provides restrictions on intraagency communications, would relax the present restriction on any private contact by adjudicators with any member of the NRC staff regarding a matter at issue in a licensing proceeding, thereby providing the Commission with the opportunity for increased access to staff expertise.

Discussion: The proposed rule is designed to serve a number of different purposes. First, it would codify the distinction between those communications restricted as ex parte and those barred on the basis of separation of functions concerns. Thus, the ex parte provision, § 2.780, deals only with communications between adjudicators and interested persons outside the agency, while the separation of functions restriction, § 2.781, deals with intraagency communications between the NRC staff and agency adjudicators. In addition, the rule would complete the process

originally begun in a 1979 proposed rule, 44 Fed. Reg. 12428 (Mar. 7, 1979), of conforming agency regulations with the specific terms of the ex parte provision of the Administrative Procedure Act (APA), 5 U.S.C. § 557(d), which was enacted in 1976 as part of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241.

Finally, the proposed separation of functions rule presents two options to enhance communications between adjudicators and the NRC staff. In line with our April 6, 1984 memorandum, Option 1 would provide that adjudicators could consult privately about a particular licensing proceeding with staff members who are not involved in "investigating" or "litigating" that proceeding. Option 2, which is based upon Commissioner Zech's proposal, has the additional feature of allowing private consultations with those staff employees who are involved in the licensing process but

who perform or supervise, or testify on the basis of performing or supervising, a neutral scientific or engineering review of publicly available materials.

Commissioner Zech's proposal and a draft version of the attached proposed Federal Register notice were sent to the Atomic Safety and Licensing Appeal Panel, the Atomic Safety and Licensing Board Panel, and the Executive Legal Director for comments. Changes made to incorporate their comments and a summary of their recommendations regarding the options to the separation of functions rule are noted in this paper. Also included is our analysis of certain questions posed by Commissioner Roberts concerning Commissioner Zech's proposal. (Attachment 2)

I. § 2.4 - General Definitions Provisions

The definitions that are proposed to be added to § 2.4, the general definition section of Part 2,[1] would answer three questions: 1) who are "Commission adjudicatory employees" with whom communications are restricted under the ex parte or separation of functions rules; 2) what is an "ex parte communication"; and 3) what are the "functions" performed by particular members of the NRC staff that will result in restrictions being placed on any private consultation between adjudicators and those staff members. A brief explanation of each of those definitions follows:

The term "Commission adjudicatory employee" in section 2.4 originally was used in the rule

[1]At the request of the Rules and Procedures Branch, we have incorporated into this rulemaking a format change for § 2.4 whereby the present letter designations would be dropped and the definitions in the section would be listed in alphabetical order. This change would bring that section into compliance with the current stylistic requirements of the Office of the Federal Register.

proposed in 1979 and was incorporated into both the proposals of OGC and Commissioner Zech. The one revision from these proposals is a change suggested by both the Licensing and Appeal Boards to paragraphs (2) and (3) to include all Panel members as adjudicatory employees whether or not they are serving on the Board involved in a particular proceeding. This would have the effect of preventing uninvolved Panel members from becoming conduits for restricted communications to a particular Board.

Also revised is the definition in paragraph (9) that is intended to cover staff employees who will be providing private advice to the Commission or other adjudicatory employees. The language of this definition has been broadened from that in the proposals of OGC and Commissioner Zech to indicate it applies to those "appointed by the Commission to participate or advise in an initial or final decision." This would allow for the use of staff advisors by any adjudicatory employee, not

just the Commission, with the caveat that the Commission would have control over such consultation by an appointment process.

As the Statement of Considerations notes, Attachment 1, at 8-9, Commission appointment of staff advisors will serve several purposes. First, it will allow for a process to ascertain the nature of the person's prior involvement in the proceeding to determine whether he already has performed functions that would disqualify him from acting as a private advisor. In response to concerns expressed by the Executive Legal Director, this appointment process also is intended to provide a mechanism for the Executive Director for Operations to provide his views on what impact the designation of, and the concommitant loss of access to, a staff member would have on staff resources needed to participate in a proceeding. Finally, a public designation process will provide a way to put persons outside the agency on notice of which particular staff members are Commission advisors

so that outsider ex parte contacts with such advisors can be avoided.

The definition of "ex parte communication" set out in § 2.4 is taken from the statutory definition found at 5 U.S.C. § 551(14). As the proposed Statement of Considerations details, Attachment 1, at 10, a reference in the 1979 proposed rule to notice and opportunity to respond by "participants" to the proceeding has been changed to "parties." This conforms the rule to the language of the APA and makes it clear that those making limited appearances under 10 CFR § 2.715(a) need not be given notice of a communication in order for the communication not to be considered "ex parte."

If a staff member is involved in an "investigative or litigating function" as defined in the third addition to section 2.4, under section 2.781 he will be precluded from advising privately any adjudicatory employee concerning the merits of the proceeding.

Several points should be noted with regard to this definition. First, as is explained in the Statement of Considerations accompanying the proposed rule, Attachment 1, at 10-11, the use of the term "litigating" rather than the APA term "prosecuting" appears to conform most closely to current legal scholarship regarding the meaning of the APA's separation of functions provision. Indeed, the most recent commentors argue persuasively that either as a matter of statutory interpretation, Asimow, When the Curtain Falls: Separation of Functions in Federal Administrative Agencies, 81 Colum. L. Rev. 759, 772-73 (1981), or constitutional due process,[2] Shulman, Separation of Functions in

---

[2]In this regard, Professor Davis has declared:

> The APA provisions that fail to forbid combinations of advocating and judging in the same individuals are uncured by the legislative history. The only cure lies in judicial use of due process. Yet the comprehensive treatment of separation of functions by Congress, without forbidding various combinations of advocating with judging, could deter some courts from forbidding what Congress failed to forbid, and the courts have not aggressively used due process.

[Footnote Continued]

Formal Licensing Adjudications, 56 Notre Dame Law. 351, 394-401 (1981), it is improper to construe the term "prosecutor" to cover only those staff members involved in the classic "prosecutorial" role in "accusatory" proceedings in which a critical element is consideration of the propriety of past conduct. Instead, they assert, the controlling principle for application of the separation of functions restriction should be whether the staff member can be considered an advocate or has developed a "will to win" by way of a psychological commitment to achieving a particular result because of involvement in litigating the particular case as part of the agency staff team. See also Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980). The proposed rule thus uses the term "litigate," which we believe more clearly embodies the appropriate concept of "advocate." However, given the paucity of case

---

[Footnote Continued]

3 K. Davis, Administrative Law Treatise § 18.5, at 355 (2d ed. 1980).

law (apart from Grolier), a reasonable argument can be made to the contrary, and the use of the term "litigate" is conservative.

In defining the specific activities that will constitute "investigative or litigating functions," paragraph (1) indicates it will include "planning, conducting or supervising an investigation." Although Commissioner Zech's proposal was phrased in terms of "conducting or supervising an inquiry or investigation of alleged wrongdoing," as OELD pointed out in its comments, the use of the terms "inquiry" and "alleged wrongdoing" creates ambiguities that might be read to encompass inspections or licensee surveys, a result that seemingly would go beyond what the APA requires. Accordingly, we have incorporated the APA's specific term "investigation."[3]

[3]OELD also suggested that some attempt be made to define "conducting or supervising" by delineating the type of personnel and the chain of command that would fall within the definition. While

[Footnote Continued]

The definition of "investigative or litigating function" in § 2.4 also presents two options for Commission consideration relative to a staff member's participation in a formal adjudicatory proceeding. Under Option 1, paragraph (2) of the definition covers functions involving personal participation in a proceeding as a technical reviewer, attorney, witness, etc. It does not include staff activities, such as research, that are not directly related to a particular proceeding or acting as a supervisor or subordinate of one performing investigative or litigating functions, so long as the supervisor or subordinate does not perform investigative or litigating functions in the proceeding.

[Footnote Continued]

this suggestion would appear to simplify the administrative process of determining who is an investigator or litigator, its practical application seems somewhat questionable since a person's activities with regard to a particular proceeding rather than his position or title ultimately will define whether he is eligible to provide private advice to adjudicators.

Option 2, which is essentially Commissioner Zech's proposal regarding separation of functions, includes an additional paragraph (3) that provides that the neutral scientific or engineering review of an issue in a proceeding based solely on the application of scientific or engineering principles to factual materials publicly available is not an "investigative or litigating function." Under this exemption, staff activity in reviewing, or supervising the review of, a license application would not necessarily disqualify an individual from later designation as an advisor to an adjudicator. In addition, paragraph (3) of Option 2 would allow staff witnesses whose testimony is based on the performance or supervision of a neutral review of publicly available material to later act as adjudicatory advisors. This proposal is based on Professor Kenneth Culp Davis' idea that a distinction should be drawn between staff witnesses who provide their opinions and analysis of technical information and those whose testimony provides the factual basis of

the agency's case. 2 K. Davis, Administrative Law Treatise § 13.10, at 243 (1958). Indeed, Professor Davis declares, the rights of the parties are better protected when adjudicators are allowed to consult privately with experts who have testified since the ideas and opinions already have been subjected to cross-examination and rebuttal by the parties. Id. at 247.

II. § 2.780 - Ex Parte Communications

The proposed ex parte rule set out in section 2.780 in large part incorporates the provisions of the Sunshine Act regarding prohibited communication between adjudicators and "interested persons" outside the agency.[4] It includes a prohibition both on making and receiving ex parte communications and contains a provision that allows for sanctions to be taken

[4]As the Statement of Considerations to the proposed rule explains, Attachment 1, at 14-15, the term "interested person" is derived from the Sunshine Act and is intended to cover any person whose interest in an agency proceeding "is greater than the general interest the public as a whole may have."

against outside persons who knowingly make an ex parte communication.[5]

The present ex parte restriction applies whenever a hearing is requested, 10 CFR § 2.780(a); however, in line with the language of the Sunshine Act, under paragraph (e) the proposed ex parte prohibition would begin to apply when a hearing is noticed or whenever an interested person learns that a hearing will be noticed. An argument can be made that, as with section 2.780(e) of Commissioner Zech's proposal, the real concern with ex parte contacts arises when it is finally settled what the issues in the case will be, i.e., they are admitted matters in controversy. Nonetheless, given the specific statutory language as well as concerns expressed by OELD and the Appeal and

[5]A provision in Part 0 of the Commission's regulations, which sets forth employee standards of conduct, advises agency personnel of the existence of both the ex parte and separation of functions restrictions and could serve as a basis for disciplinary action against agency employees in appropriate circumstances.

Licensing Boards concerning this provision as written,[6] it has been revised to conform it to the language of the Sunshine Act.

Paragraph (f) of § 2.780 of the proposed rule also describes several specific types of communications to and from interested persons that will not be considered ex parte. These include communications concerning 1) status of proceedings, 2) matters in litigation or before another agency,[7] and 3) generic issues involving

---

[6]OELD expressed a concern that the provision in Commissioner Zech's proposal was unclear because there now exists no procedure for "designating a matter in controversy," while the Licensing and Appeal Boards indicated that the often considerable amount of time between a notice of hearing and the admission of contentions "allows for much mischief."

[7]It should be noted that exemption for communications relating to litigation and other agencies proceedings contained in the ex parte rule, § 2.780(f)(3), allows communication only to members of the General Counsel's office, while the separation of functions provision, § 2.781(b)(1)(ii), does not contain this limitation. Because the communications likely will be from persons, most notably the applicant and intervenors, that have a critical private interest in the outcome of the proceeding, and because the communications may involve extensive discussions and negotiations that go to the heart of a pending proceeding, we believe that screening such outside communications through the General Counsel's office is desirable to avoid unnecessarily tainting the adjudicatory process.

the public health and safety or other agency statutory responsibilities such as rulemaking, congressional hearings on legislation, and budgetary planning. Besides those communications designated in OGC's and Commissioner Zech's proposals, we have added a paragraph, § 2.780(f)(2), that acknowledges there may be other regulatory or statutory exclusions.

With regard to the exemption for generic issues, the proposed rule relaxes the requirement of the exemption for generic matters found in section 2.780(d)(2) of the existing rule by not requiring that the communication be "requested by" the adjudicatory employee. As a counterbalance, however, it adds the explicit caveat that the communication is not to be associated by the adjudicatory employee or the interested person with the resolution of any formal adjudicatory proceeding pending before the NRC.

III. § 2.781 - Separation of Functions

The separation of functions provision of the proposed rule sets out those restrictions that will be applicable to intraagency communications between adjudicatory employees and NRC staff members. As was indicated previously, the rule is based on the premise that "advocates," rather than "prosecutors," are to be covered by the prohibition. Further, as the Statement of Considerations explains, Attachment 1, at 20-21, the rule would not be based in any critical way upon the initial licensing exemption, which, as with the use of the term "prosecutor," appears grounded in the questionable premise that the application of the APA separation of functions provision should turn on whether a given proceeding is accusatory or nonaccusatory. While we likely will use that exemption as part of any defense of the relaxed prohibition on intraagency communications that is embodied in either option we have proposed, we would not recommend that the Commission invoke it as a basis for suspending all restrictions on

intraagency communications in proceedings that otherwise might be classified as "initial licensing."

As with the ex parte rule, a number of communications not subject to the separation of functions bar are set forth in section 2.781(b). Under section 2.781(b)(1), communications to any adjudicatory employee regarding status reports, agency participation in matters pending before a court or another agency, and generic issues involving public health and safety or other statutory responsibilities of the agency are not prohibited. The latter exception is, like its counterpart in the ex parte rule, subject to the explicit direction that the communications not be associated with the resolution of a pending proceeding.

Additional exceptions are set forth in section 2.781(b)(2) as being applicable only to the Commission and Commission-level offices. The first three types of communications --

initiating or directing an investigation or initiating an enforcement proceeding, supervising agency staff to assure compliance with general policy, and setting staff priorities and schedules or allocating agency resources -- are based upon the "agency head" exemption to the APA's separation of functions provisions, 5 U.S.C. § 554(d)(C).[8] As is noted in the Statement of Considerations, Attachment 1, at 24-25, this exception is a recognition that the many responsibilities that rest with agency heads for the conduct of agency business, including enforcement and administrative matters, requires that they and their immediate advisors be able to discuss matters privately with appropriate staff offices even if it involves a discussion of information relating to an ongoing adjudication.

[8]While it is not clear whether the "agency head" exemption would apply to persons other than the agency head and their personal advisors, as we have explained in the Statement of Considerations, Attachment 1, at 24 n.7, a reasonable argument can be made that the NRC's organizational structure would allow the application of the exemption to Commission-level offices as well.

Also listed as excepted from the separation of functions bar under paragraph (b)(2) are those communications to Commission-level adjudicatory employees that involve an explanation of technical principles that are not at issue in a proceeding, those communications related to adding issues to a proceeding after an initial decision, and communications relating to the reopening of a proceeding. The first exception recognizes that the Commission should not be excluded from staff expertise relevant to uncontested technical matters. The second exception is based upon a decision of the United States Court of Appeals for the District of Columbia Circuit, in Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977). In EDF, Inc., the court held that agency prosecutors could consult privately with an agency head regarding broadening the charge in a pending enforcement proceeding. The exception would extend this rationale to attempts to broaden an adjudicatory proceeding generally through the

addition of issues after an initial decision. The third exception is a new addition that is intended to incorporate the District of Columbia Circuit's decision in RSR Corp. v. FTC, 656 F.2d 718, 722-24 (D.C. Cir. 1981) (per curiam). In RSR Corp. the court declared that since a final decision concludes an adjudication, agency consideration of a motion to reopen is not part of an adjudication and thus is not subject to the APA's separation of functions requirement, which only governs adjudications. It should be noted, however, that whether the cases relied upon for the exceptions for adding issues and reopening will support such wide-ranging private consultations with staff litigators is subject to considerable doubt since both cases can readily be confined to their particular facts.

Because of the wide-ranging nature of the communications permitted by section 2.781(b)(2), we have included in paragraph (b)(3) a reminder that such communications are not to be

associated with the resolution of any pending adjudicatory proceeding.

Section 2.781(c) indicates that receipt of a communication by an investigative or litigating employee that is prohibited under section 2.781(a) should be placed on the public record. As with the comparable provision in the ex parte rule, § 2.780(c), this paragraph is intended to provide a cure for improper communications.

Subsection (d) makes the separation of functions restriction of section 2.781 applicable when a notice of hearing is published, the same event that triggers any ex parte restrictions. This differs from Commissioner Zech's proposal, which would have applied this restriction to a given issue in the proceeding when that issue was designated a matter in controversy. Although no specific statutory provision mandates when the APA's separation of functions prohibition becomes applicable, the language of the Sunshine Act as it applies to similarly restricted

communications can be read as providing a strong suggestion about the appropriate time. Accordingly, the language of subsection (d) has been revised to state that the notice of hearing, or knowledge that the notice will be published, will trigger the separation of functions prohibition.

Paragraph (e) of section 2.781 serves as a reminder that communications permitted from, to or between adjudicatory employees cannot serve as a conduit for ex parte communications. As the Statement of Considerations points out, Attachment 1, at 27-28, a similar warning against the transmittal of ex parte information by agency employees is contained in the Sunshine Act's legislative history.

As the Statement of Consideration also notes, Attachment 1, at 28, the proposed rule is based on the premise that the mere exposure to ex parte information or contact with those employees who are investigators or litigators,

is insufficient to require a staff member to be disqualified as an adjudicatory advisor. Instead, in giving and receiving advice, the adjudicator and the staff consultant must strive to ensure that off-the-record information about a matter in controversy that is part of the decisional process is made public and that the parties are given an opportunity to respond in some meaningful way.

The final provision in section 2.781, paragraph (f), is intended to acknowledge clearly this agency's responsibility to ensure that its decisions are based on a record that the parties to the proceeding have had an adequate opportunity to scrutinize and address. While this provision might be questioned as restating the obvious, nonetheless we believe it performs an important function. Besides serving as a concrete reminder to all adjudicatory employees and staff members about the APA's requirement of on-the-record decisionmaking, 5 U.S.C. §§ 556(e), 557(c), it also serves as a public

declaration of the agency's understanding of its duty that will be helpful in defending any court challenge that improper communications occurred that should invalidate a licensing decision.

The substantially enhanced opportunity for substantive contacts between adjudicators and the NRC staff that is embodied in section 2.781, particularly with regard to the Option 2 definition of investigative and litigating functions, undoubtedly will provide a tempting subject for challenges to the adequacy of any agency hearing in which it is implemented. One of our concerns is that this relaxation of existing regulatory prohibitions will result in an increased judicial willingness to probe into contacts between the licensing staff and adjudicatory employees, including the Commission, by way of allowing evidentiary hearings to explore the nature of the contacts. See generally Professional Air Traffic Controllers Organization v. FLRA, 685 F.2d 547, 557 & n.21 (D.C. Cir. 1982) (evidentiary hearing convened

by appellate court to probe private contacts of adjudicators with persons inside and outside the agency). The facts of a given case undoubtedly will have much to do with a court's willingness to begin such an investigation. Nonetheless, the agency's adoption of paragraph (f)'s declaration will give us an enhanced opportunity to assert that the agency's firm commitment to on-the-record decisionmaking, as evidenced by this provision, must elicit a presumption of regularity of the agency's process that places a substantial burden upon anyone challenging the conduct of that process in a particular case. See FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 974-75 (D.C. Cir. 1980). Thus, we believe this provision serves a very useful purpose.

IV. Conforming Changes

As the Statement of Considerations notes, Attachment 1, at 30, the proposed rule contains several conforming changes in other Commission

rules in Part 0, Employee Standards of Conduct, and Part 2. The Part 0 change to section 0.735-48, which warns employees of the existence of certain restrictions on communications in adjudicatory proceedings, incorporates references to the proposed ex parte and separation of functions rules. Similarily, changes have been made to sections VII(c) and IX(c) of Part 2, Appendix A. With the concurrence of the Chairman of the Licensing Board, the proposed rule would delete from § VII(c) unnecessarily restrictive provisions that limit consultations between members of a particular Licensing Board and all other Licensing Board Panel members, other than the Chairman or Vice Chairman. Retained in § VII(c) is an existing provision that indicates certified questions relating to subpoenas and discovery requests directed to the NRC staff will not be considered to involve a substantive matter at issue so as to require restrictions on intraagency consultations and communication. The existing prohibition in section IX(c) on

consultation between Licensing Board members assigned to a proceeding and any Appeal Board member also is retained.

In seeking to conform all references to the existing ex parte and separation of functions rules, we also come across a reference in § 2.305. That section is a provision in Subpart C to Part 2, which sets forth the procedures for issuing temporary operating licenses under section 192 of the Atomic Energy Act, 42 U.S.C. § 2242. OELD in its comments on the proposed rule questioned whether this provision should be conformed, given that the Commission's authority to issue temporary operating licenses expired at the end of 1983. We agree that there is no reason to conform this section in light of the expiration of the Commission's authority or, indeed, to retain the rules implementing it since. It does not appear that authority will be renewed at any time in the forseeable future. Accordingly, the proposed rule would repeal Subpart C.

V. Assessment of Proposed Separation of Functions Rule from OGC, OELD, the Licensing Board, and the Appeal Board

In assessing the propriety of the two options in the separation of functions rule, we think it is clear that Option 2 involves substantially more litigative risk than Option 1, an assessment in which OELD, the Appeal Board, and the Licensing Board concur. Whether a court is willing to accept the rule's classification of "neutral scientific and technical reviews"[9] and Professor Davis' premise about witnesses is subject to considerable doubt.[10] Nonetheless, given the

---

[9]Indeed, as the Licensing Board noted in its comments on Commissioner Zech's proposal:

> Any scientific or engineering review relevant to an issue in controversy in an adjudicatory proceeding will generate conclusions that will not be "neutral" in the eyes of all the disputants. Moreover, scientific and engineering "principles" rarely enjoy universal acceptance. The selection and application of particular principles is going to be viewed as non-neutral by some parties, inviting litigation.

[10]For instance, as one commentator has suggested:

> Much like the staff attorney, the staff witness may be "psychologically wedded" to his position and may have an unexpressed "will to win." The staff witness would thus

[Footnote Continued]

Commission's persistent concern about obtaining adequate information regarding adjudicatory proceedings, it may well believe that the litigative risk is worth assuming.

Recommendation: Authorize the Secretary to issue the attached notice of proposed rulemaking with either Option 1 or Option 2, as the Commission directs.

Herzel H. E. Plaine
General Counsel

Attachments:
1. Draft Federal Register Notice
2. OGC Analysis

[Footnote Continued]

subject the decisionmaker to biased advice. In fact, the witness's views may be more rigid than even the staff attorney's since they may come from years of experience molded into a "true belief" about a subject. In this light, little difference appears between the staff witness and the prosecutor or advocate...."

Shulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame Law. 351, 407 (1980).

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, November 1, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, October 25, 1985, with an information copy to SECY. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:
Commissioners
OGC
OPE
OI
OCA
IA
OPA
EDO
ELD
NRR
NMSS
I&E
RES
SP
AEOD
ACRS
ASLBP
ASLAP
RM
ADM
SECY

Attachment 1

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 0 and 2

Revision to Ex Parte and
Separation of Functions Rules
Applicable to Formal Adjudicatory Proceedings

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission proposes to amend its regulations dealing with ex parte communications and separation of adjudicatory and nonadjudicatory functions in formal adjudicatory proceedings to update these agency rules of practice and to incorporate requirements imposed by the Government in the Sunshine Act. Changes are proposed in both the form and the substance of the existing rules to clarify their meaning and to aid agency adjudicatory officials in maintaining effective communications with NRC staff personnel and persons outside the agency while at the same time ensuring that proceedings will be conducted fairly and impartially. This proposed rule supersedes a prior proposed rule entitled, "Ex Parte Communications and Separation of Adjudicatory and Non-Adjudicatory Functions," published March 7, 1979 (44 FR 12428), and this notice serves to withdraw the prior proposed rule.

DATES: Comment period expires [insert date sixty days from date of Federal Register publication]. Comments received after this date will be considered if it is practicable to do so, but assurance of consideration can be given only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, ATTN: Docketing and Service Branch. Hand deliver comments to: Room 1121, 1717 H Street, NW., Washington, D.C., between 8:15 a.m. and 5:00 p.m.

Examine comments received at: The NRC Public Document Room, 1717 H St., NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Paul Bollwerk, Attorney, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone: (202) 634-3224.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On March 1, 1979, the Commission proposed certain amendments to its existing rules, 10 CFR 2.719 and 2.780, dealing with ex parte communications and the separation of adjudicatory and nonadjudicatory functions. These revisions were intended to incorporate the requirements imposed on all agencies by amendments to the Government in the Sunshine Act (5 U.S.C. 551(14), 556(d), 557(d)). They were not proposed to effect any other substantive changes in the Commission's existing rules. The revisions were offered for public comment in the Federal Register on March 7, 1979 (44 F.R. 12428), and all comments were due by April 23, 1979. Only one comment on the proposed rule was received. Since this proposed rule supersedes the March 7, 1979 proposed rule, this notice addresses the comment received on the 1979 rule and also withdraws that proposed rule.

Developments occurring subsequent to that notice of proposed rulemaking raised considerable doubt about the efficacy of the proposed rule as it then was drawn. One of these was the accident at Three Mile Island, Unit 2, in March 1979. As a direct result of that incident, the Commission's operating procedures, including its ex parte and separation of functions requirements, were the subject of intense scrutiny. Several different reports issued after the accident concluded that the agency's separation of functions requirements generally were too stringent, impeding the agency's ability to protect the public health and safety by unnecessarily isolating the Commission from staff knowledge and expertise.[1] These reports suggested that a loosening of the existing prohibitions, whose basic restrictions were embodied in the 1979 proposed rule, was in order.

A second circumstance that indicated the need for further modifications to the proposed rule was the completion by the Office of the General Counsel (OGC) of its own study of the agency's separation of functions and ex parte rules. Begun at the request of the Commission in February 1979, before the Three Mile Island accident, this study was designed to determine what, if any, substantive changes could be made in the NRC's existing rules to facilitate communications between the Commission and the NRC staff in order to afford the Commission greater

---

[1]Report of the President's Commission on the Accident at Three Mile Island 51 (October 1979); Report of the Office of the Chief Counsel of the President's Commission on the Nuclear Regulatory Commission 43 (October 1979); 1 Nuclear Regulatory Commission Special Inquiry Group, Three Mile Island: A Report to the Commissioners and to the Public 141 (January 1980).

access to staff expertise. In this study, NUREG-0670,[2] after reviewing the historical development of the Commission's ex parte and separation of functions rules and analyzing the applicable requirements of the Administrative Procedure Act (APA) and constitutional due process, OGC presented several rule change options for Commission consideration.

Additionally, in the course of its review of NRC licensing procedures, the agency's Regulatory Reform Task Force also considered the need to change the agency's existing ex parte and separation of functions rules. In its November 1982 Draft Report, the Task Force suggested revisions to the rules.[3]

In light of these various recommendations[4] and reports[5] regarding separation of functions and ex parte contacts, further changes in the

---

[2]NRC Office of the General Counsel, A Study of the Separation of Functions and Ex Parte Rules in Nuclear Regulatory Commission Adjudications for Domestic Licensing, NUREG-0670 (March 1980). NUREG-series reports referenced in this document are available for inspection and copying for a fee in the NRC Public Document Room, 1717 H Street, NW., Washington, D.C. These reports may be purchased from the U.S. Government Printing Office by calling 202-275-2060 or by writing this office at P.O. Box 37082, Washington, D.C. 20013-7082. They also may be purchased from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

[3]Draft Report of the Regulatory Reform Task Force, SECY-84-447 (Nov. 3, 1982).

[4]In addition to the recommendations of the TMI-related reports, in June 1982, the American Bar Association's Section of Administrative Law adopted a resolution calling on the Commission to review its ex parte and separation of functions rules.

[5]Besides the OGC study, the following were considered in preparing this proposed rule: 2 K. Davis, Administrative Law Treatise §§ 13.01-.11 (1958); 3 id. §§ 17.8-.10, 18.1-.8 (2d ed. 1980); Asimow,

[Footnote Continued]

1979 proposed rule are considered appropriate. Because these modifications can be deemed both substantial and substantive in relation to both the existing NRC regulations and the 1979 proposed rule, another proposed rule is being published to allow additional public comment.

II. PROPOSED RULE ON RESTRICTED COMMUNICATIONS

In the proposed rule that follows, the Commission assumes that adjudications relating to nuclear power plant licensing and certain other proceedings covered by 10 CFR Part 2, Subpart G, are formal APA adjudications under 5 U.S.C. 554, 556, 557. As classified by Congress in the APA, restrictions on communications relative to formal agency adjudicatory proceedings fall into two categories: (1) private, ex parte contacts between persons outside the agency and decisionmakers, 5 U.S.C. 557(d), and (2) private, intraagency contacts between those performing decisionmaking functions and other agency members who perform investigative or prosecuting functions relative to a proceeding, id. 554(d). While these two types of restricted communications have a different focus in terms of the persons involved, the aim of both is to preserve the integrity of formal adjudicatory proceedings by banning private contacts that would expose decisionmakers to biased viewpoints or off-the-record facts. Yet, in seeking to protect the probity of the

---

[Footnote Continued]

When the Curtain Falls: Separation of Functions in Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981); Pedersen, The Decline of Separation of Functions in Regulatory Agencies, 64 Va. L. Rev. 991 (1978); Shulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame Law. 351 (1981).

agency's adjudicatory process, care must be taken not to construct unnecessary barriers to communication that ultimately will impede the adjudicator's ability to render effective, informed decisions. It is with these goals in mind that the ex parte and separation of functions rules have been revised.

While the major substantive changes in the rules are explained in a more detailed section-by-section analysis, we note initially the two major organizational changes that are under consideration. First, despite the APA's clear distinction between prohibited ex parte communications and those prohibited on separation of functions grounds, both the present rule and the 1979 proposed rule included private NRC staff communications with decisionmakers as within the "ex parte" restriction. To avoid any further uncertainty or confusion, all references to staff/decisionmaker communications as ex parte have been deleted from the currently proposed rule for ex parte communications, thereby relegating the regulation of such contacts to those prohibitions on intraagency communications found in the proposed rule of practice for separation of functions.

An additional major organizational change is the proposed consolidation of what are now two separate regulations -- 10 CFR 2.719 and 2.780 -- into consecutive sections -- §§ 2.780 and 2.781 -- that share certain common terms defined in § 2.4. This association is wholly consistent with the nature of the restrictions sought to be imposed. Although each stricture involves a different communicator/recipient relationship, both have similar limitations -- no private communications with decisionmakers -- and similar remedies -- public disclosure of

prohibited communications. The proposed rules thus seek to make the restrictions involved more understandable by placing them together and using common terminology whenever possible.

A. General Definitions Provision

Certain terms relevant to the revised ex parte and separation of functions restrictions have been added to § 2.4, which contains the definitions for words and phrases used in 10 CFR Part 2. Along with adding definitions to this section, it is further being revised by removing the alphabetical paragraph designators and alphabetizing all terms defined in that section, including the three additions. This revision should facilitate referencing definitions and revising the section in the future.

With regard to the particular provisions proposed to be added to § 2.4:

1. The proposed paragraph for § 2.4 that defines "Commission adjudicatory employees" is in substance §§ 2.719(a) and 2.780(a) of the 1979 proposed rule. It has been expanded, however, to include several additional types of adjudicatory employees, including administrative law judges, their staff, and special assistants.

Also added as paragraph (9) for this definition is a provision to include as adjudicatory employees those NRC staff officers or employees who are appointed by the Commission to be involved in the decisional process in a particular proceeding. This addition is in conjunction with the major revision to the separation of functions rule whereby the separation of functions prohibition on communications with adjudicatory

employees would apply only to those staff members performing investigative or litigating functions regarding the particular proceeding. As subsequently will be explained in more detail, unlike existing restrictions this would allow some agency staff personnel to become involved in the adjudicatory decisionmaking process as advisors.

With regard to this paragraph (9), it should be noted that in the event an NRC staff employee is to be used as an adjudicatory advisor, a public designation to that effect must be made by the Commission. This serves several purposes. The designation of a staff employee as an advisor may make him unavailable for use by the NRC staff in its litigation of a licensing proceeding. Further, the availability of an employee may depend on his previous involvement in a proceeding, a factual matter that may require careful scrutiny. Thus, it is contemplated by the Commission that the use of staff employees in an advisory capacity would be subject to internal controls to ensure that NRC staff management has some administrative input into the process of designation of such employees as well as to afford an opportunity for gathering and analyzing the necessary factual information on the person's participation in the proceeding. The designation by the Commission will be the culmination of this internal process. In addition, designation will put interested persons outside the agency on notice of the person's status as a Commission adjudicatory employee for the purpose of avoiding ex parte communications. A similar procedure is endorsed in the legislative history of the Sunshine Act.
H.R. Rep. No. 880 pt. I, 94th Cong., 2d Sess. 20 (1976) (report of Committee on Government Operations) (emphasis added); H.R. Rep. No. 880

pt. 2, 94th Cong., 2d Sess. 19 (1976) (report of Committee on the Judiciary); S. Rep. No. 354, 94th Cong., 1st Sess. 36 (1975).

2. The second proposed paragraph for § 2.4 defines the term "ex parte communication." With regard to that definition, mention should be made of the sole comment received concerning the rule as proposed in 1979. In that comment, the law firm of Isham, Lincoln and Beale argued among other things that the definition of "ex parte communication" then suggested in § 2.780(b) was "confusing and poorly drafted" because (1) it allegedly would require that all communications be made on the record, thus interfering with "conference calls and other informal conferences where the Licensing Board and all parties are represented but no public record of it is kept"; and (2) it referred to "all participants" -- rather than "all parties" in a proceeding -- thus leaving open the possibility that persons who make limited appearances under 10 CFR 2.715 would be included.

As to the commenter's example of conference calls and other informal conferences, the Commission believes that the proposed definition does not give cause for concern. The language used by the Commission comes from the Sunshine Act itself, 5 U.S.C. 551(14). The legislative history makes clear that a "communication is not ex parte if either, (1) the person making it placed it on the public record at the same time it was made, or (2) all parties to the proceeding had reasonable advance notice. If a communication falls into either one of these two categories, it is not ex parte." H.R. Rep. No. 880 pt. I, supra, at 22 (emphasis added); H.R. Rep. No. 880 pt. 2, supra, at 21 (same); S. Rep. No. 354, supra, at 38 (same). Obviously, the situations

discussed in the comment would be perfectly proper under the rule proposed both in 1979 and presently.

As to the matter of the 1979 proposed rule's reference to "participants," the Commission has decided to substitute the term "parties," thereby conforming the rule to the language of the Sunshine Act and avoiding the possibility that persons making limited appearances under 10 CFR 2.715(a) would be included.

3. The third proposed paragraph for § 2.4 defines the term "investigative or litigating function." That term is used in the separation of functions rule to specify those functions performed by members of the NRC staff in a particular proceeding that will mandate which staff members will not be allowed to advise any adjudicatory employee about how to decide that case. Although the APA in section 554(d) refers to "investigative or prosecuting functions," the exact meaning of the term "prosecuting" has been the subject of some controversy. As was fully discussed in the OGC study, the original APA framework arguably was designed to impose a separation of functions prohibition only in accusatory proceedings, i.e., those in which the primary concern is the lawfulness of past conduct, as opposed to those nonaccusatory proceedings, such as rulemakings or initial licensing, in which it can be asserted that the decision is reached typically on the basis of mostly legislative facts and general policy considerations. NUREG-0670, at 54-57. While the use of the term "prosecutor" is consistent with this construct, after careful consideration the Commission has decided that it will not adopt a narrow reading of the separation of functions requirement to limit it only to accusatory cases

and those persons involved in "prosecuting" functions. Doing so would require the application of subtle and difficult distinctions between those licensing cases that are accusatory and those that are not. Instead, the somewhat broader term "litigating" is incorporated with the term "investigative" and is intended to denote those personnel involved in advocacy functions in both accusatory and nonaccusatory proceedings.

[OPTION 1]

The term "investigative or litigating function" is defined under this proposed rule to include planning, conducting or supervising an investigation and planning, developing or presenting, or supervising the planning, development or presentation of, testimony, argument or strategy in a proceeding. This definition would continue to encompass NRC staff members involved in litigating a particular licensing proceeding, including staff attorneys involved in presenting the case, those staff members performing technical reviews of an application that is the subject of an adjudicatory proceeding, and staff employees who are witnesses or perform similar supportive functions at the proceeding. It does not, however, include all staff members as under the present NRC restriction on separation of functions. For instance, supervisors and subordinates of those involved in investigative or litigating functions who have not themselves assumed such a role or research personnel who are not involved in the particular proceeding would not be included under this definition. This will give the Commission and other adjudicatory employees increased access to staff advice and expertise that is not now available without conducting public proceedings.

[OPTION 1 END]

[OPTION 2]

The term "investigative or litigating function" is defined under this proposed rule to include planning, conducting or supervising an investigation and planning, developing or presenting, or supervising the planning, development or presentation of, testimony, argument or strategy in a proceeding. This definition would continue to encompass NRC staff members involved in litigating a particular licensing proceeding, including staff attorneys involved in presenting the case and those staff members who aid attorneys in developing the arguments or strategy in a proceeding. It does not, however, include all staff members as under the present NRC restriction on separation of functions. For instance, supervisors and subordinates of those involved in investigative or litigating functions who have not assumed such a role themselves or research personnel who are not involved in the particular proceeding would not be included under this definition.

Under paragraph (3), this proposed definition also does not include as investigators or litigators those staff members who, as part of the licensing process, only perform or supervise, or testify in the proceeding after performing or supervising, a neutral scientific review of an issue based solely on the application of scientific or engineering principles to factual material available to the parties to the adjudicatory proceeding. The Commission believes that a valid distinction exists between those employees who review and do a technical analysis of publicly available documentation to determine whether a particular application complies with pertinent statutory or regulatory requirements and those who seek to use such analysis to advocate a

position regarding contested issues in a pending proceeding. Further, it is arguable that the dangers the separation of functions prohibition seeks to avoid are not applicable with a staff member who has put forth his position on such technical matters in public testimony and has been subject to cross-examination and rebuttal evidence. 2 K. Davis, Administrative Law Treatise § 13.10, at 247 (1958). But see Shulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame Law. 351, 399-400, 406-07 (1981). Thus, the Commission proposes that such witnesses not be subject to a separation of functions restriction.

The definition of "investigative and litigating functions" put forth in the rule clearly is a controversial one since it would allow the Commission greatly increased access to staff members who otherwise are substantially involved in the licensing process, although not necessarily as advocates. The Commission is vitally interested in comments on the legal and policy ramifications of this proposal.

[OPTION 2 END]

B. Ex Parte Communications Provision

1. Paragraph (a) of the revised § 2.780 is essentially paragraph (c) of § 2.780 of the 1979 proposed rule and incorporates into the rule the language of APA § 557(d)(1)(A). It has, however, been rephrased to delete the reference to NRC staff employees that was contained in the 1979 proposed rule, thereby implementing the distinction between the coverage of the ex parte and separation of function restrictions, as was described earlier.

Several additional points concerning paragraph (a) should be made. With regard to the phrase "relevant to the merits of the proceeding,"

the legislative history of the Sunshine Act indicates that this term is "to be construed broadly and to include more than the phrase 'fact in issue'" used in the APA's separation of function restriction. H.R. Rep. No. 880 pt. I, supra, at 20; H.R. Rep. No. 880 pt. 2, supra, at 20; S. Rep. No. 354, supra, at 231. As the legislative history also points out, this language is intended to exclude status report requests and communications regarding general background. Id. These exclusions are made explicit in this rule in paragraph (f) of § 2.780, as is explained in more detail subsequently.

An outstanding issue is whether this phrase can be interpreted to exempt certain issues relating to a proceeding that are not contested by the parties to the proceeding. For example, there are often uncontested issues in mandatory construction permit proceedings. Similarly, in operating license proceedings, the presiding officer or the Commission may be interested in certain matters that are relevant to public health and safety or the particular facility, but that have not been raised as issues in the proceeding by any party. The Commission believes that the phrase "relevent to the merits of the proceeding" should be read to include only issues contested by the parties to the proceeding. The Commission is interested in receiving comments on this interpretation. Commenters are asked to address not only the applicability of 5 U.S.C. 557(d), but also 5 U.S.C. 556(d) and any relevant case law. See, e.g., Shulman, supra, 56 Notre Dame Law. at 379 n.120.

The legislative history of the Sunshine Act also makes clear that the term "interested person" used in the APA and paragraph (a) of § 2.780 is intended "to be a wide, inclusive term covering any

individual or other person whose interest in the agency proceeding is greater than the general interest the public as a whole may have." H.R. Rep. No. 880 pt. I, supra, at 19, H.R. Rep. No. 880 pt. 2, supra, at 19-20; S. Rep. No. 354, supra, at 36. Thus, interested persons need not have a monetary interest in the proceeding or have the status of a party or intervenor. The term would include parties, participants under 10 CFR 2.715(a), other public officials, competitors, and nonprofit or public interest organizations and associations with a special interest in the proceeding. The term would not include a member of the public at large who makes a casual or general expression of opinion about a pending proceeding.

2. Paragraph (d) of § 2.780 of the 1979 proposed rule forms the basis for paragraph (b) of § 2.780 of this proposed rule. Besides being rephrased to delete the reference to NRC staff personnel, an addition to the rule admonishes Commission adjudicatory employees not to "request or entertain" ex parte communications. This language makes clear the affirmative duty of such employees both to refrain from instigating ex parte communications and to halt or avoid those that others put before them.

3. Paragraph (c) of § 2.780 is essentially paragraph (f) of the 1979 proposed § 2.780 and is intended to incorporate the requirements of APA § 557(d)(1)(C) pertaining to disposition of ex parte communications received by adjudicatory officials. In this regard, it should be noted that the Commission has dropped the requirement found in § 2.780(e) of the 1979 proposed rule that all communications identified as ex parte be referred for action to the Executive Director for Operations. Upon

further reflection, the Commission has decided that this process would unnecessarily complicate and delay appropriate corrective action regarding the communication. Instead, the official receiving the communication or a designee is given the responsibility for seeing that the communication and any responses are placed in the public record.[6]

4. Proposed paragraph (d) of § 2.780, which sets forth the additional sanctions that can be imposed for knowing violations of the ex parte prohibition, is derived from APA § 557(d)(1)(D) and essentially tracks § 2.780(h) of the 1979 proposed rule.

5. Paragraph (e) of the proposed § 2.780, which is similar to § 2.780(i) of the 1979 proposed rule, implements APA § 557(d)(1)(E)'s provision that dictates the ex parte prohibition will begin to apply "no later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of the acquisition of such knowledge." Paragraph (e) is somewhat

---

[6]The APA requires that ex parte communications be placed "on the public record of the proceeding." 5 U.S.C. 557(d)(1)(C). The legislative history makes it clear that the term "public record" is not what is normally thought of as the record that forms the basis of the agency decisions. Instead, it means "the docket or other public file containing all the material relevant to the proceedings. It includes . . . material that has been accepted as evidence in the proceeding, and the public file of related matters not accepted as evidence in the proceeding." H.R. Rep. No. 880 pt. I, 94th Cong., 2d Sess. 22 (1976); H.R. Rep. No. 880 pt. 2, 94th Cong., 2d Sess. 21 (1976); S. Rep. No. 354, 94th Cong., 1st Sess. 38 (1975). Thus, while the particular communication and any responses to it may well be part of the "public record" of a proceeding, they may not be part of the "evidentiary record" absent some appropriate agency action, either sua sponte or at the request of the parties to the proceeding, to incorporate them as such.

less restrictive than the parallel provision of existing § 2.780(a), which provides for application of ex parte restrictions when a notice of hearing is published or when a hearing request is filed. In light of the language of APA § 557(d)(1)(E), which speaks only in terms of the issuance of a notice of hearing, the existing rule's application of ex parte prohibitions when a hearing request is received appears overbroad and is not retained.

Paragraph (e)(2)'s provision implementing the Sunshine Act's directive that the ex parte prohibition will apply when an interested person or Commission adjudicatory employee knows that hearing will be noticed also requires additional explanation. AEA section 189a, 42 U.S.C. 2239(a), requires that a hearing be noticed and held on any application for a permit to construct a nuclear reactor. Because this statutory hearing requirement puts everyone on notice that a hearing definitely will be held, a broad reading of the Sunshine Act's "knowledge" proviso could make ex parte prohibitions applicable, if not from the moment an applicant considered filing for a construction permit, long before the filing of a formal hearing notice is even contemplated in a particular proceeding. Such a far-reaching application of the ex parte rule could damage severely the flexibility of the Commission's licensing process by precluding NRC adjudicatory employees from any private consultations with NRC staff members prior to the noticing of a hearing for fear of barring those same staff members from subsequently consulting informally with others outside the agency. The Commission believes such an expansive interpretation of the statute is not compelled by either its language or its legislative history. See

NUREG-0670, at 75 n.142. Accordingly, this paragraph is intended to provide that knowledge that a statute or regulation that requires a formal hearing at an indeterminate time without some knowledge of when the hearing in the particular proceeding in question is to be noticed will not be considered knowledge that the matter will be noticed for a formal, on-the-record hearing so as to cause the ex parte prohibitions of § 2.780 to apply.

6. Exceptions to the ex parte prohibition are set forth in proposed paragraph (f) of § 2.780. The first three exemptions -- status reports, communications permitted by statute or regulation, and communications to members of the General Counsel's Office regarding litigation or matters before other agencies -- are incorporated from § 2.780(b) of the 1979 proposed rule.

An additional exemption provision allows communications to adjudicatory employees regarding generic matters. Under existing § 2.780(d)(2), communications requested by the Commission regarding "general health and safety problems and responsibilities of the Commission" are not considered to be in violation of the ex parte prohibition. In the 1979 proposed rule, this was broadened to include communications relating to the Commission's statutory responsibilities. This expansion is retained in this proposed rule, with the addition of several examples.

The Commission also proposes several revisions to this provision regarding generic matters. The 1979 proposed rule stated that the communications involved in the exemption were not to be "specifically related to any particular proceeding pending before the Commission."

The 1979 notice of proposed rulemaking notes that this clause embodies the Commission's recognition that "this provision cannot be used as a means of circumventing the adjudicatory process" and that the Commission "will act to ensure that its use is limited to matters that are of generic rather than limited concern" (44 F.R. at 12429). The Commission believes, however, that it is helpful to adopt more explicit language to emphasize that such communications may not be "associated" -- either by the interested person or the adjudicatory employee -- "with the resolution of any on-the-record proceeding pending before the NRC"; such proceedings are to be resolved solely on the basis of the factual record and applicable law and policy.

This proposed rule also would broaden the scope of this exemption by allowing communications on generic matters to be instituted by those outside the agency. As set out in the 1979 proposed rule, § 2.780(b)(5) limited the exemption to "communications between the Commission and staff regarding generic issues...." The commenter on the 1979 proposed rule suggested that the exemption be extended to include communications from those outside the agency. Section 2.781(b)(1)(iii) of this proposed rule now provides for this exemption as it relates to staff contacts, while § 2.780(c)(1)(iv) establishes such an exemption for Commission contacts with interested persons outside the agency. Also, other adjudicatory employees who are advising the Commission on a particular proceeding, such as members of the Office of Policy Evaluation or perhaps the Director of the Office of Nuclear Reactor Regulation, see proposed § 2.4(t)(6), (8), may need to contact the staff or outsiders concerning related generic issues. Accordingly, the scope

of this provision and § 2.781(b)(1)(iii) relating to staff communications has been broadened to include other adjudicatory employees.

Finally, this proposed rule addresses a suggestion by the commenter on the 1979 proposed rule that there should be no restriction on outsiders' initiation of contacts with adjudicatory employees about those matters which, although related to a pending adjudication, also are of generic interest to the agency. This proposed rule does not have the restrictive language contained in the existing rule, § 2.780(d)(2), which allows only for "communications requested by the Commission concerning ... [g]eneral health and safety problems and responsibilities...." (Emphasis supplied). Thus, the rule as proposed would not preclude unsolicited contacts from falling within the exemption.

C. Separation of Functions Provision

One of the major questions facing the Commission in revising its separation of functions rule is whether the agency should invoke the APA's initial licensing exemption, 5 U.S.C. 554(d)(2)(A), so as to make the separation of functions prohibition applicable only to accusatory proceedings. As was explained earlier, the APA's separation of functions provision can be interpreted as being based on the distinction between accusatory and nonaccusatory proceedings. The initial licensing exemption seemingly is based on this same distinction, Congress' determination being that initial licensing -- i.e., a proceeding

involving a license application or a licensee-requested modification -- usually is a nonaccusatory proceeding based on technical expertise and policy determinations rather than any extensive consideration of the applicant's past conduct as it relates to violations of statutory or regulatory requirements. NUREG-0670, at 57.

After careful consideration, the Commission has decided not to revise its separation of functions rule in a way that critically depends on the use of the initial licensing exemption because of the great legal uncertainty that surrounds the use of the exemption. See NUREG-0670, at 156-158 & n.233A; Asimow, When the Curtain Falls: Separation of Functions in Federal Administrative Agencies, 81 Colum. L. Rev. 759, 777-78 (1981); Shulman, supra, 56 Notre Dame Law. at 358-64, 380-404. Moreover, the use of the initial licensing exemption would require reintroduction of the unworkable distinction between accusatory and nonaccusatory proceedings because the legislative history of the APA indicates the exemption is not intended for use in accusatory proceedings. United States Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 50-52 (1947) [hereinafter cited as Attorney General's Manual]. Accordingly, the rule as proposed would apply separation of functions restrictions in all formal, on-the-record proceedings conducted by the agency without regard to whether such matters would otherwise be classified as initial licensing or as accusatory or nonaccusatory.

Another unsettled, controversial question in the area of separation of functions prohibitions is whether such restrictions should be imposed to bar higher-level adjudicators from communicating privately with

lower-level adjudicators. Present agency practice, embodied in § 2.719(c) and Part 2, App. A, § IX(c), precludes such consultations between Atomic Safety and Licensing Board members assigned to a proceeding and Atomic Safety and Licensing Appeal Panel members on any fact in issue in the proceeding. This proposed rule would not change this practice. The Commission, however, invites comments on whether this existing limitation is necessary or appropriate. See Shulman, supra, 56 Notre Dame Law. at 401-04, 409-11. Compare Legal Times of Wash., Dec. 15, 1980, at 4 (after debate, Administrative Conference of United States tables recommendation to allow consultation between lower-level adjudicators and agency heads) with Pederson, The Decline of Separation of Functions in Regulatory Agencies, 64 Va. L. Rev. 991, 1001 (1978) (lower-level adjudicators should be considered evidence-gatherers who prepare agency records and, as such, should be able to consult with agency heads).

Finally, § 554(d) of the APA, as well as the existing 10 CFR 2.719(a) and the 1979 proposed rule, § 2.719(b), all require that adjudicatory officials not be responsible to or subject to the supervision or direction of the prosecuting or investigative staff of the agency. Analytically, this requirement also implements the principle of separation of functions. Because the institutional arrangements embodied in the NRC's rules of practice and procedure are adequate to implement this requirement, it is not specifically set forth in this proposed rule.

Concerning the particular provisions of proposed § 2.781:

1. Paragraph (a) of this proposed rule is similar to § 2.719(c) of the 1979 proposed rule and serves as the basic statement of the scope of the separation of functions restriction. There have been several changes from the 1979 proposed rule, however. In place of the term "prosecuting" used in the 1979 proposed rule to describe one of the staff functions that will trigger a separation of functions question, the term "litigating" has been substituted. As was explained previously, this revision is in line with the rejection of the accusatory/nonaccusatory distinction. By using the more expansive term "litigating" the Commission seeks to include those staff employees who undertake an advocacy role.

One additional change of note in § 2.781(a) is in paragraphs (a)(2) and (a)(3), which are intended to indicate, as is suggested in the APA's separation of functions provision, see 5 U.S.C. 554(d); Attorney General's Manual at 56, that proper public disclosure of communications between adjudicatory employees and staff members will avoid or cure any separation of functions violations.

Finally, in describing those proceedings to which separation of functions should apply, the Commission has retained the term "factually related," which is derived from the APA, 5 U.S.C. 554(d)(2), and has been used in both the existing rule and the 1979 proposed regulation. To be "factually related," proceedings must arise out of the same or a connected set of facts such that a "common nucleus of operative facts" exists rather than simply a similar pattern of facts. See Giambanco v. INS, 531 F.2d 141, 150 n.4 (3d Cir. 1976) (Gibbons, J., dissenting); Shulman, supra, 56 Notre Dame Law. at 365 n.59.

2. Paragraph (b) of § 2.781 sets forth certain communications that, either in and of themselves or when presented to certain adjudicatory employees, are not precluded by the rule. The communications set forth under paragraph (b)(1) -- status reports, other litigation outside the agency, and generic matters -- are the same as those set forth under proposed § 2.780(f) relating to ex parte communications and can be made to any adjudicatory employee. In contrast, paragraph (b)(2) lists communications that can be made to the Commissioners themselves and to certain Commission-level employees because of the status of such individuals as administrators and policymakers or the advisors to those administrators and policymakers.

The communications provided for in paragraphs (b)(1)(i) through (iii) of § 2.781 are based on the APA's "agency head" exemption to its separation of functions provision, 5 U.S.C. 554(d)(C), whereby the person or body that governs the agency, and any immediate advisors,[7] may communicate with staff investigators and litigators about various matters that might otherwise bring them into conflict with the APA's separation of functions restrictions on communications. In the case of investigations, which is covered under paragraph (i), it has been

---

[7]It has been recognized that the "agency head" exemption should apply equally to communications to the agency head's personal advisors, at least so long as they remain in that advisory role. Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1982); Asimow, supra, 81 Colum. L. Rev. at 766. Given the NRC's organizational structure whereby the Office of the Secretary, the Office of General Counsel, and the Office of Policy Evaluation are considered "Commission-level" offices that have a primary responsibility for advising the Commission itself on technical, legal, and policy matters, invocation of this exemption to cover such offices appears appropriate.

recognized that if agency heads are to fulfill their responsibility for the conduct of investigations or the initiation of enforcement proceedings, they may be involved in discussions of factual matters also at issue in ongoing adjudicatory proceedings. Attorney General's Manual at 58.[8] Similarly, as is indicated in paragraphs (ii) and (iii), of § 2.781(b)(2), although supervisory determinations about staff resources or about staff compliance with agency policies may require some discussion or consideration of matters at issue in a particular proceeding, Commissioner contacts with investigators or litigators to resolve resource and policy compliance questions should not be barred.

Paragraph (iv) of § 2.781(b)(2) recognizes that, apart from a staff member's expertise regarding circumstances of a particular case he or she may be investigating or litigating, he or she also may be an expert in one or more technical areas about which the Commission may need general, background information. In the event that the particular regulatory, scientific or engineering principles about which the

---

[8]Support for this particular exemption also may be found in Pangburn v. CAB, 311 F.2d 349 (1st Cir. 1962). After an airplane accident, the CAB members initiated and participated in an investigation of the accident for purposes of preparing a report to Congress. Concurrently, the CAB members adjudicated whether to suspend the license of the pilot involved in the accident. The factual issues in the investigation were identical to the issues in the adjudication. Nonetheless, the court rejected due process arguments that the CAB was precluded from pursuing concurrently its investigatory and adjudicatory activities. The court further commented that the APA, 5 U.S.C. 554(d), specifically provides for an agency to carry out its investigatory and adjudicatory mandates at the same time; the remedy for eliminating potential unfairness is simply to preclude agency staff members who engaged in investigations or prosecutions from advising Commission members in the same or a factually related adjudication. See also FTC v. Cement Institute, 333 U.S. 683 (1948).

Commission wishes to be informed are not somehow at issue in the proceeding, this paragraph will allow the Commission to obtain this information from a particular investigator or litigator.

Paragraph (v) of § 2.781(b)(2) is proposed to be added as a consequence of the United States Court of Appeals for the District of Columbia Circuit's decision in Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977). In EDF, Inc., the court stated that agency prosecutors could consult privately with an agency head regarding broadening a suspension proceeding by adding changes. Id. at 1006 n.20. The addition of paragraph (v) would allow private consultations between the Commission and investigators or litigators after an initial decision concerning any request to broaden the adjudicatory proceeding by adding issues.

The Commission proposes to add paragraph (vi) of § 2.781 on the basis of the District of Columbia Circuit's decision in RSR Corp. v. FTC, 656 F.2d 718 (D.C. Cir. 1981) (per curiam). In RSR Corp. the court declared that neither the APA nor due process imposed a separation of functions prohibition applicable to agency consideration of a motion to reopen a proceeding after a final agency decision in an administrative proceeding. Id. at 722-24.

The final paragraph, (b)(3) of § 2.781, is intended to indicate that none of the exemptions can be used to circumvent the protections provided by the adjudicatory process. No Commission adjudicatory employee or staff employee performing investigative or litigating functions is to associate any of these types of communications explicitly or implicitly with the resolution of any on-the-record

proceeding; such proceedings should be resolved solely on the basis of the factual record and applicable law and policy. Further, as required by statute, no Commission employee who performs investigative or litigating functions subsequently will perform adjudicatory duties in the same or a factually related proceeding. 5 U.S.C. 554(d).

3. Paragraph (c) of § 2.781 is similar to § 2.780(c) of this proposed rule and describes the measures that are to be taken to ensure that if such a prohibited communication is received, it is properly disclosed to avoid any prejudice to the parties.

4. Paragraph (d) of § 2.781 is a new addition that specifies when the separation of functions prohibition is to be applied. Like the proposed ex parte provisions in § 2.780(g), the separation of functions provisions are made effective only at the time the proceeding is first noticed for a hearing. This reflects the Commission's belief that prior to this time the staff's knowledge about and position on a given matter is too tentative and unsettled to cause concern about biased advice or off-the-record facts. This provision strikes the proper balance between the agency's need for efficient and effective communications and the public's interest in fair, unbiased proceedings. See RSR Corp., 656 F.2d at 722-24 (neither APA nor due process requires imposition of separation of functions ban during agency consideration of motion to reopen proceeding since no adjudication yet involved).

5. Proposed paragraph (e) of ¶ 2.781 advises all NRC personnel that communications with adjudicatory employees now permitted by § 2.781 are not to become the instrument for ex parte communications otherwise prohibited by § 2.780. As the legislative history of the Sunshine Act

notes "ex parte contacts by staff acting as agents for interested persons outside the agency are clearly within the scope of the prohibitions." H.R. Rep. No. 880 pt. I, supra, at 20; H.R. Rep. No. 880 pt. 2, supra, at 19; S. Rep. No. 354, supra, at 30. Given the increased possibility for staff input into the decisional process that is allowed under this proposed rule, this explicit warning appears appropriate.

This is not to say, however, that the mere exposure of a staff employee to communications that arguably would be ex parte prior to that person's involvement in the decisionmaking process will automatically disqualify that person from later acting as an adjudicatory employee. In fact, if the employee has not otherwise performed an investigative or litigating function, then such exposure to off-the-record information does not make him or her an advocate. Asimow, supra, 81 Colum.L.Rev. at 762, 771-72; see Shulman, supra, 56 Notre Dame Law. at 377-80. But see Grolier, Inc. v. FTC, 615 F.2d 1215 (9th Cir. 1980). Thus, communications by staff employees with outsiders or staff investigators or litigators prior to being requested by the Commission or other adjudicatory employees to become decisionmaking advisors will not, in and of itself, disqualify the staff employee. Of course, any off-the-record information about any matter in controversy that is imparted to a decisionmaker by a staff advisor must be made public and subjected to comments by the parties if it is to be used as the basis for any initial or final decision.

A related question, and one that is not directly addressed in the provisions of this proposed rule, is whether a staff employee, once becoming an advisor to a decisionmaker and thus an adjudicatory employee

under paragraph (8) of the definition of "Commission adjudicatory employee" in § 2.4, can ever again assume a role as an agency investigator or litigator. Arguably, the separation of functions restriction only applies to preclude investigators or litigators from being involved as adjudicators or their advisors, and not the converse. If an individual advising an adjudicatory employee has developed a bias against one of the parties in litigation, then allowing that advisor to become a litigator seemingly does not hurt the party since it will have a full opportunity to defend itself and its positions. On the other hand, if an advisor develops a bias in favor of a particular party, that party seemingly is not harmed in any way by the advisor assuming a role as a litigator. The Commission requests comments on the propriety of including a provision allowing such contacts.

6. The possibility for increased consultation by NRC adjudicators with the NRC staff that would result under this proposed rule may cause concern among some participants in NRC adjudicatory proceedings, particularly given the almost complete separation of NRC staff from adjudicators that has existed previously. As Professor Davis has noted, however, for those agencies such as NRC that regulate in areas involving complex technical questions, the choice between consulting and not consulting staff experts is "a choice between knowledge and ignorance." 3 K. Davis, Administrative Law Treatise § 17.10, at 310 (2d ed. 1480). As such, Professor Davis has expressed his support of such consultations, with the caveat that the agencies should seek to minimize any harmful effects by striving to ensure, among other things, "that the parties have an opportunity to meet in appropriate fashion whatever

extrarecord facts are introduced through consultation" and "that the parties have a chance to respond to new ideas that may be decisive." Id. at 312. Paragraph (f) of proposed § 2.781 has been added to make clear that the increased possibility of consultation does not in any way change the agency's legal duty or commitment to ensure that the decisive elements of its determinations are based upon a public record that the parties have had an opportunity to address.

III. CONFORMING CHANGES IN PARTS 0 AND 2

In addition to the revision of the ex parte and separation of function rules of practice themselves, the Commission also proposes conforming changes to several other regulatory provisons. One of these is a change in § 0.735-48 of 10 CFR Part 0, Conduct of Employees. This regulation warns employees of the existence of restrictions on communications resulting from the ex parte and separation of functions rules in 10 CFR Part 2. The proposed revision would update existing references to §§ 2.719 and 2.780 in light of the proposed changes in those provisions.

Similarily, revisions are made to §§ VII(c) and IX(c) of Appendix A to Part 2, the general statement of policy and procedure on the conduct of formal proceedings. Deleted from § VII(c) as unnecessarily restrictive are provisions limiting consultations between members of a particular Licensing Board and Licensing Board Panel members, other than the Chairman or the Vice Chairman. Finally, as previously was noted, the existing restriction on consultation between the Licensing Board

members assigned to a particular proceeding and any Appeal Board member is retained in Appendix A.

A separate but related issue raised by the need to conform other NRC regulations to any revised separation of functions and ex parte rules is the need to retain a reference to those rules in § 2.305. This section is a provision of Subpart C of Part 2, which sets forth the procedures for issuing temporary operating licenses under § 192 of the Atomic Energy Act of 1954, 42 U.S.C. 2242. Since the Commission's authority to issue temporary operating licenses expired on December 31, 1983, there is no reason to conform the section or, indeed, to retain Subpart C. Accordingly, that subpart would be removed under the proposed rule.

ENVIRONMENTAL IMPACT: CATEGORICAL EXCLUSION

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

PAPERWORK REDUCTION REVIEW

The information collection requirements contained in this proposed rule are exempt from the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3518 (c)(1)).

REGULATORY ANALYSIS

Under the APA, 5 U.S.C. 554(d), 557(d), in formal adjudicatory proceedings, restrictions apply to communications between adjudicators and agency employees performing investigative or litigating functions or interested persons outside the agency. The revisions in the proposed ex parte rule will conform the language of the agency's present regulations more closely to the Sunshine Act's provisions restricting communications with persons outside the agency. This rule change will not affect the substantive restrictions on outside communications applicable under present regulations. Under the revised separation of functions rule, however, there will be an increased possibility for adjudicator/staff communications because those staff members not involved in an investigative or litigating function in a particular proceeding can advise decisionmakers on matters at issue in that proceeding. The potential for increased information to adjudicators makes this rule change preferable to existing requirements. While other possible rule change options exist, notably invocation of the "initial licensing" exemption in the APA or reading the section 554(d) restriction to apply only to "prosecutors" rather than "litigators," serious questions about the legality of these particular revisions make them unacceptable both in terms of agency resources to defend such rules and the possibility of judicial reversal of licensing actions based on the application of such rules. The proposed rule thus is the preferred alternative and the cost involved in its promulgation and application is necessary and

appropriate. The foregoing discussion constitutes the regulatory analysis for the proposed rule.

REGULATORY FLEXIBILITY CERTIFICATION

The proposed rule will not have a significant economic impact upon a substantial number of small entities. Most entities seeking or holding construction permits or Commission licenses that would be subject to the revised ex parte provisions would not fall within the definition of small businesses found in § 34 of the Small Business Act, 15 U.S.C. 632, or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121. Although intervenors subject to the provision on ex parte communications likely would fall within the pertinent Small Business Act definition, the proposed ex parte rule, if adopted, would not reduce or increase the litigation burden of intervenors because it is substantially the same as the restrictions now in effect. Although the revised restrictions on intraagency communications found in the separation of functions provision might result in some cost reduction in proceedings in that the increased availability to adjudicators of staff expertise may shorten the proceedings, that reduction probably will be negligible. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities.

LIST OF SUBJECTS IN 10 CFR PART 0

Conflict of interest, Penalty.

LIST OF SUBJECTS IN 10 CFR PART 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 0 and 2:

PART 0 -- CONDUCT OF EMPLOYEES

1. The authority citation for Part 0 is revised to read as follows:

> Authority: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964-1965 COMP., p. 306; 5 CFR 735.104.
>
> Sections 0.735-21 and 0.735-29 also issued under 5 U.S.C. 552, 553. Section 0.735-26 also issued under secs. 501, 502, Pub. L. 95-521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96-28, 93 Stat. 76, 77 (18 U.S.C. 207).

2. Section 0.735-48 is revised to read as follows:

§ 0.735-48 Restricted Communications.

Certain employee communications are prohibited in formal adjudicatory proceedings under §§ 2.780 and 2.781 of this chapter.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

3. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub.L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub.L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub.L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.300-2.309 also issued under Pub.L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). Sections 2.600-2.606 also issued under sec. 102, Pub.L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.781 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub.L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Appendix A also issued under sec. 6, Pub.L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

4. Section 2.4 is revised by removing the alphabetical paragraph designators, alphabetizing all words defined, and adding three new definitions to read as follows:

§ 2.4 Definitions.

* * * *

"Commission adjudicatory employee" means --

(1) the Chairman, the Commissioners, and members of their personal staffs;

(2) the members of the Atomic Safety and Licensing Appeal Panel and staff assistants to the Panel;

(3) the members of the Atomic Safety and Licensing Board Panel and staff assistants to the Panel;

(4) a presiding officer appointed under § 2.704, including an administrative law judge, and staff assistants to a presiding officer;

(5) special assistants (as defined in § 2.772);

(6) the General Counsel and employees of the Office of the General Counsel

(7) the Director of the Office of Policy Evaluation and employees of that office;

(8) the Secretary and employees of the Office of the Secretary; and

(9) Any other Commission officer or employee who, after written notice to the parties, is appointed by the Commission to participate or advise in an initial or final decision. Any other Commission officer or employee who, as permitted by § 2.781, participates or advises in an initial or final decision on a continuing basis must be appointed as a Commission adjudicatory employee under this paragraph.

"Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

[OPTION 1]

"Investigative or litigating function" means --

(1) personal participation in planning, conducting or supervising an investigation; or

(2) personal participation in planning, developing or presenting, or supervising the planning, development or presentation of testimony, argument or strategy in a proceeding.

[OPTION 1 END]

[OPTION 2]

"Investigative or litigating function" means --

(1) personal participation in planning, conducting or supervising an investigation; or

(2) personal participation in planning, developing or presenting, or supervising the planning, development or presentation of testimony, argument or strategy in a proceeding;

(3) but excludes personal participation in performing or supervising, or testifying after performing or supervising, a neutral scientific or engineering review of an issue based solely on the application of scientific

or engineering principles to factual materials that are available to all parties to a proceeding.

[OPTION 2 END]

5. Part 2 is amended by removing Subpart C.

Subpart C [Removed]

6. Section 2.719 is removed.

§ 2.719 [Removed]

7. Part 2 is amended by revising the undesignated centerhead immediately after § 2.772 to read as follows:

RESTRICTED COMMUNICATIONS

8. Section 2.780 is revised to read as follows:

§ 2.780 Ex Parte Communications.

In any proceeding under this subpart --

(a) Interested persons outside the agency may not make, or knowingly cause to be made to any Commission adjudicatory employee, any ex parte communication relevant to the merits of the proceeding.

(b) Commission adjudicatory employees may not request or entertain from any interested person outside the agency or make or knowingly cause to be made to any interested person outside the agency any ex parte communication relevant to the merits of the proceeding.

(c) Any Commission adjudicatory employee who receives, makes or knowingly causes to be made a communication prohibited by this section shall ensure that it and any responses thereto promptly are served on the parties and placed in the public record of the proceeding. In the case of oral communications, a written summary shall be served and placed in the public record of the proceeding.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Commission or other adjudicatory employee presiding in a proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(e) The prohibitions of this section are applicable (1) when a proceeding is first noticed for a hearing under this subpart or (2) whenever the interested person or Commission

adjudicatory employee responsible for the communication has knowledge that a proceeding will be noticed for a hearing under this subpart.

(f) The prohibitions in this section do not apply to --

(1) requests for and the provision of status reports;

(2) communications specifically permitted by statute or regulation (e.g., § 2.720).

(3) communications made to or by members of the Office of the General Counsel regarding matters pending before a court or another agency; and

(4) communications regarding generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated by the Commission adjudicatory employee or the interested person with the resolution of any proceeding under this subpart pending before the NRC.

9. New § 2.781 is added to read as follows:

§ 2.781 Separation of Functions.

(a) In any proceeding under this subpart, any NRC officer or employee engaged in the performance of any investigative or litigating function in that proceeding or in a factually related proceeding may not participate in or advise a Commission adjudicatory employee about the initial or final decision on any disputed issue in that proceeding, except --

(1) as witness or counsel in the proceeding;

(2) through a written communication served on all parties and made on the record of the proceeding; or

(3) through an oral communication made both with reasonable prior notice to all parties and with reasonable opportunity for all parties to respond.

(b) The prohibition in paragraph (a) of this section does not apply to --

(1) Communications to or from any Commission adjudicatory employee regarding --

(i) the status of a proceeding;

(ii) agency participation in matters pending before a court or another agency; or

(iii) generic issues involving public health and safety or other statutory responsibilities of the agency (e.g., rulemakings, congressional hearings on legislation, budgetary planning) not associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(2) Communications to or from Commissioners, members of their personal staffs, the General Counsel and employees of the Office of the General Counsel, the Director of the Office of Policy Evaluation and employees of that office, and the Secretary and employees of the Office of the Secretary, regarding --

(i) initiation or direction of an investigation or initiation of an enforcement proceeding;

(ii) supervision of agency staff to ensure compliance with the general policies and procedures of the agency;

(iii) staff priorities and schedules or the allocation of agency resources;

(iv) general regulatory, scientific or engineering principles that are useful for an understanding of the issues in a proceeding and are not contested in the proceeding;

(v) the need to add issues to a proceeding after rendition of the initial decision; or

(vi) the need to reopen a proceeding after rendition of the initial or final decision.

(3) None of the communications permitted by paragraph (b)(2) of this section are to be associated by the Commission adjudicatory employee or the NRC officer or employee performing investigative or litigating functions with the resolution of any proceeding under this subpart pending before the NRC.

(c) Any Commission adjudicatory employee who receives a communication prohibited under paragraph (a) of this section shall ensure that it and any responses thereto are placed in the public record of the proceeding and served on the parties. In

the case of oral communications, a written summary shall be served and placed in the public record of the proceeding.

(d) The prohibitions in this section are applicable (1) when a proceeding is first noticed for a hearing under this subpart or (2) whenever an NRC officer or employee who is or has reasonable cause to believe he or she will be engaged in the performance of an investigative or litigating function or a Commission adjudicatory employee has knowledge that a proceeding will be noticed for a hearing under this subpart.

(e) Communications to, from, and between Commission adjudicatory employees permitted by this section may not serve as a conduit for ex parte communications prohibited by § 2.780.

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an appeal from an initial decision, or a petition for reconsideration of a final decision that clearly

and concisely sets forth the information or argument relied on to show the contrary.

10. In § VII of Appendix A to Part 2, paragraph (c) is revised to read as follows:

VII. General

* * * * *

(c)(1) Section 2.781 specifies when consultation between Commissioners or boards, on the one hand, and the staff, on the other hand, is permitted in licensing proceedings conducted under Subpart G. Section 2.781 also permits a board, in the same type of proceeding, to consult with members of the panel from which the members of the board are drawn.

(2) The provisions of § 2.781 restricting intraagency consultations and communication are not applicable to matters certified to the Commission or to the Atomic Safety and Licensing Appeal Board under the Commission rules in §§ 2.720(h) and 2.744(e)(1) since those matters are not deemed to involve substantive matters at issue in a proceeding on the record.

11. In § IX of Appendix A to Part 2, paragraph (c) is revised to read as follows:

IX. Licensing Proceedings Subject to Appellate Jurisdiction of Atomic Safety and Licensing Appeal Board.

* * * * *

(c) Consultation between members of the Atomic Safety and Licensing Appeal Board for a particular proceeding and the staff is permitted on the conditions specified in 10 CFR 2.781. However, members of the Atomic Safety and Licensing boards for particular proceedings shall not consult on any fact in issue in those proceedings with members of the Appeal Board Panel.

* * * * *

Dated at Washington, D.C., this ____ day of _____, 1985.

For the Nuclear Regulatory Commission

SAMUEL J. CHILK,
Secretary of the Commission.

Attachment 2

OGC ANALYSIS OF COMMISSIONER ROBERTS 4/11/85
QUESTIONS REGARDING EX PARTE AND SEPARATION OF FUNCTIONS

1. Why the "investigating/prosecuting" functions should be defined in § 2.4(v)(2) [of Commissioner Zech's proposed rule] to include any of the "litigating" functions, especially testifying as a staff witness on a technical matter, in non-accusatory (i.e., licensee-initiated and any others not questioning a party's past conduct) proceedings, including initial license and license amendment proceedings, since the proposed rules purportedly conform to the APA "separation of functions" provisions, and since staff advocates do not perform "prosecuting" or "investigating" functions - as those terms were used by Congress in the APA - in non-accusatory adjudications.

The issue of whether a "prosecuting" function should be defined to include a "litigator," i.e., one who serves in an advocacy role in a proceeding, is a controversial one. A broader reading of the APA's term "prosecuting" to include litigating or advocacy functions has been championed by recent commentators, Asimow, When the Curtain Falls: Separation of Functions in Federal Administrative Agencies, 81 Colum. L. Rev. 759, 772-73 (1981) (nothing in APA's language or legislative history precludes reading APA separation of functions provision to include advocates); Shulman, Separation of Functions in Formal Licensing Adjudications, 56 Notre Dame Law. 351, 394-401 (1981) (due process limitations may apply to private consultations between staff advocates and adjudicators); see also 3 K. Davis, Administrative Law and Procedure § 18.5, at 355 (2d ed. 1980) (cure for congressional

failure to forbid combination of advocating and judging lies in judicial use of due process, although congressional failure to forbid such combination appears to have deterred courts from aggressively using due process); and by at least one court, see Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980). We believe the broader reading of the term "prosecuting" suggested by these authorities is the better legal view.

It should be noted, however, that under Option 2 of the proposed rule that is being presented with this analysis, we have attempted to define the term "litigating" as narrowly as possible to limit it to those staff personnel most directly involved in litigating the licensing proceeding, as opposed to those involved in the license review process through scientific or engineering analysis of publicly available materials. In fact, implementing an earlier suggestion by Professor Davis, see 2 K. Davis, supra, § 13.10, at 247 (1958), under Option 2 staff witnesses who testify on the basis of having performed such review functions also would not be considered to have performed a "litigating" function.

2. Whether, and if so why, not defining "investigating" or "prosecuting" functions to include "litigating" functions in non-accusatory proceedings properly should be viewed as invoking the "initial license" exception, since invoking that exception only appears to be necessary to allow employees or agents engaged in "investigating" or "prosecuting" functions to participate or advise in the initial or recommended licensing decision by the trier of fact and in the agency review of the decision.

As a practical matter, defining "prosecutor" to exclude nonaccusatory advocates or invoking the initial licensing exception has the same effect for nonaccusatory NRC proceedings to grant applications for initial licenses or licensee-initiated modifications. There are, however, many NRC initial licensing proceeding that could be described as "accusatory,"[1] and invocation of the initial licensing exemption, as opposed to simply defining "prosecutor" to exclude nonaccusatory advocates, might provide a broader result if the initial licensing exemption is read to exempt "prosecutors" in such accusatory cases. Whether the initial licensing exemption would apply in accusatory cases is subject to considerable doubt. See Shulman, supra, 56 Notre Dame Law. at 358 & nn.30-31.

3. How the proposed rule properly would allow any greater range of staff technical advice to the Commission on contested technical issues than under our current rules, since to avoid "tainting" the Commission's decision any staff technical person who is to be appointed "a Commission adjudicatory employee" under § 2.4(t)(8) [of Commissioner Zech's proposed rule] would apparently have to be identified and isolated from off-the-record contacts with both interested persons outside the agency and those of the staff who communicate off the record with interested persons outside the agency at least by

---

[1]For example, many current operating license proceedings involve claims of harassment of QA/QC personnel, falsifying records or material false statements and thus might be classified as "accusatory." Some uncertainty about the exact scope of the term "accusatory" exists because its meaning is not explained in any detail in the APA's legislative history and thus is subject to considerable interpretation.

the time the proceeding is noticed for hearing to avoid violation of the ex parte provisions of 5 U.S.C. 557(d). Also, why those "staff technical persons" under such conditions would likely be more knowledgeable about a contested technical issue than would any other "Commission adjudicatory employee" who is competent in the particular field of interest.

As the Statement of Considerations accompanying the proposed rule notes, the designation of a staff member as a Commission adjudicatory employee need not necessarily come at the time the hearing is noticed. Rather, that person can be appointed later, despite previous contacts that might be considered ex parte if made to a Commission adjudicatory employee, so long as any off-the-record information he has gained through his previous contacts with outside persons that is communicated to an adjudicator is placed on the public record. Thus, the staff person could have participated substantially in the licensing review process on a particular plant, although not in the adjudicatory process as a litigator, and still be eligible to be an advisor to an adjudicator. This proposal will allow communications with staff personnel having substantial technical experience with particular facilities.

4. Why proposed § 2.780(e) [of Commissioner Zech's rule] is not less restrictive than 5 U.S.C. 557(d)(1)(E) requires.

Section 557(d)(1)(E) provides that the APA's separation of functions restriction begins to apply when a notice of hearing is issued. It is arguable that concerns about ex parte contacts really became paramount when the particular issues in

the case are joined, i.e., they are designated for hearing. Nonetheless, given the explicit statutory language as well as the concerns expressed by OELD, the Licensing Board, and the Appeal Board about the provision as set forth in Commissioner Zech's proposal, it has been omitted from the proposed rule, which now tracks the statutory language.

5. Why § 2.780(f) [of Commissioner Zech's proposed rule], except for (f)(2) [now (f)(3)], is necessary, since (f)(1) and (f)(3) [now (f)(4)] do not appear to relate to the merits of "any issue in the proceeding." Also, why (f)(2) is necessary, except to cover challenges to "immediate effectiveness review" decisions, since other court challenges related to the merits of any issue in a proceeding should involve final agency action terminating the proceeding.

Subsections (f)(1) and (f)(3) [now (f)(4)] of section 2.780 make explicit what is implicit in the definition of "ex parte communication." Since questions about the propriety of outsider contacts regarding status reports and generic matters are likely to be frequent absent some statement in the rule, we believe it is useful to spell out these exceptions rather than leaving them as unwritten interpretations.

Section 2.780(f)(2) [now (f)(3)] is useful not only because of court litigation involving "immediate effectiveness reviews," but also as it would cover other interlocutory matters that are raised from time to time. See, e.g., San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408 (D.D.C. 1980). Since we cannot predict or control the timing or subject matter of such suits, we believe it is useful to

have the exemption stated explicitly so that there is no question about OGC's authority to deal fully with applicants or intervenors on litigation involving an ongoing proceeding. Other agencies' rules similarly have recognized this exemption. See 11 CFR § 111.22 (Federal Election Commission).

6. Why § 2.781(a)(2) [of Commissioner Zech's proposed rule] is necessary and the purpose for including (a)(3).

Generally speaking, the separation of functions limitation on participation by investigators or litigators as a "witness or counsel" in a proceeding that is embodied in section 2.781(a)(1) will be sufficient to implement that prohibition. Witnesses and counsel generally communicate with an adjudicator publically and in a setting in which other parties have an opportunity to be aware of and respond to their assertions. Nonetheless, to further emphasize that contacts with an adjudicator by any person acting as an investigator or litigator must be public, we have included the specific provisions in section 2.781(a)(2) and (a)(3) relating to written and oral communications.

It should be added that it is not clear that making such off-the-record communications public will cure totally a separation of functions violation. That prohibition is designed not only to prevent off-record information inputs but also to keep the decisionmaking process itself from being tainted by the participation of staff members who are

advocates in the proceeding. Nonetheless, we believe that making any communication public will give us a cogent argument for asserting that communications to an adjudicator otherwise made in violation of the separation of functions prohibition should not provide a basis for overturning the adjudicator's decision.

7. Why § 2.781(b)(1)(i) [of Commissioner Zech's proposed rule] does not violate 5 U.S.C. 554, which exempts only the Commissioners themselves from its restrictions.

In Grolier, Inc. v. FTC, 615 F.2d 1215, 1220 (9th Cir. 1980), the Court indicated that a persuasive argument can be made that the agency head exemption applies to the personal advisors of agency heads, at least so long as they remain in such positions. Including other Commission-level offices such as OGC, OPE and SECY extends this interpretation in a way that we believe is logical and defensible.

8. Why § 2.781(b)(1)(ii) [of Commissioner Zech's proposed rule] is necessary and why (b)(1)(iii) does not go to the merits and should not be on the record.

Section 2.781(b)(1)(ii) states explicitly an implicit aspect of the agency head exemption of section 554(d). We believe it is useful to put agency personnel and outside persons on notice of the scope of this exemption and thus avoid reliance on unpublished interpretations of the rule.

Section 2.781(b)(1)(iii) is based on an interpretation of the District of Columbia Circuit's decision in Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998, 1806, n.20 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977). In EDF, Inc., the court held that agency prosecutors were not prohibited from privately discussing with the agency head whether to broaden an existing charge in an ongoing enforcement proceeding. Arguably, Commission consideration of whether to broaden an adjudicatory proceeding by adding issues falls into the same category. This interpretation admittedly extends considerably the District of Columbia Circuit's holding in EDF, Inc. and thus is subject to substantial litigative risk.

9. Why defining the "investigating/prosecuting" functions to exclude the "litigating" functions in non-accusatory proceedings, as the APA allows, would not simplify the drafting of our ex parte and "separation of functions" rules by eliminating the need for many exceptions from the rules which are not exceptions under the APA and eradicate much of the continuing confusion about whether our rules conform to the APA.

Drafting the rules to define "prosecuting" functions strictly, thereby excluding "litigating" functions in nonaccusatory proceedings would simplify the rules, at least in terms of application, since many NRC licensing proceedings are nonaccusatory. Whether this would conform the rules to the APA or to the requirements of due process is a question about which there is considerable doubt, as we indicated in the answer to Question 1.