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For Comment

Study of the Nuclear Regulatory Commission's Appellate System

L. Bickwit, M. Malsch, S. Ostrach, K. Christenson

Office of
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U.S. Nuclear Regulatory
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Introduction

The Commission has a three-tier adjudicatory system. Matters are first heard and decided by an Atomic Safety and Licensing Board, followed in most cases by a mandatory review by an Atomic Safety and Licensing Appeal Board and then by discretionary Commission review. This system was taken over intact from that used by the Atomic Energy Commission. In view of the different responsibilities and mission assigned to this Commission by the Energy Reorganization Act, it was thought useful to study the adjudicatory appellate system to determine if it was in harmony with the Commission's needs and resources. This study examines: (1) the history of the appeal boards, (2) the role the appeal boards play in the current adjudicatory process, (3) legislative trends relating to use of intermediate appellate bodies for agencies, (4) the adjudicatory systems at other agencies, and (5) the current workload of the appeal boards and the Commission. The final section of the study discusses the available options for change and makes recommendations for potential improvements in the functioning of the present appellate system.

I. History and Capabilities of the NRC's Present Appeal System

A. Historical Development

Before 1969, decisions of the Atomic Safety and Licensing Boards[1/] became final decisions of the Atomic Energy Commission ("AEC" or "Commission") within 45 days of issuance unless the parties filed exceptions or the Commission decided to review the case on its own motion.[2/] This procedure changed, however, when the Atomic Safety and Licensing Appeal Board ("Appeal Board") was created in 1969 as an intermediate adjudicatory tribunal.[3/] The Appeal Board, as originally created, was composed of the Chairman and Vice Chairman of the Atomic Safety and Licensing Board Panel ("ASLBP") and a third technically qualified ASLBP member who was designated by the Commission for each proceeding.[4/]

1/ The Atomic Safety and Licensing Boards were created pursuant to the authority of section 191 of the Atomic Energy Act of 1954, as amended in 1962. 42 U.S.C. § 2241 (1976).

2/ 31 Fed. Reg. 4339 (1966), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-4 (Sept. 1, 1978). There were no appeals as of right from licensing board decisions until 1966. Before this time parties were limited to filing petitions for review and the Commission could grant or deny these petitions at its discretion. Permitting parties to file exceptions and supporting briefs within 20 days of service of the initial decision and thus obtain a review as of right was implemented to expedite the Commission's decisional process by eliminating the need for a petition for review and a Commission ruling on the petition. Id.

3/ See 34 Fed. Reg. 13,360 (1969), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-9 (Sept. 1, 1978).

4/ Id. The Appeal Board members served in a dual capacity as members of the Appeal Board and members of the ASLBP, although they could not perform both functions in the same case.

In uncontested proceedings the Appeal Board was authorized to review the initial decision on its own motion or to allow the decision to become final.[5/] If the decision was contested, however, the Appeal Board was mandated to rule on the exceptions.[6/] Also, unless the Commission had a direct financial interest[7/] in the proceeding, the Appeal Board was "authorized, either in its discretion or on the motion of the Commission, to certify to the Commission for its determination, major or novel questions of policy, law or procedure."[8/] Furthermore, the Commission retained the authority to review on its own motion all Appeal Board decisions except those in which the Commission had a direct financial interest.

The purpose of delegating the review function to the Appeal Board was to enable the Commission "to devote more of its time and energies to major matters of policy and planning."[9/] These major matters of policy and planning were largely non-regulatory issues arising out of the AEC's promotional and developmental programs and are now a part of the Department of Energy.

5/ Id.

6/ Id.

7/ "Facilities in which the Commission has a direct financial interest include those owned by the Commission, though not located at Commission installations, and operated for it under contract systems. Also included are those facilities for which AEC has given direct financial assistance or has waived charges for fuel." AEC Rel. No. M-192 (Aug. 18, 1969).

8/ 34 Fed. Reg. 13,360 (1969), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-10 (Sept. 1, 1978).

9/ Id.

In late 1971 the ASLBP Chairman and Vice Chairman were replaced by a permanent Appeal Board Chairman and Vice Chairman who were no longer Licensing Panel members.[10/] Thus, the Appeal Board was now generally composed of the permanent Appeal Board Chairman and Vice Chairman and a third member designated by the Commission for each proceeding.[11/] However, if antitrust considerations were involved in the proceeding, the Appeal Board would include the Chairman and two ASLBP members designated by the Commission who had qualifications appropriate to the issues to be decided.[12/]

Among the reasons for appointing a permanent Chairman and Vice Chairman were (1) the increased appellate workload; (2) the desire to further separate AEC staff involved in various stages of the reactor licensing process; and (3) recognition that licensing procedures were becoming increasingly complex and were therefore requiring more time throughout the licensing process.[13/]

This change proved insufficient to accommodate the increasing caseload of the Appeal Board since the Chairman was still required to sit on every case and the Vice Chairman on all except antitrust

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10/ 36 Fed. Reg. 23,899 (1971), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-16 (Sept. 1, 1978).

11/ Id.

12/ Id.

13/ Id.

cases.[14/] As a result, an Appeal Panel was established from which three members possessing qualifications deemed appropriate to the issues to be decided in a given proceeding are selected.[15/] The Commission designates members of the Panel, but the Appeal Panel Chairman or, in his absence, Vice Chairman selects the Panel members who will serve on the Appeal Board for a particular proceeding.[16/]

In late 1974, when the division of AEC into ERDA and NRC was being implemented, some thought was given to terminating the separate existence of the Appeal Panel. Some persons took the view that the NRC Commissioners, shorn of the non-regulatory responsibilities of the former AEC, might not need an intermediate review board.[17/] However, the Energy Reorganization Act of

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14/ 37 Fed. Reg. 22,791 (1972), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-22 (Sept. 1, 1978). The Commission had earlier recognized that individual members, including the Chairman or Vice Chairman, might become unavailable considering the great demand on them, and had therefore provided that it could designate an alternate if necessary. See 37 Fed. Reg. 6380 (1972), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-17 (Sept. 1, 1978). This provision also proved inadequate.

15/ 10 CFR § 2.787 (1979).

16/ Id. See 37 Fed. Reg. 22,791 (1972), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-22 (Sept. 1, 1978).

17/ Reasons against dissolving the intermediate review board included (1) there had been a substantial increase in the number and scope of contested licensing proceedings due in large part to the enactment of NEPA; (2) the Appeal Board was handling the area well and the Commission had other start-up concerns; and (3) the Commission lacked the requisite staff to deal with very many adjudicatory issues itself. See Remarks by Victor Gilinsky, Commissioner, U.S. NRC (Presented at the Edison Electric Institute/Envirosphere Company Conference, Washington, D.C. on September 11, 1978), "Taking Charge of Reactor Licensing," NRC Rel. No. S-78-7.

1974.[18] did not reflect this line of thought. The statute's only reference to the Appeal Panel is a clause providing that the functions of "the Atomic Safety and Licensing Appeal Board" are transferred from the AEC to the NRC.[19] This language suggests that Congress believed the question of the need for or usefulness of an Appeal Panel to be one best left to the Commissioners of the newly formed NRC. However, the Conference Report indicates that the Commission would be required to notify Congress before abolishing the Appeal Panel.[19a]

More recently, the Commission amended its rules of practice to permit parties to petition the Commission for a discretionary review of an Appeal Board decision or action, thus replacing the previous system wherein an Appeal Board decision was only reviewed if the Commission decided to exercise its discretionary review on its own motion.[20] At the same time, the Commission provided proceedures for parties to request stays of the decisions or actions of both presiding officers and the Appeal Board.[21] In general, it was hoped that use of the petition for discretionary review would "increase participation in the Commission's decision making process and provide the Commission with focused views on the

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18/ 42 U.S.C. 5801 et seq. (1976).

19/ 42 U.S.C. 5841(g)(1) (1976).

19a/ I Legislative History of Energy Reorganization Act of 1974, at 1420-21.

20/ 10 CFR § 2.786 (1979).

21/ 10 CFR § 2.788 (1979). This section really just codified existing case law.

validity and impact of Appeal Board decisions."[22/] To date this "certiorari" system has apparently not led to a significant increase in the amount of adjudication done by the Commission compared to the amount done under the previous sua sponte system.

B. The NRC's Present Adjudicatory System

Analysis of the role of the Appeal Board requires an understanding of how the ASLAB relates to the other components of the adjudicatory system. Thus, this segment of the study discusses the roles of the licensing boards, Chief Administrative Law Judge,[23/] appeal boards and Commission under the present system. Particular emphasis is given to the Commission's powers under the present system and the extent to which these existing powers are utilized.

Section 181 of the Atomic Energy Act of 1954, as amended, makes the Administrative Procedure Act applicable to all NRC activities that do not involve restricted data or defense

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22/ 42 Fed. Reg. 22,128 (1977), reprinted in U.S.N.R.C. Rules and Regulations, 2-SC-32 (Sept. 1, 1978).

23/ This term is somewhat misleading since the NRC currently has only one ALJ who operates apart from licensing boards. The title is not meaningless, however, because the regulations provide the CALJ with some authority that other ALJs would not have. Thus, because he has the title CALJ, the ALJ can exercise all such authority. Traditionally, in his role as ALJ, the CALJ has only been utilized in civil penalty cases. The ALJ is also a Licensing Panel member and serves on ASLBs.

information.[24] Consequently, the APA provides a thread of continuity throughout the NRC adjudicatory system and is the statutory basis for the general rules that govern proceedings in all NRC adjudications.[25]

Despite these general rules, procedures vary depending on the type of proceeding involved. There are four major categories of administrative proceedings within the Nuclear Regulatory Commission; namely, (1) construction permit proceedings, (2) operating license proceedings,[26] (3) antitrust proceedings,[27] and (4) enforcement

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24/ 42 U.S.C. § 2231 (1976). For activities involving restricted data or defense information, the Commission is required to promulgate regulations that will effectively safeguard and prevent disclosure of such information with minimal impairment of the APA procedural rights. Id. The applicable sections of the Administrative Procedure Act are 5 U.S.C. §§ 551-59 (1976).

25/ See 10 CFR §§ 2.700-2.790 (1979). These general rules govern procedure in all formal adjudications whether initiated by the issuance of an order to show cause, a notice of hearing, a notice of proposed action pursuant to 10 CFR 2.105, or a notice of the Attorney General's advice on the likelihood of an antitrust violation. 10 CFR 2.700 (1979). Notice of proposed action is required for (1) certain facility licenses, (2) a license for receipt of waste radioactive material, (3) an amendment to a license in (1) or (2) involving a significant hazards consideration, or (4) any other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded. 10 CFR 2.105 (1979).

26/ Included in the category of operating license proceedings are proceedings to issue a license, amend a license at the request of the licensee, and to transfer or renew a license.

27/ Section 105 of the Atomic Energy Act requires the Commission to send the Attorney General a copy of all applications for licenses to construct or operate a commercial production or utilization facility.

Where the Attorney General or his designee advises that there may be adverse antitrust aspects and recommends

(Continued on following page)

proceedings.[28] Once an initial decision has been issued, the review procedures are similar in all four categories although in unusual enforcement proceedings (the Three Mile Island Unit 1 start-up, for example) an Appeal Board may not be appointed. There are, however, differences in how a hearing is initiated as well as whether a hearing is mandatory, mandatory upon request, or discretionary. The procedures common to all proceedings will be discussed in reference to construction permit proceedings. Variations in the other three types of proceedings will be indicated where appropriate.

27/ (Continued from preceding page)

> that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in 105a. 42 U.S.C. 2135 (1976).

Technically, antitrust proceedings are part of construction permit or operating license proceedings. They are listed separately here because of their special character.

28/ Enforcement proceedings include "cases initiated by the staff, or upon a request by any person, to impose requirements by order on a license or to modify, suspend, or revoke a license," or for imposing civil penalties. 10 CFR § 2.200 (1979).

A hearing is statutorily required before any construction permit for a commercial nuclear facility may be issued.[29/] Thus once an application for a construction permit has been docketed[30/] and the review by the Staff and the Advisory Committee on Reactor Safeguards (ACRS)[31/] has begun, the hearing process begins. Usually, a three-member licensing board composed of one ASLBP

29/ 42 U.S.C. § 2239 (1976). Hearings in other proceedings are not statutorily mandated. For example, when civil penalties are going to be imposed or when a 2.206 order to show cause is issued, the licensee may demand a hearing. However, if no demand is made, a hearing is not statutorily required. Similarly, the Commission must grant a hearing if requested by any person whose interest may be affected by a proceeding to grant, suspend, revoke or amend a license. 42 U.S.C. 2239. In instances where a hearing is neither required nor instituted by the Commission, a notice of proposed action may be published. Such notices are published prior to issuing (1) a new facility license, (2) a license for receipt of waste radioactive material for the purpose of commercial disposal, (3) an amendment to a license in (1) or (2) involving a significant hazards consideration, or (4) any other license or amendment for which the Commission determines an advance opportunity for public hearing should be afforded. If a request for hearing or petition for leave to intervene is filed, the presiding officer must decide whether a hearing is justified. The relevant considerations are (1) the petitioner's rights under the Act to be made a party, (2) the petitioner's property, financial or other interest in the proceeding, and (3) the possible effect of any order that might be issued in the proceeding on petitioner's interest. 10 CFR § 2.714(d). The ruling on the request/ petition is immediately appealable to the ASLAB within 10 days of issuance of the order. 10 CFR § 2.714a. If no request for hearing is made, the Director of NRR or NMSS issues the license or amendment without a hearing.

30/ 10 CFR § 2.101(a)(4) (1979).

31/ 10 CFR § 2.102 (1979).

member who is an attorney knowledgeable in administrative procedure and two ASLBP members who have technical expertise deemed appropriate by the Commission or the ASLBP Chairman[32/] is designated as the presiding officer. If the Commission chooses, however, it may provide that one or more members of the Commission, or a named officer, will preside.[33/]

Hearings on applications for construction permits may be either contested or uncontested. If anyone petitions for leave to intervene in response to the notice of hearing and the petition is granted, the hearing is contested and full adjudicatory procedures ensue.[34/] The petitioner is admitted as a party to the proceeding. In contrast, if the proceeding is uncontested, a de novo review of the application is not required.[35/] Rather, the application, staff analysis, ACRS report and any other relevant documentation become the record of the proceeding that is reviewed by the licensing board.[36/]

32/ 10 CFR § 2.721 (1979). Ordinarily, one technical member is an environmental scientist and one is a physical scientist or engineer.

33/ 10 CFR § 2.704(a) (1979). The Commission's authority to designate such presiding officers extends to all four types of proceedings. See Id.

34/ A contested proceeding is "(1) a proceeding in which there is a controversy between the Staff of the Commission and the applicant for a license concerning the issuance of the license or any of the terms or conditions thereof or (2) a proceeding in which a petition for leave to intervene in opposition to an application for a license has been granted or is pending before the Commission." 10 CFR § 2.4(n) (1979).

35/ 10 CFR § 2.104(d)(2) (1979).

36/ Id.

A "special prehearing conference" is held in all construction permit cases.[37/] The presiding officer enters an order which recites (1) the action taken at the conference, (2) the schedule for further actions in the proceeding, (3) any agreements by the parties, (4) the key issues and the parties in the proceeding, and (5) provides for the submission of status reports on discovery.[38/] Any party may file objections to the order and the Board may revise it or certify all or some of the questions to the ASLAB.[39/] Granting petitions for certification is discretionary. The ASLB's special prehearing conference order is considered an interlocutory order and thus is not immediately reviewable. Therefore, if the licensing board refuses to revise or certify the order, the parties have no immediate forum for review.

In addition to the "special prehearing conference", a prehearing conference is held at a later stage of the proceeding in all proceedings for a construction permit or operating license. A prehearing conference may also be held, at the option of the presiding officer, in any other proceeding. The purpose of the prehearing conference, which is normally held after the completion of discovery, is to expedite the proceeding by clarifying the issues, getting stipulations, limiting expert witnesses, etc. Although the parties may file objections to the implementing order, if the presiding officer decides not to revise it or certify it to the appeal board, there is no immediate review.[40/]

37/ 10 CFR § 2.751a(a) (1979).

38/ 10 CFR § 2.751a(d) (1979).

39/ Id.

40/ 10 CFR § 2.752 (1979).

After the hearing, the Commission has a great deal of discretion. Normally, the presiding officer issues an initial decision. This decision becomes the final agency order unless a party excepts within 10 days or the Commission directs that the record be certified to it within 45 days.[41/] The Commission may, however, request the presiding officer certify the record to it without an initial decision. The Commission may then either (1) prepare its own initial decision to which exceptions may be filed, or (2) omit an initial decision because due and timely execution of its functions "imperatively and unavoidably" require it to do so.[42/] If the latter option is chosen, the Commission's order is the first and only agency order.

The ASLAB is authorized to perform the review function ordinarily exercised and performed by the Commission. This includes reviewing initial decisions of licensing boards to which exceptions are filed. If a major or novel question of policy, law or procedure is involved, the ASLAB may certify the question to the Commission in its discretion. The ASLAB decision is the final agency action unless the Commission decides to exercise discretionary review either (1) on its own motion, or (2) in response to a petition for review.[43/]

The Commission has 30 days to review a decision on its own motion. Such review is unlikely, however, unless a case has exceptional legal or policy implications. A party may petition for

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41/ 10 CFR § 2.760(a) (1979).

42/ 10 CFR § 2.760(b)(1)-(2) (1979).

43/ 10 CFR §§ 2.785-2.786 (1979).

Commission review on the ground that the ASLAB decision or action is erroneous with respect to an important question of fact, law or policy.[44/]

Questions of fact are only reviewed if the ASLAB decision is clearly erroneous and contrary to the licensing board's resolution of that same issue. Any issue not raised before the ASLAB, either by the parties or by the ASLAB sua sponte, will not be reviewed by the Commission. Similarly, any issue pending on motion for reconsideration will not be considered on review.[45/] A party has 10 days to file a petition for reconsideration of a final decision. However, if the decision became final because the party failed to file exceptions, no petition for reconsideration will be entertained.[46/] Petitions for reconsideration of a Commission decision upon petitions for review are not entertained.[47/]

The discussion above indicates that the Commission may step in at any time in any proceeding. The rationale for this broad discretion is that the Commission has general supervisory powers over all of its staff.[48/] Ultimately, it is the Commission that

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44/ 10 CFR § 2.786 (1979).

45/ 10 CFR § 2.786(b)(4) (1979).

46/ 10 CFR § 2.771(a) (1979).

47/ 10 CFR § 2.786(b)(7) (1979).

48/ See Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 516-17 (1977).

is responsible for staff's actions; thus, if the Commission thinks it advisable to intervene at any stage, it has the authority to do so.49/

49/ For a similar analysis of the FCC review board, see Freedman, Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation No. 6, Administrative Conference of the United States 131-37 (_____).

II. General Administrative Law Background

A. Current Trends in Administrative Adjudicatory Proceedings

The purpose of this section is to describe the current trends in administrative law regarding the use of intermediate appeal boards. There is a plethora of Congressional studies and scholarly papers covering this subject. Most, however, focus on reducing delay rather than assuring the proper division of responsibilities between agency components. Despite this different focus, reviewing the pertinent sections of the recent Congressional study on federal regulation[50/] and the resultant proposed legislation[51/] will adequately identify the present trends.

Volume IV of the Senate study, entitled "Delay in the Regulatory Process," is divided into two parts. Part I "discusses the extent and causes of delay"[52/] and Part II "discusses the role of agency leadership, management and planning in reducing delay." The authors of the study conclude that "[d]elay is a fundamental impediment to the effective functioning of regulatory agencies."[53/]

50/ IV Staff of Senate Comm. on Governmental Affairs, 9th Cong., 1st Sess., Study on Federal Regulation 85 (Comm. Print 1977) [hereinafter cited as Senate Study].

51/ S. 262, 96th Cong., 1st Sess., 125 Cong. Rec. S858 (1979).

52/ Senate Study, supra note 50, at v.

53/ Id. at ix. The average licensing proceeding takes more than 19 months, the average ratemaking proceeding 21 months, and the average enforcement action 3 years. The economic costs of undue regulatory delay are estimated at tens of millions of dollars. Id. at ix.

Among the principal causes of excessive delay[54/] are (1) too much emphasis on trial-type proceedings, (2) inadequate planning, priority-setting, and leadership by top management, (3) too little effort at setting and enforcing deadlines, (4) unnecessary layers of review, and (5) insufficient use of incentives and sanctions to encourage participants to speed up regulatory proceedings.[55/]

The Committee on Governmental Affairs made several recommendations aimed at reducing delay. These recommendations fall into identifiable categories, namely, (1) reducing agency emphasis on adjudication, (2) amending the Administrative Procedure Act to provide the agency with greater flexibility, (3) reducing agency review, and (4) improving leadership, management and planning.

The recommendations most relevant to the instant study concern reducing agency review. Specifically, the Committee recommends that "Congress ... enact legislation allowing each agency to provide that decisions or categories of decisions become final unless reviewed by the agency in its discretion.[56/] Also, each agency should be allowed to establish appellate boards and assign to them some or all of the agency's responsibilities for reviewing initial decisions." The Committee found that these two recommendations would effectuate the primary purpose of agency review: managing the regulatory workload. Although agency heads clearly have the authority

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54/ Excessive delay is distinguished from delay caused by (1) a large caseload, (2) a small budget, and (3) due process requirements. Id. at 11-12.

55/ Id. at ix.

56/ Id. at XVIII.

to make day-to-day decisions, they do not have the time. If they "delegate decisionmaking power to subordinates, and establish screening devices so that only those decisions requiring top-level attention will find their way to the top,"[57/] the agency becomes efficient. Not only are routine decisions made sooner, but the agency heads' time is conserved for addressing major policy matters. Thus, utilizing discretionary review and establishing intermediate appeal boards are two pivotal recommendations.

According to the Committee, agency review should be limited to discretionary review of (1) adjudicative facts if not supported by substantial evidence, (2) law and policy issues if clear, judicially reversible error is committed, and (3) novel or important issues of law or policy if the agency decides a high-level decision is necessary.[58/]

Limiting review in this manner, however, will be insufficient to resolve the bottleneck if the agency has a large caseload.[59/] Therefore, the Committee further recommends that agency leadership delegate part of its review function to a board.[60/] Because, ideally, members of the board will be implementing the policies set by the agency,

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57/ Id. at 83.

58/ Id.

59/ Id. at 84.

60/ Id. These recommendations are not new. In 1961, President Kennedy tried to implement reform that would permit the major agencies to "delegate adjudicatory responsibilities to hearing examiners or employee boards (or agency members themselves) 'subject only to discretionary review by the agency.'" Id. at 84-85. Also, the Administrative Conference has recommended adoption of discretionary review and an intermediate appeal board, 1 CFR § 305.68-6 (1979).

the members "must be in tune with the thinking of the agency leadership, and be trusted by them."[61/] Giving the agency head broad authority to specify the manner of selection and removal of board members insures continued control of agency policy.

Although agency review of appellate board decisions should not be precluded, the Committee recommends that it be severely limited. Specifically, review should be limited to instances where "clear errors of fact or unresolved legal or policy issues of the utmost importance are presented."[62/] Traditionally, however, agency review has been excessive. One explanation for excessive review is that agency members are reluctant to establish and adhere to generic standards.[63/] Thus, some agency heads prefer to decide important issues piecemeal.[64/]

In addition to the internal pressure to defer major policy decisions, many agency members are under pressure from powerful interest groups to review decisions.[65/] The sole motive for the interest groups desiring such review may be to cause delay that will restrict opponents with less time or money. Neither internal nor external pressures justify excessive review.

61/ Id.

62/ Id. at 83.

63/ Id. at 90.

64/ Id. "The tendency of many supervisors to become involved in the details of processing individual cases weakens agency management and causes the supervisors themselves to become bottlenecks in the bureaucratic process. Higher level managers, with a similarly narrow case-processing orientation, contribute to an administrative approach that stresses legalistic handling of individual cases." Id. at xi.

65/ Id.

Implementation of discretionary review and an intermediate appeal will only improve the administrative review process if the new procedures are faithfully adhered to by the agency head. Therefore, the Committee further recommends that in deciding whether review of any issue is justified, the agency make a preliminary finding that clear errors of fact or unresolved legal or policy issues of the utmost importance are involved.[66/] No finding is necessary if the agency decides to decline review.[67/] As an additional safeguard, the study recommends that the oversight committees of Congress periodically inquire into the agencies' success at limiting review.[68/]

The Reform of Federal Regulation Act of 1979 was introduced to the Senate on January 31, 1979.[69/] The bill, S. 262, implements some of the recommendations made by the Committee on Governmental Affairs in its "Study on Federal Regulation."[70/] As Senator Ribicoff accurately notes, the bill "will provide comprehensive far-reaching reform of the process of Federal regulation."[71/]

66/ Id. at 91-92.

67/ Id. at 92.

68/ Id.

69/ S. 262, 96th Cong., 1st Sess., 125 Cong. Rec. 5859 (Jan. 31, 1979). The bill was introduced by Senators Ribicoff, Percy, Kennedy, Cohen, Eagleton, Glenn, Javits, Levin, Long, Mathias, Nunn, Proxmire, Pryor, Roth and Talmadge.

70/ See Senate Study, supra note 50. Comparable bills have been introduced by the Administration and Senator Kennedy. See S. 755, 96th Cong., 1st Sess., 125 Cong. Rec. S3337 (Mar. 26, 1979); S. 1291, 96th Cong., 1st Sess., 125 Cong. Rec. S7126 (June 6, 1979).

71/ S. 262, supra note 139, at S858.

In general, the bill requires agencies to (1) plan and set priorities, (2) perform a cost-benefit analysis for all proposed regulations, (3) take steps to reduce delays, and (4) periodically review its major rules to determine if they are still necessary.[72/] The bill also strengthens the Administrative Conference.

The provisions of S. 262 relevant to this study are summarized below.

The Act amends the APA to authorize agencies to establish employee review boards. These review boards may review initial or recommended decisions by presiding officers. Agencies are permitted to vest final agency action in either the board or the presiding officers. Thus, no appeal is required. If the agency delegates such authority, review by the agency heads is discretionary.[73/] The limited circumstances when such review should be granted are specified.[74/]

Occasionally, agency review will be inevitable because of the importance or complexity of the issues. In such cases review by the appeal board should be precluded and the agency head should directly review the initial decision. Each agency must specify the conditions and circumstances under which it has immediate jurisdiction over initial decisions.[75/]

72/ Id. at S881.

73/ Id. at S876.

74/ Id.

75/ Id.

As the Ribicoff Study notes, agency review will only be reduced if the agency heads trust the review board members and feel that they are in tune with the thinking of agency leaders. Thus, the agencies are given broad discretion in selecting and removing members of agency review boards.76/

A review board may be composed of one or more members of the body comprising the agency or three or more employees. No initial decision may be reviewed more than twice.77/

The above is only a brief review of selected provisions of the bill. Clearly the tone of the bill reflects that of the study. However, the focus of the study, and of the bill itself, is administrative efficiency and reducing unnecessary delays. The study does not focus on different or innovative ways to involve top agency officials in the decision process.

76/ Id.

77/ The provisions of the bill regarding review of presiding employee decisions do not supersede "any provision of law specifically governing in a particular agency the composition or organization of any employee board or the right of any agency members to direct review of decisions, or ... any authority otherwise possessed by an agency to delegate the final decision ...." This savings clause appears to be applicable to the NRC Appeal Board.

B. Appellate Systems in Other Agencies

This section analyzes the adjudicatory systems of several other federal agencies to identify and evaluate alternative systems. The agencies discussed below were not selected randomly. Rather, a majority of the agencies were canvassed and one agency was chosen to represent each identifiable appellate system. Included in the systems discussed are: discretionary review, intermediate appeal board with discretionary review, review by group of Commissioners, direct review to Commission, final appeal boards, and review by group of Commissioners with substantial staff assistance.

1. Discretionary Review

Before 1962, the Civil Aeronautics Board (CAB) generally reviewed the entire record of all cases.[78/] This complete review occurred despite the fact that the regulations permitted the CAB to limit review to specific exceptions. "Artful pleading by a litigant wanting review, or wanting delay, could ordinarily place the entire record before the Board."[79/]

In 1962, however, the CAB adopted discretionary review.[80/] Thus, there was no longer any appeal as a matter of right, rather

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78/ Senate Study, supra note 50, at 85.

79/ Id.

80/ Id.

review was vested in the sound discretion of the Board. Generally petitions for review were only granted if there was prejudicial error of fact or law, or an important policy issue.[81/] Resolution of the cases was substantially accelerated "without any apparent detrimental effect on the quality of decisions."[82/] The average savings during the first eight years was 50 days per case which was attributable to reviewing only 48% of the cases and limiting the scope in those cases reviewed.[83/] "[T]he consensus among CAB practitioners and at the CAB among the Board Members, the staff and the hearing examiners [was] that the responsibility vested in the hearing examiner under the discretionary review procedure, ha[d] improved the quality of the examiner's work product, ha[d] improved the prestige of the Bureau of Hearing Examiners, and ha[d] enabled the Board to dispose of many cases without review."[84/]

Between October 1969 and June 1975, the percentage of cases accorded full review rose from 48 to 83 percent.[85/] The cause of this increase is an informal practice of granting review whenever

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81/ Id.

82/ Id. at 85-86.

83/ Id. at 86.

84/ Ellis, Report in Support of Discretionary Review of Decisions Of Presiding Officers; Subparagraph 1(b) of Recommendation No. 6, 1 Admin. Conf. of United States, Recommendations and Reports, 155, 166-67 (1970).

85/ Senate Study, supra note 50 at 86.

one Commissioner thinks it is advisable.[86/] The Committee on Governmental Affairs concluded that this problem could be resolved if the Board members exercised greater self-restraint in voting for review.[87/]

The CAB regulations are located in Title 14 of the Code of Federal Regulations. There are two basic categories of actions that are reviewable: (1) staff action and (2) ALJ decisions.[88/]

The ALJs are delegated the Boards function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of a hearing unless the record is certified to the Board with or without a recommended decision. The initial decision of the ALJ becomes a final order of the Board 30 days after service unless a petition for discretionary review is filed within 21 days or the Board decides to review the decision on its own motion.[89/] Petitions for review are only granted if "(i) a finding of a material fact is erroneous; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent; (iii) a substantial or important question of law, policy or discretion is involved; or (iv) a prejudicial procedural error has occurred."[90/] Two or more members must vote for review before

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86/ Id.

87/ Id. at 87.

88/ See 14 CFR § 302.27-302.37; 14 CFR § 385.50-385.54 (1978).

89/ 14 CFR § 302.27 (1978).

90/ 14 CFR § 302.28 (1978).

the Board may exercise its right of review. (As noted before, however, there is an informal practice whereby the Commissioners will vote to review a decision if any single Commissioner wants to consider the case.) Even if the Board grants review, it may issue a final order whenever it determines further proceedings are not warranted.[91/]

If the ALJ certifies the record in a proceeding to the Board without issuing an inital or recommended decision, the Board may, but is not required to, issue a tentative decision. Parties to the proceeding have 10 days to file exceptions to the tentative decision. Petitions for reconsideration of final orders of the Board may be filed by any party within 20 days of service.[92/]

There is also discretionary review of staff action. Petitions for review must be filed within 10 days of staff action. The staff member and his supervisor then have an opportunity to reverse the decision once a petition for review is filed. If the staff action is not reversed, the petition is submitted to the Board. Again, discretionary review is exercised if two members decide to hear the case. Decisions by the Board under this section are final and are not subject to petitions for reconsideration.[93/]

91/ Id.

92/ 14 CFR § 302.37(a) (1978).

93/ 14 CFR §§ 385.51-54 (1978).

2. Intermediate Appeal Board

The intermediate review board of the Federal Communications Commission was the model for Administrative Conference recommendation No. 68-6.[94/] In 1961 the Communications Act was amended to permit the FCC to establish "a Review Board to hear appeals from ALJs in nearly all classes of cases.[95/] The new system was evaluated after 5 years of operation. The reviewer concluded that the Review "Board was performing very well in both avoiding delay and in freeing the time of the Commissioners for important policy matters."[96/] During the first 18 months of the new system, the Board disposed of appeals almost 3 months faster than the Commission had been taking. This substantial reduction decreased in subsequent years due, in part, to an increase in the jurisdiction of the Review Board without a comparable increase in the Commission's staff assistance. Professor Freedman, quoting FCC Chairman Henry's statement, found that the Review Board decided cases more expeditiously than the Commission could. In general, the quality of Review Board decisions is high. "Typically they meet rather than avoid complex issues and support their conclusions with reasoning and relevant authority."[97/] In fact, agency practitioners believed that Board decisions were more predictable and consistent with precedent, existing policy, and the record than Commission decisions. At that time, the Commission

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94/ See 1 CFR 305.68-6 (1979).

95/ Senate Study, supra note 50 at 87.

96/ Id.

97/ Id.

reviewed only 10 percent of the Board opinions.[98/]

In the early 1970's, an FCC staff task force discovered that the performance of both the Review Board and the Commission had deteriorated to the point that it took "much longer to obtain a final, judicially reviewable decision in the 'routine' cases handled by the Review Board than in the 'difficult'" [cases] reviewed directly by the Commission.[99/] Two deficiencies in the Board reviews were noted: (1) the Board was required by statute to provide de novo review regardless of the adequacy of ALJ findings, and (2) the Board was understaffed, thereby causing excessive delay.[100/] Another cause of delay is that the Commission and its staff virtually perform de novo review of Board decisions when deciding whether to grant discretionary review.

The FCC's adjudicatory system is the one most like the NRC's system. Both agencies have intermediate appeal boards and certiorari Commission review. Initially, all proceedings at the FCC are heard by one of twelve ALJs. Although the ALJ usually renders the initial decision the Commission has the authority to demand that the record be certified to it for initial or final decision. The Commission must find, however, that due and timely

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98/ Id.

99/ Id. at 88.

100/ Id. at 88-89.

execution of its functions imperatively and unavoidably so requires.[101] If the ALJ makes the initial decision, it is appealable to a three-member appeal board.[102]

The FCC has broad authority to direct that a matter before a Board be certified to it for review.[103] Such certification is directed if the Commission perceives that a matter pending before the Board involves a novel or important question of law or policy.

Similarly, the Board may certify any question to the Commission either on its own motion or upon consideration of the motion of a party.[104] These certification procedures are useful tools to ensure that important policy decisions are made by the body assigned that task by Congress. The NRC has identical provisions.

The FCC regulations specify that the Commission, panel of Commissioners, or the Review Board may review an ALJ decision.[105] Exceptions to initial decisions of ALJs may be filed by a party within 30 days. Also, the Commission may elect to review the decision within 50 days.[106] Review may be limited to issues the parties excepted to or to those the Commission deems advisable.[107] After the Review Board decision is issued, any party may submit an application for review to the Commission which is wholly discretionary.

101/ 47 CFR 1.247 (1978).

102/ 47 CFR 0.361 (1978). Proceedings involving renewal or revocation of a station license are appealable directly to the Commission. 47 CFR 0.365 (1978).

103/ 47 CFR 0.361(c) (1978).

104/ 47 CFR 0.361(b) (1978).

105/ 47 CFR 1.271 (1978).

106/ 47 CFR 1.276(a)(i) (1978).

107/ CFR 1.279 (1978).

3. Review by Groups of Commissioners

The Interstate Commerce Commission's (ICCs) administrative review process is burdensome and repetitious.[108] It is not a system to be emulated. The unique features of the system are (1) at least two levels of review are required, (2) there may be as many as four administrative reviews, and (3) two or more of the reviews may be by the same "Division" of the Commission.[109] A typical scenerio follows.

The presiding officer, which is either an ALJ, Joint Board or Division of the Commission, issues an initial decision.[110] If exceptions are filed, review by an employee review board or a Division of the Commission is mandatory.[111] Parties may then request review of the ruling on the exceptions. This review will be to an "appellate" division of the Commission which in actuality is the same three commissioners who reviewed the exceptions.[112] If the latter decision reverses or modifies any prior

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108/ General procedures are set forth at 49 CFR 1100.96-1100.99 (1978).

109/ See Senate Study, supra note ____, at 82. Much of this repetitious review is statutorily mandated. 49 U.S.C. 17 (1976).

110/ The Commission may eliminate the requirement of an initial decision. See 49 CFR 1100.92 (1978).

111/ The policies and practices of the review boards and Divisions are located in the minutes of Commission meetings. ACUS, Federal Administrative Law Judge Hearings 238 (1975).

112/ Unless, of course, the exceptions were initially reviewed by an employee appeal Board.

order, the parties have a right to another round of reconsideration. Finally, parties may petition the full Commission for discretionary review. Such review is only granted if there are "matters of general transportation importance."[113/]

4. Direct Review to the Commission

At the Federal Trade Commission (FTC), any party may appeal an initial decision to the Commission.[114/] Also, the Commission may, on its own motion, decide to review the case.[115/] The scope of review is completely within the discretion of the Commission.[116/] Parties may file a petition for reconsideration of the Commission decision. Such petitions must be confined to new questions raised by the Commission decision upon which the petitioner had no previous opportunity to argue.[117/]

113/ Id. at 237-38; Senate Study, supra note ____, at 82.

114/ 16 CFR 2.52(a) (1978). The Consumer Product Safety Commission, Federal Energy Regulatory Commission, Food and Drug Administration and National Transportation Safety Board have substantially equivalent procedures. See 16 CFR 1025.51-1025.56, 18 CFR 1.27-1.34; 21 CFR 12.120-12.139; 49 CFR 821.42-821.50 (1978). Most agencies with these procedures have much simpler proceedings. For example, the CPSC staff brings approximately 5-10 cases per year. Each hearing takes approximately 5-8 days. Of these cases, only 2 or 3 are appealed.

Similarly, although the NTSB heard 136 appeals in 1978, the average hearing took less than one day. Reviewing such a record is a manageable task.

115/ 16 CFR 3.53 (1978).

116/ 16 CFR 3.54 (1978).

117/ 16 CFR 3.55 (1978).

5. Final Appeal Board

The Office of the Secretary of the Interior has a unique review system well suited to its diversified duties. Five specialized review boards make the final decision in most cases. Ad hoc boards are established for unique situations.[118/] Although the Secretary may preside at or review any proceeding he elects to,[119/] there is no right to petition the Secretary for review. Moreover, petitions for reconsideration of an Appeal Board Director's decision are rarely granted.[120/]

6. Review by Group of Commissioners With Substantial Staff Assistance

In NLRB unfair labor practice cases,[121/] exceptions may be filed to an ALJ's decision. Generally, these decisions are reviewed by a three-member panel of the five-member board. However, in cases involving questions of policy or novel issues of law, the full board will review the case.[122/]

If a decision is to be decided by a panel, it is first assigned to a single board member. An attorney on the board member's staff reviews the decision and prepares the case for submission to a subpanel of experienced counsel. Usually, the

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118/ See 43 CFR 4.1 (1978).

119/ 43 CFR 4.5 (1978).

120/ 43 CFR 4.21(c) (1978).

121/ The vast majority of NLRB cases fall within this category. The applicable procedural regulations are located at 29 CFR 101-102.

122/ ACUS, supra note 50, at 254.

subpanel drafts a tentative decision, although it may send a memorandum to the full panel or the Board if it cannot resolve an important issue.[123/]

The tentative decision must be approved by the board member to whom it was assigned before it can be circulated to the two other panel members. The other panel members assign the draft to one of their staff attorneys who screens it and makes recommendations or suggestions. Panel discussion may be necessary. Any changes are incorporated into the draft and cleared with all panel members before the decision is released. Any board member may request review by the full board at any time. Cases considered by the full board take substantially longer.[124/]

123/ Id.

124/ Id.

III. Statistical Analysis of Appeal Panel Workload

The purpose of this section is to describe the workload of the ASLAP. One source of data used for this analysis is a memorandum prepared by the Panel which covers the period between November 1, 1977 and November 1, 1978.[125/] During that 12-month period, the members and professional supporting staff of the Appeal Panel devoted a total of approximately 15,000 man-hours in the direct performance of adjudicatory functions.[126/] The professional supporting staff, which consisted of a counsel, a technical advisor and two legal interns contributed 7,000 of these man-hours.

A breakdown of the 15,000 man-hours reveals that 60% was spent reading transcripts, exhibits and briefs, and performing technical and legal research. Thus approximately 9,000 man-hours was spent performing these tasks. Of the remaining 40%, 20% was occupied drafting opinions and orders. Oral arguments and collegial consultation required 10% or 1500 hours. The remaining 10% was spent in miscellaneous activities such as keeping abreast of developments in the cases before the Panel. A more detailed breakdown of the Appeal Panel's workload follows.

125/ See Memorandum for Commissioner Kennedy from Alan Rosenthal, December 21, 1978.

126/ There was no evidentiary hearing held during this period. Both before and after that period Appeal Boards have held evidentiary proceedings in proceedings including Indian Point (seismic issues), Seabrook (alternate sites) and others. Hundreds of professional man-hours are required for every evidentiary hearing. Thus the 15,000 man-hours is a conservative estimate of the Panel's workload for one year.

The Panel published 64 "decisions" and "memoranda and orders". An additional 100 unpublished memoranda and orders were also written.

In 32 instances parties sought review of final licensing board orders. There were also five petitions for certification, five motions for reconsideration, one referral, and various other filings requiring some degree of substantive appeal board consideration. The total number of appeals, petitions and motions was 51. Over 95 different issues were presented by these filings.

The aggregate length of the written records of the cases reviewed was phenomenal. The records included a total of 13,316 documents, 45 volumes of interrogatories, 55 volumes of written testimony, 1939 exhibits and 164,309 pages of transcript. Under the current rules of practice in which the Appeal Boards can and do make findings of fact based on their own examination of the record (unlike appellate courts which do not directly address the records themselves) the boards are responsible for taking proper account of every piece of those massive records.

One particular aspect of the Appeal Panel's workload to date should be mentioned. To date, the Panel has issued two merits decisions on substantive antitrust proceedings. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC ___ (1979); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977). Members of the Panel estimate that preparation of each opinion required over a full man-year from the

Panel member principally assigned to drafting the opinion, as well as requiring substantial time commitments from other Panel members who served on the Board, and from the Panel's counsel and law clerks. During that year the member who worked on the antitrust case had little time to devote to other matters before the Panel. Furthermore, it should be noted that these antitrust decisions do not present technical or policy questions of the sort normally decided by the Commission and the Boards. Rather, they present only legal and, to a lesser extent, economic issues that would likely prove highly difficult for any person who lacks previous familiarity with antitrust law.

At the present time the number of antitrust merits decisions that will come before the Panel or the Commission seems limited to perhaps three or four in the next several years. While this would require substantial resources, it seems manageable. However, if the Commission's antitrust workload were to increase -- for example, by judicial overturning of the South Texas decision or by an increase in the licensing caseload -- then the demands of antitrust cases might be a controlling factor in structuring the Commission's adjudicatory system.

IV. Options

This section is the culmination of the study. The various options discussed have been developed based upon both the practices of other agencies, as discussed in the previous section, and general administrative law principles. For each option there is a discussion of the pros and cons. Because the principal thrust of the study is whether to abolish or retain the appeal board, the options are grouped in the two general categories "abolish the appeal board" and "retain the appeal board".

A. Abolish the Appeal Board

A.1. Abolish the Appeal Board and Abolish the Review Functions Presently Exercised by the Appeal Board

This option would, in effect, make most licensing board decisions final Commission action, since the functions of the appeal board in ruling on exceptions to licensing board decisions and conducting sua sponte reviews of licensing board decisions would no longer be performed. All that would remain by way of agency appellate review would be the present Commission sua sponte and discretionary review functions, with these functions exercised with respect to the licensing board decisions. The absence of any right to file and obtain a decision on exceptions to a licensing board decision

and the absence of any prior sua sponte review of the licensing board's decision would make more difficult the conduct of the Commission's review functions, because whatever Commission review is conducted would be conducted on the basis of a clean slate, with no prior review to highlight the significant issues and problem areas. On the other hand, CAB experience suggests that according more finality to licensing board decisions will likely improve the quality of those decisions.

A.2. Abolish the Appeal Board and Have the Commission Exercise the Functions Presently Exercised by the Appeal Board

This option, unlike the previous option, would most likely substantially increase the amount of Commission involvement in the adjudicatory decision process. This is because parties would have the right to file and obtain a Commission decision on exceptions to licensing board decisions, and the Commission would exercise a much more intense sua sponte review function -- the entire record of each adjudication would be reviewed in some detail. If we make what appears to be a reasonable assumption that under this option the Commission and its staff would devote the same time and resources to

review of licensing board decisions as the appeal board presently devotes to its reviews, this option would result in about 13,500[127/] man-hours increase spent in Commission and Commission staff review efforts each year.

By any measure, this represents a substantial increase in Commission involvement. With this would come not only direct and increased Commission involvement in the adjudicatory decision process and in the development of regulatory policy during that process, but also some sense of satisfaction on the part of litigants that their concerns will receive the attention of the highest officials in the agency who are directly accountable to the Congress.

The increase in resources is also a substantial "con". There is no way that this increase in resource requirements could be absorbed by the

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127/ This assumes that the time period between Nov. 1, 1977 and Nov. 1, 1978 (the time period used to derive the 13,500 man-hour figure) is representative of future years. This figure is derived from the resources estimates provided by the appeal board in section III, and on an estimated .7 man-year for present OGC reviews. That figure, however, is undoubtedly low since Commission review requires five members while Appeal Boards only have three members. Also, Commission deliberations would be subject to the Sunshine Act, which may also contribute to delays.

present organization. It is theoretically possible that the present appeal board panel and its staff could be transferred to the Commission's own staff, either as a group within the General Counsel's office or as a new Commission staff office of opinions and reviews. This would eliminate the need for additional personnel. The difficulty is that this would represent a much less visible role and consequent loss of stature for the members of the Appeal Panel, and the Commission would likely experience difficulty in maintaining the present high level of professional excellence.

Another "con" to this option is that unless the Commissioners themselves, as opposed to some staff reporting to the Commission, were to perform the review functions, then the increase in Commissioner involvement will be largely illusory, with the present highly visible appeal board review replaced by an invisible review performed by a staff office with little or no direct contact with the actual litigants. And, given the substantial resources required, it seems unlikely that the Commission itself would be willing to devote so large a fraction of its resources to adjudicatory matters,

many of which would be fairly routine. Also, many of the issues that the Commission would need to address on a routine basis under this option are purely legal issues. A Commission consisting of only one or two lawyers is not likely to be interested in devoting time to such questions.

Finally, the present appeal boards are able to meet on short notice and devote long periods of time -- even several days -- to one case. It is unlikely that the Commission could operate in this manner in any but the most serious cases, and as a result decisions on appeal would likely be delayed.

A.3. Abolish the Appeal Board and Have a Group of Commissioners Exercise the Functions Presently Exercised by the Appeal Board

This option is suggested by the practices of the ICC and NLRB. Generally speaking, this option shares many of the advantages and disadvantages of the previous one in terms of increased Commission involvement and direct access by litigants to policy makers. However, this option has an advantage in that Commissioners are likely to be able to devote more time to adjudicatory matters if not all Commissioners are required to study each case

in detail. For example, three Commissioners could operate very much like the present appeal board in individual cases, with the other two, in cooperation with the three, performing a discretionary review function that need not entail any detailed review of the entire record.

However, there is a disadvantage to this option in that all five Commissioners would find themselves in the awkward position of formally reviewing the work of three. Vesting final decisionmaking authority in the group would avoid this problem, but this would be at odds with section 201(a)(1) of the Energy Reorganization Act, which provides that each member of the Commission shall have equal responsibility and authority in all decisions of the Commission. Also, it is not likely that a delegation of final authority to a group could be effected as a practical matter without some assurance that in any given case a group of three fairly reflected the views of the Commission as a whole. This problem could also be avoided if any one member of a group could request and obtain full Commission review of one or more issues at some early stage of the group's deliberations. However, it would be quite easy for such a system to become, in effect, Option A.2, with the whole Commission reviewing each decision.

B. Retain the Appeal Board

B.1. Continue the Present System

The present system is fairly efficient and results in decisions that are well reasoned. The difficulty is that Commission involvement is limited, and takes place at the tail end of the proceeding when changes in direction are most difficult to implement. Furthermore, this option limits Commission involvement in and understanding of the early stages of the adjudicatory process.

B.2 Continue the Present System But Encourage Referral of Rulings and Certification of Questions to the Commission by the Appeal Board and/or Licensing Board

Present practice is to discourage licensing boards from referring rulings or certifying questions to the appeal board, and to discourage appeal boards from referring rulings or certifying questions to the Commission. This could be changed by encouraging licensing boards and appeal boards to refer rulings or certify questions. The referrals or certifications would occur during the course of the prehearing or hearing, just prior to or as a part of the initial decision of the licensing boards, or just prior to or as a part of the appeal board decision. The change in practice would be confined to major

issues of law or policy (or some other defined category). There are also two suboptions here -- referrals or certifications could go directly from licensing boards to the Commission, or they could go to the appeal boards which would pass them up to the Commission for decision.

This option would retain the advantages of the present system. It would also increase Commission involvement since the Commission would influence the conduct and outcome of the proceeding in deciding on the certified questions or referred rulings. However, this increased involvement would depend on the initiative of the appeal boards and licensing boards. Unless the Commission were to be fairly precise in its policy change as to the kinds of issues that were to be referred or certified, then there would be the danger that the licensing boards and appeal boards would pass over issues that the Commission would have liked to review. Also, the additional level of review associated with referrals or certifications would delay completion of the proceeding in those cases where moving forward depended on a Commission decision.

The suboption entailing direct licensing board referral or certification to the Commission has the

advantage of procedural simplicity. However, under this suboption the appeal boards would be bypassed and, unless some special mechanism were developed to obtain the views of the appeal boards, Commission decisions would be made without the benefit of prior appeal board review. The suboption entailing step-by-step referral or certification to the appeal boards and Commission is procedurally complex, but would serve as a convenient way to obtain the views of the appeal boards on the merits of the issues that were presented. One could also avoid the step-by-step procedure by providing only for certification or referral to the appeal boards, and rely on the greater visibility of appeal board decisions and Commission sua sponte review to assure Commission involvement. However, this would entail only a minor increase in Commission involvement.

B.3. Continue the Present System, Encourage Referral of Rulings and Certification of Questions to the Commission by the Appeal Board And/or Licensing Board, and Provide for Interlocutory Appeals

This option is the same as option B.2., except that the change in practice would also include interlocutory appeals by the parties. Similar to option B.2., the interlocutory appeals would be confined to certain major issues of law or policy, or some other defined category. The appeals would be filed with the appeal

board, and there would be sua sponte and certiorari type discretionary Commission review of the appeal board interlocutory decisions. The appeal boards could also refer rulings on appeals or certify the appeals to the Commission for decision.

As has been pointed out, under option B.2. Commission involvement depends on the initiative of the licensing boards and appeal boards in certifying questions and referring rulings. Under the certification or referral procedure the parties may urge that a matter be certified or referred, but the decision to refer or certify is within the discretion of the licensing board or appeal board. Option B.3. would give the parties the right to request and obtain an appeal board decision on a particular matter at any time during the course of the prehearing or hearing. This added feature would provide greater assurance that important matters would receive early Commission attention, and it can be expected that most parties would file interlocutory appeals on matters important to them if given the opportunity to do so.

However, interlocutory reviews have the potential to delay the proceeding, since in many situations

it may be unreasonable to move forward on the basis of a licensing board decision that is under review and may be revised or modified. Furthermore, if proceedings continue before the licensing board during interlocutory review, parties will be required to participate in two forums simultaneously which might be a severe strain on parties with limited resources. Interlocutory appeals would also place additional demands on the resources of the Appeal Panel. These disadvantages would be minimized if the Commission were to carefully limit the types of decisions as to which interlocutory review would be allowed.

B.4. Increased Direct Commission Review

Under this option the Commission would increase its present supervision over adjudicatory proceedings by providing for Commission staff (principally OGC) oversight over pending proceedings, either on a general or selective basis, and by Commission orders directing licensing boards or appeal boards in particular proceedings to certify questions or refer rulings to the Commission for review and decision. Such orders could be issued by the full Commission based on the recommendation of OGC, any other Commission staff office (such as OPE), or any one or more Commissioners. Also, this option could be adopted in combination with options B.2. or B.3.

This would clearly increase Commission involvement in the adjudicatory process. An increase in Commission staff resources (primarily OGC) would be required to keep abreast of pending proceedings before licensing boards and appeal boards so that the Commission could be informed of decisions or issues that are good candidates for mandated certification. However, certification of questions will in some cases delay and perhaps add confusion to the proceeding; also such direct Commission involvement will serve to dilute the role of the appeal boards and licensing boards and may, over the long term, result in a loss of stature and professionalism.

B.5. Commissioners as Members of the Licensing Board or Appeal Board

Under this option one or more Commissioners could sit as a member (or members) of the presiding licensing board or appeal board. The agency appeal process would be conducted as at present. The principal advantage of this option is that it entails the least change in the present review process. However, there are several disadvantages. If a Commissioner did sit in a particular case, this should probably disqualify him or her from participating in the Commission review of the decision. Also, the increase in Commission

involvement would be minimal -- this option would primarily serve to familiarize individual Commissioners with the details of selected proceedings, and with the practicalities of the other levels of the adjudicatory system.

V. Conclusion

The studies that have focused on intermediate level agency appeal boards, and the practices of other agencies in establishing such boards, have all focused on administrative efficiency, rather than on problems associated with insulation of top officials from the adjudicatory process. Thus they are of limited value. However, a review of the Commission's adjudicatory process shows that the functions performed by the appeal board are important and worthwhile.

The Appeal Panel plays a valuable institutional role within the agency. It is separate from the Commission and its sole responsibility is to test whether the regulations and the statutory requirements have been met in each individual case. The Commission, on the other hand, has other responsibilities, most notably issuing new rules and policies, and supervising staff, which tend to interfere with the narrow task of scrutinizing each record to see if the requirements of the regulations and statutes as they are written have been met. The Commission, which is free to modify the regulations when it takes them up, is not a body that finds it easy to supervise the Licensing Boards in their task of applying the rules

as written. The Appeal Panel, which lacks the Commission's power, is for that very reason a more suitable body for performing day-to-day review.

Furthermore, the Appeal Panel members themselves, by virtue of their individual stature, institutional responsibility and organizational independence have often played a role as valuable advisors to the Commission. Their decisions have sometimes pointed to the need for new policies, and their occasional active participation in Commission deliberations on general matters that relate to the Commission's adjudicatory responsibilities has been useful. Abolishing the appeal board would tend to destroy those institutional advantages. These considerations argue against any of the A. options.

Also, option A.1. -- the option that would abolish both the appeal board and its functions -- would accord a degree of finality to licensing board decisions that is unreasonable, given the universally felt need for at least some substantial Commission involvement in the adjudicatory process. Option A.2. -- Commission exercise of the functions presently performed by the appeal board -- does not seem practicable in view of the large demands that would be placed on the time of individual Commissioners in order for the option to result in fact in increased Commission involvement. Option A.3. -- intermediate decisions by panels of Commissioners that would be subject to review by all five Commissioners -- would be awkward in practice because some members of the Commission would

be placed in the apparent position of reviewing the work of other members of the Commission. Also the demands on the resources of the Commissioners who served as panel members would be severe.

This leaves the various options under B. -- all of which entail retaining the present structure and functions of the appeal board. Each of the options here has its advantages and disadvantages. Options B.3. (encourage referrals of rulings and certified questions and provide for interlocutory reviews), B.4. (increased direct Commission review), and B.5. (Commissioner members of the licensing or appeal board) seem the most promising. Option B.1. -- retain the present system -- does not increase Commission involvement and is rejected for this reason. Option B.2. is similar to option B.3., but does not provide for interlocutory appeals and, as explained above, results in less Commission involvement than option B.3. For this reason option B.3. is preferred over option B.2.

Option B.4. -- increased direct Commission review -- would also increase Commission involvement with minimal costs, provided that orders directing certification or referral were issued sparingly so as to minimize confusion and delay, and avoid any demoralizing effects on licensing and appeal boards. Because such orders should be issued sparingly, option B.4. should probably be adopted only in combination with option B.3.

Option B.5 -- one or more Commissioners sitting as members of a licensing board or appeal board -- could be pursued independent of either option B.3. or B.4., and there seems to be no reason not to retain it as an option to be exercised at the choice of individual Commissioners.

In summary, we believe that the best and most efficient means for increasing Commission involvement in the adjudicatory decision process is to encourage referred rulings and certified questions and provide for interlocutory reviews of defined categories of decisions, to provide for increased direct Commission review, and to provide individual Commissioners with the option of sitting as members of the licensing or appeal board in individual cases. The categories of issues to be referred or certified or be the subject of interlocutory appeals would depend on the interests of the Commission, but we suggest that the Commission give serious consideration to intervention denials, rulings on novel questions of interpretation of the governing statutes and Commission regulations, and rulings on intervenor contentions which go directly to the scope of the staff safety or environmental review. The precise details of this combination of options would need to be worked out in the process of developing the necessary rule changes.

Two important concluding observations should be made. First, the present adjudicatory decision process has, in our

view, influenced the type and scope of staff review of safety matters only to a very limited degree. The type and scope of staff review has largely been dictated by essentially "generic" decisions in the Standard Review Plan and regulatory guides. This suggests that the principal solution to a lack of sufficient Commission involvement in the resolution of substantive issues in the licensing process lies not in changes in the formal adjudication procedures, but in the Commission becoming more deeply involved in the generic development of staff review practices. This could be done by increased use of rulemaking. It could also be done on an informal basis, without the need for new rules or new formal adjudicatory procedures, so long as the generic practices that result are subject to full review and impartial hearings in any later adjudication in which they were applied.

Second, Commission supervision of ongoing adjudicatory proceedings would be greatly aided by a clear definition of the role of the staff as a party; staff could be instructed to inform the licensing boards of the novel and close questions presented by individual applications, and to request and actively support interlocutory reviews, certifications and referrals where, in the staff's view Commission policy guidance would be helpful. Alternatively, if the issue which staff finds difficult is generic rather than specific to the particular proceeding in which it is first identified, staff should be encouraged to present the issue to the Commission for possible public rulemaking rather than artificially attempting to resolve the generic issue in the adjudication.

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At the Chairman's request the Office of the General Counsel studied the Commission's appellate system. The study included examination of the development of the study, analysis of the current workload, investigation of the practices of other agencies, and consideration of alternatives to the present system. The study recommends retention of the present system with some limited modifications to enable the Commission to more effectively use its existing appellate powers.

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