May 23, 1980 SECY-80-262

COMMISSIONER ACTION

For: The Commission

From: Leonard Bickwit, Jr., General Counsel

Subject: OGC STUDY OF THE NRC'S APPELLATE SYSTEM -- COMMISSION DECISION ON OPTIONS

Background: The Study of NRC's Appellate System (Appeal Board Study -- NUREG-0648), submitted to you in December 1979, identified and discussed options for increasing direct Commission participation in adjudicatory proceedings. At the January 11, 1980 meeting to review the study and options, the Commission voted to publish a notice of request for public comment on the study. That notice, published on January 30, also invited public comment on the Report of the Advisory Committee on Construction During Adjudication (CDA Study -- NUREG-0646). That study developed and discusse alternatives to the Commission's rule which permits plant construction before completion of construction permit proceedings. One public comment was received and is discussed in Attachment A to this paper.

At the time of the public comment notice and in response to Commissioner Gilinsky's request, the Commission asked the General Counsel to analyze the interrelationship of the options developed in the two studies in order to better understand how decisions respecting one study could influence the other. The interrelationship matter is addressed in Attachment B to the paper. OGC's conclusion is that, while a decision on the Appeal Board Study holds some importance for the matter of construction during adjudication, it need not await, or be tied to, your decision on CDA.1/ Thus, the present

1/ The CDA rulemaking is in the public comment stage; a decision paper will be sent to the Commission about August 1, 1980.

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circumstances make the issues presented by the options in the Appeal Board Study ripe for Commission decision.

The root issues for your resolution now concern the Appeal Board Study options for reform within the present NRC appellate structure (i.e., Set B options which would retain the Appeal Board), and are addressed in the "Discussion" section of this paper. The study did not discover a convincing case for abolishing the Board, and the public comment discussed in Attachment A completely endorses retention of the Board. Abolition of the Board was recommended by the Report of the TMI Special Inquiry Group. However, the reasons underlying the SIG recommendation, which are also discussed in Attachment A, are insufficiently thorough and are rebutted by the Appeal Board Study. The SIG Report does not provide a basis either for abolishing the Board or further studying the question.

Discussion:

A. Summary of Decision Questions

The matters for decision may be summarized as follows: Within the present system, the most obvious way for the Commission to increase its direct participation in adjudication is to exercise its discretion more often to review rulings and questions (i.e., review more cases). The Appeal Board Study identifies two avenues to this end which raise the following questions (study options are noted in parentheses):

-- Does the Commission wish to increase its discretionary review of Appeal Board rulings under 10 CFR 2.786 (Option B.1)?[2/]

-- Does the Commission wish to exercise its supervisory authority for directed review of Licensing Board rulings and questions (Option B.4)?

2/ Option B.1 of the Appeal Board Study was to retain the present system. The present system offers the opportunity for more review. For convenience, this paper uses Option B.1 to refer to the alternative of reviewing more cases under the present system.

However, as the study recognizes, these avenues do not exhaust the opportunities for increased Commission involvement in adjudication. The study found that Commission policies against interlocutory review potentially discourage parties and the Licensing Boards from resorting to appellate review of interlocutory questions. Increasing discretionary review of Appeal Board cases does not reach such interlocutory questions because they do not get to the Appeal Board in the first place. Directed review under the Commission's supervisory authority is only a partial means to review interlocutory matters because it relies solely on the Commission to discover opportunities for review, rather than on the Boards and the parties who are more familiar with the issues.

Since the impediments to interlocutory review at the behest of Licensing Boards and parties lie in barriers to such review by the Appeal Board, an additional opportunity within the present system for increased Commission involvement is to reduce those barriers. The Appeal Board Study identifies the questions:

-- Does the Commission wish to encourage opportunities for Licensing Board referral of interlocutory rulings and certification of interlocutory questions (Option B.2)?

-- Does the Commission want to repeal the bar to interlocutory appeals by parties (Option B.3)?

When interlocutory rulings are reviewed, application of the present appellate system results in such matters being reviewed first by the Appeal Board and then by the Commission. Yet, the resolution of some interlocutory questions may not require two levels of administrative appellate review; review only by the Commission could save time and resources. Thus, if the Commission were to decide to create more opportunities for review of interlocutory matters, a subordinate question posed by the Appeal Board Study is:

-- Does the Commission want some, or all, of the interlocutory questions that come to it for review to bypass the Appeal Board?

B. Discussion and Recommendations on Options

Option B.1 -- Exercise Discretion to Review More Appeal Board Rulings. The present appellate structure permits the Commission to review all Appeal Board decisions. However, Commission rules provide that it will review only cases of "exceptional legal and policy importance ...." 10 CFR 2.786. The Commission could abolish this standard or relax its application so as to review more Appeal Board decisions.

Abolition of the standard would have little importance in itself. The present standard reflects that licensing decisions must compete with other regulatory matters for Commission attention. Furthermore, it is not a serious barrier to the Commission reviewing more cases.

One of the principal barriers to reviewing more cases will be resources. In the case of Option B.1 and most other options, acceptance of our recommendations will probably necessitate new resources for OGC.

Our recommendations on Option B.1 are:

(1) One step toward relaxing application of the standard -- and one which we recommend -- is a Commission instruction to the General Counsel to recommend Commission review in more cases.

(2) We also recommend that the Commission give new consideration to relaxing its practice by deciding informally to permit review on the vote of two (or more) Commissioners.3/

3/ OGC does not mean to retreat from its recommendation in SECY-80-84 against Commission review on the vote of two Commissioners. Rather, the recommendation in this paper recognizes that, if the Commission wants to accept the workload associated with reviewing more cases, one way to increase the number of cases reviewed is to permit review on the vote of two Commissioners.

Option B.4 -- Commission-Directed Review of Interlocutory Matters. Within the present system under which the Commission has supervisory authority over the Licensing and Appeal Boards, the Commission can direct the boards to certify questions and refer rulings to the Commission for review. The Appeal Board Study concludes that the opportunities for increasing Commission participation in adjudication through this device are limited, principally because the device can be used only sparingly. Thus, Commission-directed review is a complement to, rather than a substitute for, review at the behest of the boards and parties.

Recently, the Commission instituted a monitoring program under which OGC monitors and reports to it on a sampling of Licensing Board proceedings. Monitoring board proceedings is a necessary first step for Commission-ordered review. However, the current program will likely need to be expanded before it can be of full value for Commission-directed review.

As to Option B.4, we therefore recommend that the Commission request OGC to report on its evaluation of the program by September 1, 1980, and recommend alternative formats for modifying the program together with their resource implications.

Options B.2 or B.3 -- Creating Opportunities for Interlocutory Review. The Appeal Board Study concluded that the present system probably limits opportunity for Commission review of interlocutory rulings by discouraging the parties and the Licensing Boards from immediately taking such rulings to the Appeal Board. Since such rulings do not find their way to the Appeal Board, if at all, until the end of the Licensing Board proceeding, Commission review is limited in that (a) it must review rulings later rather than earlier in a proceeding (because the timing of its review normally depends upon the timing of Appeal Board review), and (b) it receives fewer rulings for review (because a policy of

postponing review of interlocutory rulings probably reduces the number of such rulings ultimately reviewed). Licensing Boards are probably discouraged from certifying questions and referring rulings because the Appeal Board rarely grants review. Parties are likewise discouraged from seeking certification and referral; also, the Commission's rules prohibit interlocutory appeals (10 CFR 2.730(f)).

Prospects for meaningful Commission involvement in adjudication through a policy of encouraging certifications, referrals and interlocutory appeals is difficult to project. On the one hand, it is unclear whether Commission and Appeal Board policies to discourage certifications, referrals, and interlocutory appeals are primarily responsible for keeping important issues out of the Commission's hands which it would want to review. On the other hand, new policies that encourage interlocutory review could burden the Appeal Board and the Commission with trivial questions. In short, new policies may not achieve the desired goals, and could create new problems.

We therefore recommend only modest changes with respect to Options B.2 and B.3 to create new opportunities for Commission review of interlocutory rulings:

(1) Issue a policy statement that reminds the Licensing Boards of Commission rules that permit certification and referral (10 CFR 2.718(i); 2.730(f)) and encourages the Boards to certify questions and refer rulings under those rules.

(2) Amend the rules to explicitly authorize the parties to request certification or referral by the Licensing Board and, if the Board refuses, to request directed certification or referral by the Appeal Board.

(3) Instruct the General Counsel particularly to monitor and report on any petition, request or ruling respecting certification and referral in a Licensing Board proceeding.

(4) Repeal the provision in the rules (10 CFR 2.786(b)) which prohibits a party from filing a petition for review with the Commission on a decision or action on a referral or certification.

We are not recommending abolition of the ban on interlocutory appeals because we believe that our other recommendations give parties adequate means to call Commission attention to important interlocutory matters. Also, lifting the ban on such appeals holds great potential for burdening the boards and the Commission with trivial matters.

Bypassing the Appeal Board. Ordinary NRC appellate practices applied to review of interlocutory matters would result in Commission review of the matter after the Appeal Board makes its ruling. However, since the purpose of facilitating review of interlocutory matters is to increase Commission involvement in adjudication and since two levels of administrative review may not always be necessary to satisfactory resolution of interlocutory matters, the Commission could provide for some such matters to come directly to it.

We do not recommend that all interlocutory matters come to the Commission directly. In most cases, Appeal Board review is desirable. Whether Appeal Board review of an interlocutory question in a particular case is desirable is largely a case-by-case question that should be addressed by the Appeal Board or Commission, in light of the facts and circumstances of the case. We do not recommend that the decision whether to bypass the Board be left either to the parties or the Licensing Board.

Under the Commission's rules, the Appeal Board can already certify a question to the Commission without deciding it. Further, if the Commission decides to direct referral or certification in a particular case, it can consider then whether to bypass the Appeal Board. Thus, our recommendation on bypassing the Appeal Board is: No further Commission action or decision is called for now.

Recommendations: (1) Adopt the recommendations contained in this paper under the heading "Discussion and Recommendations on Options."

(2) Request OGC to prepare the necessary policy statement and rule changes to implement the Commission's decision.

Leonard Bickwit, Jr.
General Counsel

Attachments: A & B

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Monday, June 9, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 2, 1980, with an information copy to the Office of the Secretary. 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.

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ATTACHMENT A

Summary and Discussion of Public Comment on Study and Recommendation of SIG to Abolish the Appeal Board

The lone comment received in response to the Commission's January 30, 1980 notice of request can be summarized as follows:

(1) With respect to the Appeal Board Study, the commenter --

- -- agreed with the study's conclusion that the Appeal Board should not be abolished;
- -- asserted that the present system need not be modified;
- -- concluded that greater Commission involvement in design and safety of nuclear plants lay in greater participation in the standard-setting process and development of staff positions;
- -- recommended rejection of Options B.2 and B.3 if the Commission pursued modifications;
- -- recommended Option B.4.

(2) With respect to the Construction During Adjudication Study, the commenter --

- -- argued that the lack of consensus among the study's members respecting recommendations owed its origin to the fact that the existing immediate effectiveness rule was working well;
- -- contended that no licensing case had been reversed on administrative appeal under circumstances in which construction impacts were wrongfully permitted under the rule;
- -- concluded that the case for change had not been made;
- -- did not oppose a 15-day delay in effectiveness following a Licensing Board decision during which time a party could prepare and file a stay request;
- -- recommended explicit limitation of the changes to the immediate effectiveness rule to CP proceedings;
- -- recommended no change to the rule for review by the Commission and for applications already filed.

Subsequent to Commission consideration of the Appeal Board Study, the Special Inquiry Group published its report which included a

recommendation to the Commission to consider abolishing the Appeal Board. That report:

-- observed that, except on rare occasions, Commissioners play no role in licensing decisions -- "one of the most important functions that the Commission performs";

-- concluded that three levels of appellate review of licensing decisions (i.e., Appeal Board, Commission, courts) was "completely unnecessary";

-- recommended requiring the Commission to consider and approve every new reactor license;

-- suggested transfer of Appeal Board members to a support office to assist the Commission in its adjudicatory work.

The Appeal Board Study fully addresses the question whether to abolish the Appeal Board and concludes that the case for abolition has not been made. The SIG Report raises no new arguments and offers no new information bearing on the question.

ATTACHMENT B

Interrelationship of Options of Appeal Board Study and Construction During Adjudication Study

The interrelationship of the options contained in the Appeal Board and Construction During Adjudication studies is difficult to assess. Generally speaking, the studies are directed at different objectives. The Appeal Board options address the objective of increasing Commission involvement in all licensing actions. The CDA options seek reduction in the extent of construction during administrative review of CP decisions.

Implications of a particular CDA decision on Appeal Board Study options. The Appeal Board options are not substantially influenced by a particular CDA option or decision. Since the CDA options would not increase Commission involvement in adjudication, they would not accomplish or contribute to the objective of the Appeal Board options. The principal CDA options place more of the administrative review stage of licensing (i.e., proceedings after the Licensing Board has rendered its initial decision) on the "critical path." Set A of the Appeal Board options abolishes part of the review stage; Set B options (except for B.1) will mostly enlarge the initial decision stage (i.e., review will come, if at all, before the Licensing Board's initial decision) which is already on the critical path under all CDA options, including the "no action" option.

CDA options could in some cases add to the disadvantages of particular Appeal Board options. For example, CDA Options B and C place the Appeal Board on the critical path, but not necessarily the Commission. Abolition of the Appeal Board, but not its functions (Options A.2 and A.3), would substitute the Commission on the critical path. Slowness of action and other disadvantages of Commission review would thus attach at a more critical time.

Moreover, tightening CDA rules (i.e., Options A, B or C of CDA) would relieve that portion of the pressure for more early Commission involvement in adjudication which is based on the belief that present Commission involvement comes too late in the process after important options are foreclosed by commencement of construction. Thus, within Set B options of the Appeal Board study, there would seem to be less reason to favor B.2, B.3 and B.4 over B.1 (with the Commission reviewing more cases).

Implications of an Appeal Board decision for CDA options. The Commission's decision on the Appeal Board options probably will influence the desirability of the principal CDA options. Your selection of Option A.1 in the Appeal Board Study will slightly strengthen the case for CDA change because it would mitigate the costs associated with tightening CDA rules. This follows from the fact that Option A.1 generally reduces the size of the review

stage which the principal CDA options would put on the critical path. Also, if you selected Option A.2 or A.3, CDA Option A would probably increase in relative desirability because it gives the Appeal Board (and thus the Commission) an ad hoc means for taking itself off the critical path.

In contrast, Commission selection of a Set B option that involves interlocutory review (i.e., B.2, B.3 or B.4) probably will slightly reduce pressure for tightening CDA rules by pushing more of the review process into the initial decision stage. As noted previously, construction is not ongoing during the initial decision stage.