



Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

AFFIRMATION SESSION 80-40

Thursday, September 11, 1980

Pages 1 - 4

POOR ORIGINAL

Prepared by:
C. H. Brown
Office of the Secretary

80-9260

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DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on September 11, 1980 in the Commission's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

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4 Affirmation Session 80-40

5
6 Commissioners' Conference Room
7 1717 H Street, N.W.
8 Washington, D. C.

9 Thursday, September 11, 1980

10 The Commission met, pursuant to notice, at 3:40 p.m.,
11 John F. Ahearne, Chairman of the Commission presiding.

12 PRESENT:

13 Chairman Ahearne
14 Commissioner Hendrie
15 Commissioner Bradford

16 ALSO PRESENT:

17 J. Hoyle, Assistant Secretary
18 L. Bickwit, General Counsel
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P R O C E E D I N G S

1
2 CHAIRMAN AHEARNE: The Commission meets this
3 afternoon to address some affirmation items.

4 The Sunshine Act requires the following vote
5 for the affirmation session. I would like to vote to hold
6 on less than one week's notice for the addition of an
7 affirmation item with respect to Delegation of Commission
8 Review Authority in the LaCrosse Proceeding. Those in
9 favor of holding on less than one week's notice?

10 (Chorus of ayes.)

11 CHAIRMAN AHEARNE: John.

12 MR. HOYLE: Mr. Chairman, we will start with
13 that item, SECY-A-80-133.

14 This paper contains a recommendation from the
15 General Counsel that the Commission delegate its review
16 authority to the Appeal Board for the LaCrosse seismic
17 risk proceeding.

18 All of you have approved this recommendation,
19 including Commissioner Gilinsky who is absent, and I ask
20 you to affirm your votes at this time.

21 (Chorus of ayes.)

22 MR. HOYLE: The second item is SECY-80-369.

23 This paper contains a recommendation from the
24 General Counsel that you approve for publication as a final
25 rule, amendments to Part 2 of the Commission's Rules to

1 permit Licensing Boards to use as special assistants, the
2 part-time board members of the Atomic Safety and Licensing
3 Board Panel.

4 All of you have approved this item, including
5 Commissioner Gilinsky, and I ask that you affirm your votes
6 at this time.

7 (Chorus of ayes.)

8 MR. HOYLE: The third item is SECY-80-387.

9 This paper contains a recommendation that you
10 delegate authority to grant exemptions to Parts 25 and 95
11 to the EDO. These rules implement a security program to
12 improve the control and protection of information concerning
13 the safeguarding of formula quantities of SNM at NRC
14 licensed fuel cycle facilities and transportation activities.

15 All of you have approved this item, and I ask you
16 to affirm your votes at this time.

17 (Chours of ayes.)

18 MR. HOYLE: The last item is SECY-80-373.

19 The Commission has before it a recommendation for
20 publication as a final rule, effective amendments to
21 10 CRR Part 40 to establish special licensing requirements
22 for uranium mills and mill tailings; amendments to Part 30
23 and 70 for consistency and to Part 150.

24 The Comaissioners each have approved publication
25 of this item with an addition to page 5 of the Federal

1 Register Notice as recommended by the Executive Legal
2 Director in a memorandum to you dated September the 8th.

3 Mr. Chairman, I notice that you also have
4 comments that I will include in the Requirements
5 Memorandum, as your own.

6 All of you have approved this paper, including
7 Commissioner Gilinsky, and I ask that you affirm your votes
8 at this time.

9 (Chorus of ayes.)

10 MR. HOYLE: We had one other matter scheduled that
11 we are going to put on for affirmation next week,
12 80-385, Amendments to 10 CFR Part 2 concerning discipline
13 in adjudicatory proceedings for next week.

14 CHAIRMAN AHEARNE: Perhaps, right?

15 MR. BICKWIT: (Nods in the affirmative.)


16 (Whereupon, the meeting was concluded at 3:45 p.m.)
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August 15, 1980

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555 SECY-80-387

CONSENT CALENDAR ITEM

For: The Commissioners

From: Daniel J. Donoghue, Director
Office of Administration 

Thru: Executive Director for Operations

Subject: DELEGATION OF AUTHORITY TO GRANT EXEMPTIONS
TO 10 CFR PARTS 25 AND 95

Purpose: To delegate authority to grant exemptions to 10 CFR Parts
25 and 95 to the Executive Director for Operations.

Category: This paper addresses a minor policy question.


Discussion: On March 5, 1980, 10 CFR Part 25, "Access Authorization for Licensee Personnel," and 10 CFR Part 95, "Security Facility Approval and Safeguarding of National Security Information and Restricted Data," were published as final rules after the Commission approved such action in SECY-79-676. These rules implement a security program to improve the control and protection of information concerning the safeguarding of formula quantities of special nuclear material at Nuclear Regulatory Commission (NRC) licensed fuel cycle facilities and transportation activities. These rules contain provisions for the granting of exemptions by the Commission or its duly authorized representatives. At that time, no specific delegation of authority to grant exemptions was requested from the Commission. Subsequent to publication, some requests for exemptions either in total or in part from the requirements of 10 CFR Parts 25 and 95 have been received. It has been Commission policy, incorporated in the NRC Manual, that the authority to grant routine exemptions to regulations, not involving major policy questions, be delegated to the program office responsible for oversight of the regulation. It is felt that this policy should be continued for 10 CFR Parts 25 and 95.

Enclosure 1 is a delegation of authority to the Executive Director for Operations (EDO), authorizing him to grant exemptions to 10 CFR Parts 25 and 95. It is anticipated that the EDO will redelegate this exemption authority to the Director, Office of Administration.

This paper has been coordinated with the Office of the Executive Legal Director, which has no legal objections.

Enclosure: As stated

CONTACT: Raymond J. Brady, SEC


Daniel J. Donoghue, Director
Office of Administration

POOR ORIGINAL

Dupe of 8009150152 (ZPP)

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, September 3, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT August 26, 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.

This paper is tentatively scheduled for affirmation at an Open Meeting during the week of September 8, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OFFICE OF THE
CHAIRMAN

MEMORANDUM FOR: William J. Dircks
Acting Executive Director for Operations

FROM: John F. Ahearne

SUBJECT: DELEGATION OF AUTHORITY

Except for those areas where the responsibility or authority is vested solely with the Commission and is therefore nondelegable, the Executive Director for Operations is hereby authorized to grant, consistent with NRC regulations, exemptions to Title 10, Code of Federal Regulations, Parts 25 and 95, "Access to and Protection of National Security Information and Restricted Data," when a finding can be made that the requested exemption does not endanger the common defense and security.

This authority may be redelegated. Any such redelegations must be in writing with copies to the Secretary of the Commission and Director, Office of Management and Program Analysis.

This delegation of authority is to be incorporated into NRC Manual Chapter 0103, "Organization and Functions - Office of the Executive Director for Operations."

Dupe of 8409150152 (ipg)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

August 6, 1980

CONSENT CALENDAR ITEM

SECY-80-373

For: The Commissioners

From: William J. Dircks, Director
Office of Nuclear Materials Safety and Safeguards

Robert B. Minogue, Director
Office of Standards Development

Thru: William J. Dircks
Acting Executive Director for Operations



Subject: LICENSING REQUIREMENTS FOR URANIUM MILLS

Purpose: To consider publication of effective amendments to 10 CFR 40 to establish special licensing requirements for uranium mills and mill tailings, amendments to 10 CFR 30 and 70 for consistency to require the completion of an environmental review prior to commencement of construction of certain types of other major plants, and amendments to 10 CFR 150 required by the Uranium Mill Tailings Radiation Control Act.

Category: This is a policy matter requiring Commission approval.

Issue: Amendments of Commission regulations to implement the Uranium Mill Tailings Radiation Control Act (UMTRCA) and the conclusions reached in the final uranium mill GEIS, and amendments to Parts 30 and 70 to require the completion of an environmental review prior to authorizing the commencement of construction of other types of major plants.

Discussion: On August 24, 1979, the Commission, as recommended in SECY 79-413, "Licensing Requirements for Uranium Mills," published for public comment proposed amendments to its regulations to implement the requirements of the UMTRCA and the conclusions derived in a draft GEIS (NUREG-0511) on uranium milling. Subsequently, staff conducted public hearings in Denver, Colorado, and Albuquerque, New Mexico, in October 1979, to obtain additional public input on the proposed rule changes and the draft GEIS.

In response to the Commission's Federal Register notice of August 24, requesting public comments, and the request for comments on the draft GEIS, 99 separate submittals were received representing views of industry, state and Federal agencies, and interest groups. Also, about 50 individuals participated in public hearings representing views from

DUPLICATE DOCUMENT

Entire document previously
entered into system under:

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JUL 16 1980

Ref: SA/McG

MEMORANDUM FOR: Ralph J. Jones, Assistant Director
for Materials Safety Standards
Office of Standards Development

FROM: G. Wayne Kerr, Assistant Director for
State Agreements Program
Office of State Programs

SUBJECT: LICENSING REQUIREMENTS FOR URANIUM MILLS

This is in response to your memo of July 3, 1980 requesting review of the draft Commission Paper regarding proposed rules on licensing requirements for uranium mills.

Our review focused on the proposed changes to Part 150. Section 150.15a. addresses those areas where certain authority has been reserved to the NRC by UMRCA. We feel that this is an appropriate addition to Part 150. We cannot, however, concur in the other proposed additions to Part 150, i.e. sections 150.31 and 150.32. The purpose of Part 150 as stated in section 150.1 is to provide certain exemptions to persons in Agreement States from licensing requirements of the Act and to define activities in Agreement States over which the regulatory authority of the Commission continues. It has never been the intent of Part 150 to address the NRC - Agreement State relationship by placing regulatory requirements on States. The proposed sections 150.31 and 150.32 would do just that.

P.L. 96-106, amending the Mill Tailing Act, required that Agreement State authority be exercised to the maximum extent practicable before the November 8, 1981 deadline. The first paragraph of the proposed 150.31 adds nothing substantive, but by making it a regulation implies more stringent "enforcement" by NRC than we think was intended by Congress. The legislative history of P.L. 96-106 suggests that the NRC's role during the interim period (before November 8, 1981) will be to assist the Agreement States in upgrading their regulatory programs to meet the new requirements. OSP is working closely with the States (developing criteria, provide status reports on their programs, etc.) to assure that the new requirements are being implemented as soon as practicable. We feel that the codification in Part 150 of the P.L. 96-106 statements is inappropriate.

Dupe of 800911L0282

Enclosure "F"

Ralph J. Jones

- 2 -

We feel that the other paragraphs in the proposed 150.31 and 150.32 are likewise inappropriate. The second paragraph of 150.31 states that after November 8, 1981 an Agreement State shall require licensees to meet Appendix A technical criteria, meet certain procedural requirements, etc. If an Agreement State does not have a program (legislation, regulations, procedures, etc.) to meet the requirements of UMTRCA by November 1981 they will not be licensing uranium mill tailings after November 1981. We feel that UMTRCA is clear as to what is required of the States and that the proposed Part 150 requirements are superfluous and may be detrimental to NRC-State relations.

G. Wayne Kerr, Assistant Director
for State Agreements Program
Office of State Programs

Enclosure "F"

JUL 25 1980

Note to: Ralph Jones
Assistant Director for Material Safety Standards
Office of Standards Development

From: Guy H. Cunningham, III
Chief Regulations Counsel
Office of the Executive Legal Director

In a memorandum to you, dated July 16, 1980, Wayne Kerr, Assistant Director for State Programs, raised an objection to including proposed 10 CFR 150.31 and 150.32, in the final regulations on uranium mill tailings. These provisions would codify requirements for Agreement States based upon the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). The provisions specify (1) that Agreement States must require compliance in licensing with Appendix A of Part 40, its equivalent, or more stringent standards, and (2) compliance with procedures specified in Section 274o of the Atomic Energy Act. A third item, of a temporary nature in Section 150.31, is a statement that, prior to November 8, 1981, Agreement States shall require compliance with Appendix A to the maximum extent practicable.

Mr. Kerr correctly points out that Part 150 does not presently directly address Federal Government--Agreement State relationships, but rather governs the relationship of the Federal Government to persons in Agreement States. The Federal-State relationship is controlled by the Agreement and by the terms of Section 274 of the Atomic Energy Act.

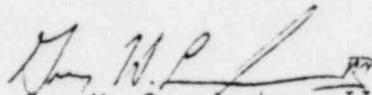
There is no legal requirement to recapitulate in the form of codified regulations the statutory requirements placed on Agreement States by Section 274o. Compare, for example, Section 274o with Section 83, both added to the Atomic Energy Act by UMTRCA. Section 83 mandates NRC regulations or orders to implement the Act's land ownership requirements. Section 274o does not mention regulations or orders for the purpose of implementation of that section. Codification of Section 274o requirements in the Code of Federal Regulations does not add to the force of the statutory language in Section 274o and is not necessary for its implementation.

Although Sections 150.31 and 150.32 are not legally required, their inclusion in the regulations can serve two legally important purposes. First, the reference to Appendix A to Part 40 will serve to identify without any ambiguity the standards adopted and enforced by the Commission, as referenced in Section 274o(2), which are to serve also as the base standards for Agreement State licensing. Second, the codification of Section 150.31 will identify these procedures acceptable to the Commission that, if implemented by the Agreement States, will presumably foreclose any Commission exercise of Section 274i authority to terminate or suspend an Agreement for non-compliance with Section 274o on procedural grounds.

Enclosure "G"

Dupe of 8009110284 (ZPP)

Basically, the decision on whether or not to include Sections 150.31 and 150.32 has to be based upon considerations of policy. Is it more desirable to state in advance, in a form that binds NRC to a specified position, the rules by which NRC will gauge State action under 274o, or should the ground rules for State compliance be handled in the less formal setting of criteria for amending State Agreements. We have no recommendation to make on which course of action is better from a policy viewpoint. Each is legally acceptable.



Guy H. Cunningham, III
Chief Regulations Counsel
Office of Executive Legal Director

cc: Wayne Kerr, OSP
John Martin, ONMSS

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

August 7, 1980

SECY-80-369

CONSENT CALENDAR ITEM

For: The Commission

From: Leonard Bickwit, Jr., General Counsel
Howard K. Shapar, Executive Legal Director

Subject: REGULATIONS IMPLEMENTING THE RECOMMENDATIONS
OF THE TASK FORCE STUDY OF THE USE OF PART-
TIME MEMBERS OF THE ATOMIC SAFETY AND LICENSING
BOARD PANEL (ASLBP) (REF.:SECY-79-668)

Purpose: To solicit Commission approval of final rules
on the uses of part-time ASLBP members.

Discussion: In November 1979 the Commission directed our
offices to examine the recommendations of the
"Task Force Study of the Use of Part-time
Members of the [ASLBP]" and provide any rule
changes necessary for their implementation.
On December 18, we forwarded proposed regula-
tions, which the Commission approved and pub-
lished in the Federal Register. 45 Fed. Reg.
5308 (January 23, 1980). The proposed rules
provided that part-time ASLBP members could
be designated as "special assistants" to a
Licensing Board to serve as technical Inter-
rogators, special masters, alternate Board
members, or consultants. Only two comments
were received (Attachment 1), both generally
agreeing with most of the proposed rule.

Those comments, however, raised questions
about the propriety of an aspect of the pro-
posal that would permit use of part-time
ASLBP members as "special masters" and
"alternate Board members." As contemplated
by the proposed rule, the special master
would be appointed by the Board, subject to
notice and disqualification requirements, to
hear evidence on a particular issue, create a
record on it, and prepare a report containing
a recommended decision. The comments objected
to this proposal stating that the Atomic
Energy Act permits hearings only by a three-
member Board (in lieu of a single hearing

Contacts:
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Bruce A. Berson, ELD, X-27678

Dupe of 8009170372 (3pp)

examiner) and does not contemplate an additional delegation of the hearing function to a technical expert. In addition, the Administrative Procedure Act contemplates that the person who presides at the evidentiary hearing shall make the initial decision. 5 U.S.C. 554(d). The comments raised similar objections to the "alternate Board member" proposal.

We believe that these comments raise important concerns with respect to the "special master." These concerns are not irrefutable; they may be resolved either by requiring de novo consideration by the Licensing Board, permitting parties to proffer the master's report for the Board record subject to Board consideration, invocation of the initial licensing exemption (in certain cases), or by making reference to the master conditioned on consent of the parties. We recommend that the Commission retain the "special master" provision but condition its use on consent of the parties.*

We do not believe that those comments are applicable, however, to the "alternate Board members" proposal. An alternate Board member will be similar to a master, except that the Board, and not the alternate, will preside, will hear the evidence and rule on all motions. The alternate will advise the Board on-the-record, which advice would then be subject to on-the-record comment or rebuttal by the parties. The Board will retain all decisionmaking authority. In short, the statutory objections raised to the master proposal do not apply to the alternate.

Finally, no comments were received objecting to the use of part-time members as technical interrogators or consultants and those proposals are unchanged in the final rules. A minor change to the proposed addition to Part 2, Appendix A has been made to avoid

*/
A master has been used in an NRC licensing proceeding but only on consent of the parties. Toledo Edison Co. et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 et seq. (1975). The master in that case, an anti-trust proceeding, was appointed to determine whether numerous documents subject to discovery were privileged.

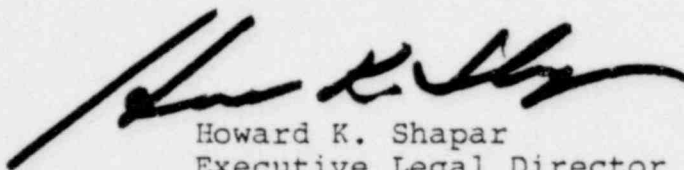
confusion in the use of the term "alternate board member" with the term "alternate" in 10 CFR 2.721(b). In addition, conforming amendments are adopted unchanged to 10 CFR 2.718 (to permit use of special assistants) and 2.719 (to permit consultation).

Coordination: The Licensing Board Panel and the Appeal Panel have concurred in the rule changes.

Recommendation: Issue the final rules.



Leonard Bickwit, Jr.
General Counsel



Howard K. Shapar
Executive Legal Director

Attachments:

1. Comment Ltrs
2. Final Rules

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, August 21, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT August 14, 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.

This paper is tentatively scheduled for affirmation Open Meeting during the
Week of August 25, 1980. Please refer to the appropriate Weekly Commission
Schedule, when published, for a specific date and time.

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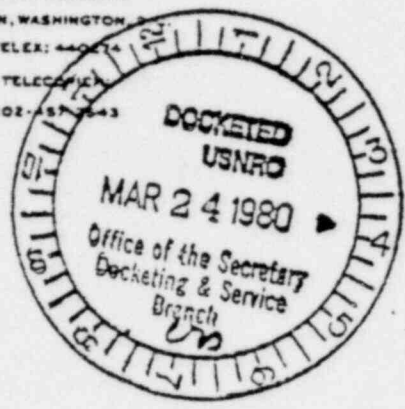
DOCKET NUMBER
PROPOSED RULE PR-2 (1)
(45 FR 5308)

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- * RESIDENT PARTNERS WASHINGTON OFFICE
- * RESIDENT PARTNERS LONDON OFFICE
- * ADMITTED TO THE DISTRICT OF COLUMBIA BAR

March 24, 1980

Samuel J. Chilk, Esq.
Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Proposed 10 C.F.R. §2.722 and
Related Amendments

Dear Mr. Chilk:

By notice issued on January 17, 1980, and published on January 23, 1980, 45 Fed. Reg. 5308, the Commission has proposed the addition to its regulations of a new §2.722, with conforming amendments to related portions of 10 C.F.R. Part 2. As attorneys representing utilities involved in the Commission's licensing process, we wish to offer comments on the proposed amendments.

The stated purpose of new §2.722 is to permit the more effective use of part-time members of the Atomic Safety and Licensing Board Panel to improve the hearing procedure, and we agree with the stated purpose, the proposed amendments provide for the use of part-time members as technical interrogators, board members, or as informal members. We believe that the proposed amendments to special masters or as alternate members apply to both the Atomic Energy Act and the Atomic Energy Licensee Procedure Act. In addition, the proposed amendments for alternate board members

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ARIZONA



PUBLIC SERVICE COMPANY

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March 25, 1980
ANPP-15098 - JMA/DBK

~~DOCKET~~ RULBak

~~PROPOSED~~ RULE PR-2

②

(45 FR 5308)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Amendment of 10 CFR Part 2 (F.R. 5308, January 23, 1980)

Dear Sir:

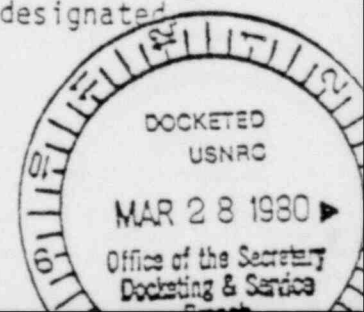
The purpose of this letter is to provide the comments of the Arizona Public Service Company (APS) on the Nuclear Regulatory Commission's (NRC or Commission) proposal to amend its Rules of Practice to permit NRC Atomic Safety and Licensing Boards (ASLB) to use special assistants to be drawn from the membership of the ASLB Panel. The proposal, which was published in the Federal Register on January 23, 1980, would allow special assistants to participate as technical interrogators, alternate ASLB members, special masters or consultants.

It appears that one of the chief purposes of the proposed rule is to make more effective use of the expertise of ASLB part-time members. Using part-time members is intended "to facilitate the hearing process and improve the quality of the record produced." (45 Federal Register at 5308.) Although such objectives certainly are worthy of achievement, APS submits that, if implemented, the rule proposed by the Commission would infringe upon parties' due process rights to a full and open hearing.

The specific aspect of the proposed rule which APS considers objectionable is found in proposed subsections 2.722(a)(2) and (3), which provide that a special assistant, if serving as a special master or alternate ASLB member, will advise the licensing board through the submission of a written report containing the conclusions of the special assistant. In the case of a special master, such report would be prepared following an evidentiary hearing conducted by the special master on a specific technical matter; in the case of an alternate ASLB member, the report would be prepared following completion of the evidentiary session on the issue for which the alternate member was designated.

Dupe of 800410484 (3pp 545)

Acknowledged by card 3-31-80



Although the advisory report would be "on-the-record," and the three designated members of the ASLB would retain all ultimate decision making authority, the fact is that parties to the hearing would have no opportunity to challenge the special assistant's conclusions and recommendations through cross-examination and confrontation. The significance of the advisory report must not be underestimated. Because the report would be prepared by an "expert", there would be a great temptation for the ASLB to be "persuaded" by the special assistant's conclusions in reaching its own decision. Yet the special assistant would most likely have reached his or her conclusions by weighing conflicting evidence. APS submits that the three designated members of the ASLB are every bit as capable as the "expert" at weighing the evidence and making a legal judgment.

The proposed regulation would subject the special assistant to the disqualification procedures of section 2.704. This does not allay APS' concern, however, because bias is not the issue. Furthermore, the concern is not satisfied by the fact that a party may file exceptions to an ASLB decision which finds the advisory report persuasive, because the report is the product of the special assistant who, unlike expert witnesses, would not have been examined by the parties.

In an administrative hearing, a party is entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts." Administrative Procedure Act, 5 U.S.C. § 556(d). "In all adjudicative proceedings, cross-examination and confrontation are the handmaidens of trustworthiness in the face of factual dispute." National Trailor Convoy, Inc. v. United States, 293 F. Supp. 634, 636 (N.D. Okla. 1968). What judge, in a products liability case, would be permitted to have an expert sit through the trial and then offer advice to the judge respecting how the case should be decided? What jury, in a complicated antitrust suit, would be permitted to have an expert in economics sit through the trial and then advise the jury in its deliberations? It is recognized that the special assistant is a member of an adjudication panel, and not a witness. In this case, however, the distinction may be one without a difference. An expert witness generally is called upon to analyze a set of facts and render an opinion. The "expert" special assistant would seem to be doing something quite similar.

Secretary of the Commission
March 25, 1980
ANPP-15098 - JMA/DBK
Page 3

Whatever infirmities may be associated with the proposed rule, certainly one must be that it is contrary to our system of adjudication to have an "expert" fact-finder advising the decision-maker where the decisionmaker has heard the presentation of the evidence by the parties. For the ASLB to solicit the advice of a special assistant would represent an abdication of its decision-making responsibilities. Worse than the abdication, however, is the fact that it would occur at the expense of maintaining a full and open hearing. To have a special assistant help develop the record by examining witnesses is one thing; to have the special assistant prepare a recommendation for the ASLB based on his expertise, where the alleged expertise is not subject to examination by the parties, is quite another matter. APS urges the Commission to delete from the proposed rule the provisions for the preparation of advisory reports by special assistants.

Very truly yours,

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NUCLEAR REGULATORY COMMISSION

[10 CFR Part 2]

Rules of Practice

AGENCY. U.S. Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission is amending its "Rules of Practice" to permit NRC Atomic Safety and Licensing Boards to use special assistants to be drawn from the membership of the Atomic Safety and Licensing Board Panel. The special assistants may be allowed to participate as technical interrogators, alternate Atomic Safety and Licensing Board members, special masters (with consent of the parties), or consultants. The purpose of the amendments is to facilitate the hearing process and improve the quality of the record produced.

DATE: The rule shall be effective upon publication in the Federal Register.

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SUPPLEMENTARY INFORMATION: In 1979, the Commission appointed a Task Force to study the use of part-time members of the Atomic Safety and Licensing Board Panel (referred to herein as ASLBP) and recommend any necessary or desirable changes regarding the use of those employees. In October 1979, the Task Force published its report and based on its surveys and interviews reached a series of findings with respect to them. Part-time ASLBP members provide the NRC access to a wide variety of expertise that could not be duplicated in a full-time staff except at considerable expense to the government. Part-time

members also offered a greater range of viewpoints on the ASLBP and more ready access to current knowledge in a particular field. Further, part-time members have aided the public perception of objectivity in the NRC licensing process. For all these reasons, the Task Force concluded that part-time ASLBP members are an important asset to the NRC. Rather than lose the benefits of those employees as hearings grew longer and more intensive, the Task Force specifically recommended that the Commission explore the use of part-time ASLBP members as "special assistants" to the Boards, to serve as "technical interrogators," "alternate Board members," "special masters," or "consultants" to aid the hearing process and improve the quality of the record produced. On January 23, 1980, the Commission published proposed rules for comment in response to those recommendations. 45 Fed. Reg. 5308. Each aspect of the proposed rules is described below.

Only two comments were received. While generally agreeing with the thrust of the rules, both raised questions about the proposed amendments to permit "alternate board members" and "special masters." In large measure, the commentators objected to both the master and the alternate member, arguing that the Atomic Energy Act does not contemplate more than three members to a licensing board (42 U.S.C. 2241(a)), that the Administrative Procedure Act (5 U.S.C. 551 et seq.) does not contemplate this arrangement or permit delegation of the hearing function (including that of the presiding officer or decisionmaker), and that the Licensing Board should not entertain "expert" viewpoints not subject to cross-examination. The Commission has examined these comments in light of the specific statutory provisions noted and, while

it does not agree with much of the arguments raised, concludes that the proposed rule on use of "special masters" should be modified to provide for their use only on consent of the parties. No fundamental change is necessary to the proposed rule on alternate board members but a more clear explanation of their role is provided.

The Atomic Energy Act amendments that added § 191 (42 U.S.C. 2241) contemplated that a three-member board would preside at licensing hearings in lieu of a single hearing examiner. Those amendments also provided that one member should be "qualified in the conduct of administrative proceedings," that is, a lawyer, who, by custom has been the Chairperson of the Licensing Board. In addition, the Administrative Procedure Act generally contemplates that the person who presides over the reception of the evidence should make the decision, although this is not required in determining applications for initial licenses and in certain other types of cases. The use of special masters without the consent of the parties, as contemplated in the proposed rule (10 CFR 2.722(a)(2)) arguably could violate these principles by having a technical expert hear the evidence and "preside" at that hearing, weigh credibility and decide major, perhaps crucial, issues in a case, and then recommend a decision. Requiring de novo review by the Licensing Board or some alternative where a party may sponsor the master's report subject to the other party's objections or comments might cure these defects but would effectively delay the proceeding, waste resources, and offset the advantages that would be expected from use of the special master. Since parties may consent to procedures which differ from those statutorily provided, and since the Commission believes that a "special master" could be invaluable in developing the record and conserving Board time, the

Commission will modify the proposed rule to provide that a special master may be used with consent of the parties. Cf. Toledo Edison Co., et al. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752 (1975) (describing the use of a master with consent of the parties to rule on privilege objections to documents sought by party discovery in an antitrust proceeding).

On the other hand, the use of an "alternate board member"^{*/} does not arguably violate the statutory principles discussed above. The use of an alternate board member will not require a separate hearing or proceeding as would use of a special master. The alternate board member will sit with the three-member licensing board, will ask questions, comment upon testimony and provide his advice on the record and in the presence of the parties to the licensing board. The licensing board will still preside at the reception of the evidence, will still rule on issues of credibility and admissibility and will decide all issues in the case. The recommended decision of the alternate board member will be made on-the-record with an opportunity for the parties to comment thereon. The Licensing Board Panel's practice of avoiding off-the-record communications between the Board and other Panel members on any fact in issue will apply to communications between the Board and the alternate after the alternate's report has been received. Thus no party will lose any statutory rights and each party will be given an opportunity to provide views and comments on the alternate member's reports to the Licensing Board. In addition, that party aggrieved by any decision of the Board,

^{*/} The term "alternate board member" as a "special assistant" should not be confused with use of the term "alternate" in 10 CFR 2.721(b). In the latter situation the "alternate" is a substitute for a member of a Board who becomes unavailable. See generally New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 99-100 (1st Cir. 1978). In this rule (10 CFR 2.722(a)(3)), the "alternate" sits with the three-member Board and not instead of the Board or any of its members.

based in part on an alternate member's decision, will have an opportunity to appeal that decision to the Atomic Safety and Licensing Appeal Board. Thus the Commission believes that no changes are necessary to the proposed rule on use of alternate board members as clarified above.

The Commission adopts final rules on the use of part-time ASLBP members as follows:

Section 2.722(a)(1) provides for technical interrogators who may assist the presiding officer during the hearing by examining witnesses. The interrogator will play no part in the decision and will provide no advice to the board. No changes are necessary to the proposed rules. See 45 Fed. Reg. 5308.

Section 2.722(a)(2) authorizes special masters to hear evidentiary presentations by the parties on specific technical matters and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Such use shall be upon consent of all the parties. The parties will have an opportunity to comment upon the report and may appeal evidentiary rulings to the presiding officer. The presiding officer will retain final decisionmaking authority over the issues heard and reported on by the special master. The proposed rule is modified to provide for consent of the parties.

Section 2.722(a)(3) authorizes an alternate board member to participate in that portion of the proceeding relating to his or her area of expertise and to report conclusions to the presiding officer. The alternate board member, as clarified above, shall ask questions, provide advice and provide a written record of his advice to the board. However, the three-member Board shall preside at all sessions and rule on all questions of evidence and other motions directed during that portion of the proceeding. The board shall also retain all decisionmaking authority. With the explanation provided in this supplementary information, no changes are necessary.

Section 2.722(b) authorizes consultants to brief the board as described in the proposed rule. In addition, modifications to existing Sections 2.718 and 2.719 shall be made as described in the proposed rule. No changes are necessary to either of these proposals. 45 Fed. Reg. 5308. A minor change to the proposed addition to Part 2, Appendix A has been made to avoid confusion in the use of the term "alternate board member" with the term "alternate" in 10 CFR 2.721(b).

Because the final rules are not substantive and relate only to matters of Board procedure and do not require any change in conduct on the part of any party, the rules are effective immediately when published in the Federal Register. 5 U.S.C. 553(d). Licensing Boards, however, engaged in licensing hearings when the rule becomes effective should solicit the views of the parties before first using a special assistant. Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Section 553 of the United States Code, notice is hereby given that the following amendments to 10 CFR Part 2 are adopted:

1. A new Section 2.722 is added as follows:

§ 2.722 Special assistants to the presiding officer.

(a) In consultation with the Panel Chairman, the presiding officer may, at his discretion, appoint from the Atomic Safety and Licensing Board Panel established by the Commission, personnel to assist the presiding officer in taking evidence and preparing a suitable record for review. Such appointment may occur at any appropriate time during the proceeding but shall, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.704. Such special assistants may function as:

(1) Technical interrogators in their individual fields of expertise. Such interrogators shall be required to study the written testimony and sit with the presiding officer to hear the presentation and cross-examination by the parties of all witnesses on the issues of the interrogators' expertise, taking a leading role in examining such witnesses to ensure that the record is as complete as possible;

(2) Upon consent of all the parties, Special Masters to hear evidentiary presentations by the parties on specific technical matters, and, upon completion of the presentation of evidence, to prepare a report that would become part of the record. Special Masters may rule on evidentiary issues brought before them, in accordance with §§ 2.743 and 2.757. Appeals from such rulings may be taken to the presiding officer in accordance with procedures which shall be established in the presiding officer's order appointing the Special Master. Special Masters' reports are advisory only; the presiding officer shall retain final authority with respect to the issues heard by the Special Master; or

(3) Alternate Atomic Safety and Licensing Board members to sit with the presiding officer, to participate in the evidentiary sessions on the issue for which the alternate members were designated by examining witnesses, and to advise the presiding officer of their conclusions through an on-the-record report. This report is advisory only; the presiding officer shall retain final authority on the issue for which the alternate member was designated.

(b) The presiding officer may, as a matter of discretion, informally seek the assistance of Members of the Atomic Safety and Licensing Board Panel

to brief the presiding officer on the general technical background of subjects involving complex issues which the presiding officer might otherwise have difficulty in quickly grasping. Such informal briefings shall take place prior to the hearing on the subject involved and shall supplement the reading and study undertaken by the presiding officer. They are not subject to the procedures described in section 2.704.

2. Section 2.718 is amended by redesignating subparagraph (k) as (l) and subparagraph (l) as (m), and inserting a new subparagraph (k) as follows:

§ 2.718 Power of presiding officer.

* * * * *

(k) Appoint special assistants from the Atomic Safety and Licensing Board Panel pursuant to § 2.722;

(l) Issue initial decisions; and

(m) Take any other action consistent with the Act, this chapter, and sections 551-558 of title 5 of the United States Code.

3. Section 2.719 is amended by revising 2.719(b) to read as follows:

§ 2.719 Separation of functions.

(a) * * *

(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff or a special assistant as provided for in § 2.722 on any fact in issue unless on notice and opportunity for all parties to participate, except (1) as required for the disposition of ex parte matters as authorized by law and (2) as provided in paragraph (c) of this section.

4. Appendix A of 10 CFR Part 2 is amended by inserting the following as a new third paragraph:

An Atomic Safety and Licensing Board may at its discretion appoint special assistants to the Board from the membership of the Atomic Safety and Licensing Board Panel established by the Commission. These special assistants are to be employed to facilitate the hearing process and improve the quality of the record produced for review. The special assistants may serve as technical interrogators in their individual fields of expertise, alternate Atomic Safety and Licensing Board members to sit with the Board and participate in the evidentiary sessions on the issue for which the alternate members were designated, Special Masters to hear evidentiary presentations by the parties on specific technical matters upon the consent of all parties, or informal consultants to brief the board prior to the hearing on the general technical background of subjects involving complex issues. The term "alternate board member" as a "special assistant" within the meaning of 10 CFR 2.722(a)(3) should not be confused with the use of the term "alternate" in 10 CFR 2.721(b). In the latter situation the "alternate" is a substitute for a member of a Board who becomes unavailable. As a special assistant, the "alternate" sits with the three-member Board and not instead of the Board or any of its members.

(Secs. 161p., 191, Pub. L. 83-703, 68 Stat. 948 et seq. (42 U.S.C. 2201p., 2241), Sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243 (42 U.S.C. 5841).

For the Nuclear Regulatory Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,

this day of , 1980.