



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

RELEASED TO THE PDR

10/19/90
date initials

REVISÉD

(TO INCLUDE ATTACHMENT)

October 9, 1990

MEMORANDUM FOR: William C. Parler, General Counsel
James M. Taylor, Executive Director
for Operations

FROM: Samuel J. Chilk, Secretary *SC*

SUBJECT: SECY-90-292 - OPTIONS AND PROCEDURES
FOR DIRECT COMMISSION REVIEW OF LICENSING
BOARD DECISIONS AND TRANSITION PLAN FOR
PHASING OUT APPEAL PANEL

This is to advise you that the Commission, as noted below, has agreed to the following actions in response to the options presented in SECY-90-292.

1. All Commissioners have agreed that Commission review of Licensing Board decisions should be discretionary rather than mandatory and that review should be based upon the broader standards for taking review that the Commission promulgated when the Licensing Board Panel was established in 1962. The Commission has also agreed to require by rule that parties seek Commission review in order to exhaust their administrative remedies. The procedure should provide for an expeditious, summary review of petitions for review. Finally, the Commission has agreed to retain the current immediate effectiveness review procedures.
2. The Commission (with Chairman Carr and Commissioners Rogers and Remick agreeing) has approved the establishment of a separate opinion writing office reporting directly to the Commission and staffed with the necessary legal and technical expertise. The General Counsel with appropriate assistance from the Office of the Executive Director for Operations and the

SECY NOTE: This SRM, the subject SECY paper and the vote sheets of Chairman Carr and Commissioners Rogers and Curtiss will be made publicly available upon publication of the Federal Register Notice.

Office of Personnel, should prepare for the Commission's consideration a plan for establishing and organizing an opinion writing office. Eligibility for the office should be open to, among others, persons within the agency who have substantial experience with the agency's adjudicatory process. In establishing the office, procedures should be adopted to provide for consultation and coordination with the General Counsel or his designee during the opinion writing process.

(OGC/EDO) (SECY Suspense: 12/4/90)

Commissioner Curtiss would have preferred to establish the opinion writing office within OGC.

3. In regard to the transition plan, all Commissioners have agreed with Option 2. Accordingly, the notice of proposed rulemaking as modified in the attached copy should be forwarded for signature and publication. In addition, the rules governing agency appellate review should be suspended, and appeals after the date of the publication of the proposed rule must be filed with the Commission instead of the Appeal Board for a merits review.

(OGC) (SECY Suspense: 10/19/90)

Attachment:
As Stated

cc: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
IG
ASLAP
ASLBP
GPA

Options and Procedures for Direct Commission
Review of Licensing Board Decisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations to provide rules of procedure for direct Commission review of the initial decisions of presiding officers in all formal and informal adjudicatory proceedings. These regulatory changes are necessitated by the Commission's decision to abolish the Atomic Safety and Licensing Appeal Panel (ASLAP or Appeal Panel) which now provides an intermediate level of review of initial decisions of presiding officers in Commission adjudications. The commissioners of the Nuclear Regulatory Commission will now themselves review initial decisions. The two broad alternatives for a new agency appellate review system are mandatory review, in which the Commission will review initial decisions on the merits on the appeal of a party (as appeal boards presently do) or discretionary review, in which the Commission will consider petitions for review and, in its discretion, take or reject review (as the Commission presently does with respect to appeal board decisions). The Commission seeks public comments on (1) the advantages and disadvantages of these two types of review systems, and (2) necessary or desirable procedural changes incident to either system, e.g., if a discretionary system is chosen, what should be the standard for the Commission taking discretionary review.

DATES: The comment period expires [45 days from date of publication].
Comments received after this date will be considered if it is practical to do

so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Service Branch. Hand deliver comments to: NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC. Copies of comments received may be examined at this NRC Public Document Room.

FOR FURTHER INFORMATION CONTACT: E. Neil Jensen, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-1634.

SUPPLEMENTARY INFORMATION: Section 189a of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) provides a right to a hearing to any person whose interest may be affected

[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c, or 188 [of the Act].

The Commission now implements this statutory requirement through a three-stage process: (1) the presiding officer (usually a licensing board or an administrative law judge)¹ issues an initial decision; (2) a party may appeal the initial decision to an appeal board constituted from the ASLAP for a

¹For simplicity, these initial decisions will be referred to as licensing board decisions; however all initial adjudicatory decisions are covered by this notice of proposed rulemaking.

review on the merits; and (3) the appeal board's decision is then subject to discretionary review by the Commission, either on its own initiative (sua sponte) or by petition of a party.

Since the Commission was established in 1975, the bulk of its adjudicatory functions were associated with contested nuclear power reactor construction permit and operating license proceedings. Now, after 15 years of sometimes long and complex administrative litigation, only one such proceeding remains. That proceeding, considering the Seabrook operating license, is now in the appellate stage and is likely to be completed in the next fiscal year.

When the Appeal ^{Panel} ~~Board~~ was established by the Atomic Energy Commission in 1969, an intermediate level of review was thought necessary in order to focus the commissioners' time on important policy matters rather than on routine appeals in the numerous cases then pending. When the Commission was established in 1975, the Appeal ^{Panel} ~~Board~~ was continued for the same reason. In the years since 1969 the Appeal ^{Panel} ~~Board~~ has ~~performed an outstanding role in~~ developing ^{ed} a consistent, well reasoned, and well articulated body of case law which assured both safety and the due process rights of parties to nuclear licensing proceedings. The ^{members of the} ASLAP must be commended for their sustained, outstanding performance. ~~But now it has become clear that the diminished adjudicatory workload no longer warrants an intermediate level of review. It has become clear to the Commission that it has sufficient time both to address regulatory policy matters and to assume a direct appellate review function.~~

Thus the Commission is now faced with the need to devise a procedural mechanism whereby the Commission itself will provide some type of appellate review of licensing board decisions in lieu of that now provided by appeal boards. By its decision to abolish the Appeal Panel the Commission does not

However, the impending completion of the last major operating license proceeding, as well as the shift in the fundamental character of agency litigation away from licensing proceedings on power plants, present the Commission with an opportunity to restructure the NRC's appellate process to address some of the criticisms that have been directed to that process over the years by, for example, the Kemery Commission and the Rogovin Special Inquiry Group. Direct Commission review of licensing board decisions will enable the Commission to increase its direct involvement in agency adjudications, provide earlier regulatory and policy guidance in litigation, and remove some of the overly-judicialized layers of formal appellate procedures that have evolved over the years.

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intend to abrogate the ~~entire~~ existing body of Appeal ^{Panel} ~~Board~~ case law and begin writing on a clean slate. To the extent consistent with the procedural rule changes contemplated by this notice, and any other rule change that may be made in the future, existing Appeal ^{Panel} ~~Board~~ precedent may still be cited and relied upon, and will be modified only on a case by case basis as issues arise ^{as} ~~like~~ any body of case law ^{is modified} ~~evolves~~ over time.

I. OPTIONS AND PROCEDURES FOR DIRECT COMMISSION REVIEW OF LICENSING BOARD DECISIONS

In sum, there are two broad options for direct Commission review of initial decisions: discretionary review and mandatory review. Each option can be implemented with a variety of procedures. Under either option under consideration here the Commission will need to examine each decision to determine if review at the Commission's own initiative (sua sponte) is warranted and will also be required to decide the merits of certain types of adjudicatory decisions such as questions certified to the Commission and stay motions. The Commission is not at this time proposing any changes to its standards for interlocutory review or stay motions.

A. Discretionary Commission Review of Licensing Board Decisions

An appellate system in which the Commission would allow only discretionary review of licensing board decisions, either upon petition of a party or sua sponte, is consistent with both the Atomic Energy Act and the Administrative Procedure Act. The advantage of a discretionary review system is that it would enable the Commission to focus its attention only on those cases that meet its standard for granting review.

A disadvantage to a discretionary review system is the possibility that the licensing board's decision might be appealed to a court without any petition for review having been submitted to the agency (which would alert the agency to potential problems with the decision) and in advance of the Commission deciding whether to take review to correct possible problems with the decision. This would occur if (1) the Commission permits the licensing or other action authorized by the licensing board's decision to take place at the time the decision issues² and (2) the court does not require the petitioner to file a discretionary petition for review with the agency before coming to court.

The Commission can prevent premature judicial review from occurring by continuing its immediate effectiveness regulation so that the more significant licensing board decisions will not become effective immediately. In addition, the rules could be amended to make explicit that the filing of a petition for review with the Commission is an available remedy before the decision becomes final. The Commission will thereby be creating a potential procedural remedy for a disappointed party which the party will need to exhaust before going to court.

If the Commission adopts a discretionary review system, it will need to establish standards for taking review. At the time the Atomic Safety and Licensing Board was established in 1962 to preside over contested adjudications, the Commission provided for discretionary petitions for review which were evaluated according to the following standard:

²Under our practice finality and effectiveness are not the same; certain licensing board decisions, those comprised within NRC's immediate effectiveness rule (10 C.F.R. § 2.764), can be effective, so the license may issue, even though the decision is still under Commission review and is therefore not final.

The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to such considerations as the following:

- (1) A finding of a material fact is clearly erroneous;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) A substantial and important question of law, policy or discretion has been raised;
- (4) The conduct of the proceeding involved a prejudicial procedural error; or
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.762(d) (1962). The Commission's present regulation governing acceptance of petitions for review of appeal board decisions, 10 C.F.R. §2.786(b)(4), is somewhat more restrictive:

- (i) A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security, constitutes an important antitrust question, involves an important procedural issue, or otherwise raises important questions of public policy.

This regulation further provides that a petition for review of matters of fact will not be granted absent contrary decisions by the licensing board and the appeal board. However the Commission has retained supervisory authority to review decisions regardless whether the review standards are met. The advantage of the less restrictive standard is that it gives the Commission greater discretion to review licensing board decisions consistent with its inherent supervisory authority.

B. Mandatory Commission Review Of Licensing Board Decisions

If the Commission decides to grant an appeal as-of-right to parties before the licensing board, it will be necessary to review on the merits

whatever "errors of fact or law" a party may choose to appeal. See 10 C.F.R. § 2.762(d)(1). A possible advantage of providing a mandatory review system is that it requires a high degree of Commission involvement since all matters properly appealed would have to be decided by the Commission itself. However in many routine cases this degree of involvement will be unnecessary. The Commission could retain its present system of allowing licensing to go forward pending a final agency decision if the immediate effectiveness criteria were met and no stay was warranted.

PROPOSAL: The Commission proposes that a discretionary review system be adopted. It will be administratively more efficient in that Commission review would be reserved for only those cases found by the Commission to have a particular problem. Acceptable licensing board decisions would not require further merits review, thus expeditiously ending the adjudicatory proceeding. However comments are invited on this choice.

The Commission further proposes a review standard like that which applied when the Atomic Safety and Licensing Board was established in 1962. With this revised standard, the review system the Commission has in mind ^{will} ~~would~~ operate procedurally like the current certiorari Commission review system (10 C.F.R. § 2.786). There will be a short petition for review which will need to be filed within a fixed period (say 20 days). If the petition is granted, a schedule will be set for full briefing and the sequence and length of briefs will be established. Decisions on the need for oral argument will be made on a case-by-case basis. Following briefing and any oral argument, a final merits decision will be issued. If the petition for review is denied, and there is no sua sponte review, the Licensing Board's decision ^{will} ~~would~~ become final.

Comments are invited on the review standard and review procedures outlined above.

To assist the Commission in performing its appellate adjudicatory functions, chiefly reviewing the licensing board decision and the sometimes voluminous record on which the decision is based and drafting decisions, the Commission will need to use an existing organization or establish a separate ~~Commission level~~ opinion writing office. While this is primarily a matter of internal Commission organization, comments are invited on the choice.

II. TRANSITION PLAN

Whatever review option is chosen, parties will need to know how cases pending while the final rule is under consideration will be handled. The Commission's transition plan for these cases is described below.

All appeals and other appellate and related matters (including appeals from initial decisions, interlocutory appeals and motions, certified questions, referrals and petitions for directed certification) pending before an appeal board on the date of publication of this notice will be decided by the appeal board under current regulations. All appeals and other appellate and related matters filed in the period beginning one day after publication of this notice and ending on the date of publication of the notice of final rulemaking shall be filed with the Commission, with the Commission assuming the decision role that would otherwise have been performed by the appeal board. However, if a filing is related closely to a matter to be decided by an appeal board, it should be decided by the appeal board even if it is filed after the date of publication of this notice. For example, a motion for stay pending an appeal before the appeal board should be decided by the appeal board even if filed after the date of publication. The appeal board should

decide in the first instance whether papers filed with it should be referred to the Commission under this transition plan. The Secretary may refer papers improperly filed with the Commission to an appeal board.

Environmental Impact: Categorical Exclusion

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

Paperwork Reduction Review

This proposed rule contains no information collection requirements and therefore is not subject to the requirements of the paperwork Reduction Act of 1980 (44 U.S.C. § 3501, et seq.).

Regulatory Analysis

Section 189a(1) of the Atomic Energy Act (42 U.S.C. § 2239) affords any person whose interest may be affected a right to a hearing

[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188....

The Commission's procedural rules now provide an intermediate layer of administrative appellate review of initial decisions of presiding officers by appeal boards constituted from the ASLAP. However, the Commission has recently determined to abolish the ASLAP. In its place, the Commission intends to establish a mechanism for direct review of decisions of presiding

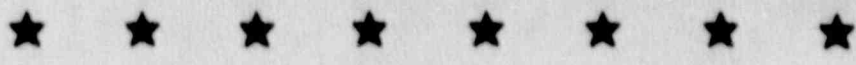
officers by the Commission. The two broad alternative mechanisms being considered by the Commission are a mandatory system of agency appellate review and a discretionary system of agency appellate review. The cost of whatever mechanism is eventually adopted is not expected to be significantly more, in terms of the time and resources needed by the Commission and parties to achieve administrative appellate review of initial decisions, than the present system of appellate review by appeal boards. If a discretionary system is ultimately adopted, the cost for the parties as well as for the Commission in the time and resources needed ^{for appellate} ~~to obtain~~ review of ~~an~~ initial decision^s is likely to be less. It is thus apparent that the cost entailed in the promulgation and application of this proposed rule is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this proposed rule.

Backfit Analysis

This proposed rule does not modify or add to systems, structures, components, or design of a production or utilization facility; the design approval or manufacturing license for a production or utilization facility; or the procedures or organization required to design, construct, or operate a production or utilization facility. Accordingly, no backfit analysis pursuant to 10 C.F.R. § 50.109(c) is required for this proposed rule.

Regulatory Flexibility Certification

The proposed rule will not have a significant economic impact upon a substantial number of small entities. Many applicants, licensees and intervenors fall within the definition of small businesses found in section 34



TRANSMITTAL TO: X Document Control Desk, P1-24
 ADVANCE COPY TO: _____ Public Document Room*
 DATE: 10/19/90
 FROM: SECY, Operations Branch C. B. S.

Attached are copies of SECY papers and related documents. They are being forwarded for entry on the Daily Accession List and placement in the Public Document Room. No other distribution is requested or required.

- 1. Recy-90-292 11. _____
revised form on
- 2. 90-292 dtd 10/9/90 12. _____
Chm Laris note
- 3. Sheet on 90-292 13. _____
Com. Rogers note
- 4. Sheet on 90-292 14. _____
Com. Curtiss note
- 5. Sheet on 90-292 15. _____
- 6. Recy-90-337 16. _____
- 7. " 90-338 17. _____
- 8. " 90-339 18. _____
- 9. " 90-342 19. _____
- 10. " 90-344 20. _____

* PDR is advanced two copies of each SECY paper and one copy of each related document.

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