



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. Secy-90-292 11. _____
revised sermon
- 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. Secy-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.

9010260206 900829
 PDR COMMS NRCC
 CORRESPONDENCE PDC



DF02
111

NOTATION VOTE

RELEASED TO THE PDR

RESPONSE SHEET

10/19/90

date

J

initials

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER CURTISS

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

APPROVED w/comments **DISAPPROVED** _____ **ABSTAIN** _____

NOT PARTICIPATING _____ **REQUEST DISCUSSION** _____

COMMENTS:

See attached comments.

James R. Utui

SIGNATURE

8/29/90

DATE

RELEASE VOTE

WITHHOLD VOTE

ENTERED ON "AS" YES **No** _____

Commissioner Curtiss' Comments on SECY-90-292

I commend the Office of General Counsel (OGC) for its fine work on this matter and I approve OGC's proposals as follows:

- A. I favor discretionary, rather than mandatory, Commission review using the broader standards for taking review that the Commission promulgated when the Licensing Board Panel was established in 1962.¹ In addition, I agree that we should require -- by regulation -- that parties seek Commission review in order to exhaust their administrative remedies and preclude premature judicial review.
- B. I favor the establishment of a separate opinion writing office, but one that is within OGC and reports to the General Counsel. This office should be separate from, although it should closely coordinate its recommendations with, the Solicitor's organization and should be staffed by attorneys other than those who will be assigned to defend the Commission's final decisions before the courts so that the options and recommendations on appeals to the Commission will be objective, will be based on the merits of the appeals, and will not be unduly influenced by considerations of litigative risk and eventual judicial review.
- C. On the matter of a transition plan and the disposition of currently pending appeals, I agree with OGC's recommendation that we proceed with notice-and-comment rulemaking, suspend the rule governing agency appellate review, and require that appeals after the date of publication of the proposed rules be filed with the Commission instead of the Appeal Board for a merits review (Option 2).
- D. The notice of proposed rulemaking should set forth the actual rules and rule changes that will be proposed to implement the Commission's decision on the various options in SECY-90-292. I would request that OGC modify the notice of proposed rulemaking to incorporate those proposed rules prior to publication.

Additional editorial comments on the notice of proposed rulemaking are attached.

¹ At this point, I reserve judgment on the question as to how many affirmative Commissioner votes should be required in order for the Commission to take review of a licensing board decision, but I would suggest that this is an issue that the Commission may need to consider as the regulations and procedures on Commission appellate review are developed.

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

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 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 Board was continued for the same reason. In the years since 1969 the Appeal Board has performed an outstanding role in developing 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 ASLAP must be commended for their sustained, outstanding performance. But now it has become clear that the ~~diminished~~ ^{changing nature of} adjudicatory ~~workload~~ ^{cases} no longer warrants an intermediate level of review. It has become clear to the Commission that it has sufficient time ^{and a real need} 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

intend to abrogate the ~~entire~~ existing body of Appeal 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 Board precedent may still be cited and relied upon, and will be modified only on a case by case basis as issues arise like any body of case law 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.

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