



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

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PDR
IN RESPONSE, PLEASE
REFER TO: M901017

October 24, 1990

Comsecy-90-3

MEMORANDUM FOR: William C. Parler, General Counsel
FROM: ^{Bate} Samuel J. Chilk, Secretary
SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION
AND VOTE, 11:30 A.M., WEDNESDAY, OCTOBER 17,
1990, COMMISSIONERS' CONFERENCE ROOM, ONE
WHITE FLINT NORTH, ROCKVILLE, MARYLAND
(OPEN TO PUBLIC ATTENDANCE)

I. Final Rule: Interim Procedures for Agency Appellate Review
(COMSECY-90-3)

The Commission, by a 4-0 vote, approved a final rule which puts into place a transition plan to handle all appeals from initial decisions of presiding officers in all formal and informal agency adjudications, and certain other appellate and related matters. The transition plan implemented by the final rule provides that, with certain exceptions, the Commission, rather than an appeal board, will provide agency appellate review for appellate matters filed in the interim period between the day after the date of publication of this final rule and the effective date of a final appellate review rule. The Commission review, in this interim period, will follow existing procedures. Appellate matters which are pending before appeal boards on the date of this final rule will be decided by the boards.

II. SECY-90-299 - Petitions to Intervene and Requests for
Hearing in Shoreham Operating License Amendment Proceeding

The Commission, by a 4-0 vote, approved an order responding to six "Petition(s) to Intervene and Request(s) for Hearing(s)" related to various actions taken by the NRC staff and the Long Island Lighting Company concerning the Shoreham Nuclear Power Station. The Petitions sought various Commission actions, including an order directing NRC staff to prepare an Environmental Impact Statement on the proposed decommissioning of the Shoreham facility and that the EIS consider resumed operation as an alternative to decommissioning.

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The order indicated that the NRC was not required under the Atomic Energy Act and the National Environmental Policy Act to consider "resumed operation" as an alternative under the facts of this situation. The order also forwarded the petitions to the Atomic Safety and Licensing Board with directions to review and resolve all other aspects of these hearing requests in a manner not inconsistent with the order.

(Subsequently, on October 17, 1990, the Secretary signed the Order.)

III. SECY-90-254 - Kerr-McGee's Motion for a Hearing Under Section 274o

The Commission, by a 4-0 vote, approved an order responding to an April 27, 1990, motion filed by the Kerr-McGee Chemical Corporation requesting that the NRC comply with Section 274o of the Atomic Energy Act which Kerr-McGee read to require a full adjudicatory hearing and oral argument before deciding whether to amend the NRC's agreement with the State of Illinois. The amended agreement would empower Illinois to regulate uranium and thorium mill tailings under the Uranium Mill Tailings Radiation Control Act.

The order denies both the request for oral argument on the proposed amendment to the Commission's agreement with Illinois, and the motion that a formal adjudication on Illinois' differing 11e(2) standards be held before the Commission decides whether to amend the agreement with Illinois. The order also indicated that the Commission had approved the amendment to the Illinois agreement. In doing so the Commission approved the Illinois generic program for regulation of 11e(2) byproduct material. However, the Commission also determined that it has a site-specific obligation that will arise only later if and when Illinois, having acquired authority over byproduct material, seeks to impose standards which differ from the Commission's own standards. If the State seeks to adopt alternatives to any requirements adopted and enforced by the Commission for disposal of the materials at the West Chicago site, the Commission will determine, after notice and opportunity for a hearing, whether the State's alternative will achieve a level of stabilization and containment at the West Chicago site, and a level of protection for public health, safety and the environment from both radiological and nonradiological hazards which are equivalent to, to the extent practicable, or more stringent than, the level which would be achieved by any requirements adopted and enforced by the Commission for disposal of the materials at the West Chicago site.

(Subsequently, on October 17, 1990, the Secretary signed the Order.)

cc: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
EDO
GPA
ACRS
PDR - Advance
DCS - P1-24

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USNRC

NUCLEAR REGULATORY COMMISSION

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10 CFR Part 2

IN: 3150 - AD77

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Interim Procedures for Agency Appellate Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This final rule puts into place a transition plan which the Nuclear Regulatory Commission (NRC) is adopting to handle all appeals from initial decisions of presiding officers in all formal and informal agency adjudications, and certain other appellate and related matters, which are filed from the day after the date of publication of this final rule until the effective date of a final rule to be issued pursuant to the Commission's ongoing rulemaking proceeding for establishing procedures for direct agency appellate review by the Commission. A notice of proposed rulemaking in that proceeding is being published in this issue of the Federal Register. As that proposed rule explains, a new procedural system for direct appellate review by the Commission is necessitated by the Commission's recent decision to abolish the Atomic Safety and Licensing Appeal Panel which heretofore has provided an intermediate level of appeal as of right from initial decisions. The transition plan implemented by this final rule provides that, with certain exceptions, the Commission, rather than an appeal board, will provide agency

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appellate review for appellate matters filed in the interim period between the day after the date of this final rule and the effective date of a final appellate review rule. The Commission review, in this interim period, will follow existing procedures. Specific appellate matters which are pending before appeal boards on the date of this final rule will be decided by the appeal boards.

EFFECTIVE DATE: (One day after date of publication)

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

SUPPLEMENTARY INFORMATION: In a companion document published in this issue of the Federal Register, the NRC announces a proposed rulemaking to establish procedures for direct review of initial decisions of presiding officers in all formal and informal agency adjudications by the commissioners of the NRC. Direct review by the commissioners will replace review by appeal boards constituted from the Atomic Safety and Licensing Appeal Panel. The Commission has decided to abolish the Appeal Panel. The notice of proposed rulemaking proposes to adopt a discretionary system of Commission review and invites comments on that choice and on what particular procedures should be adopted.

This final rule implements the plan the Commission is adopting to provide for an orderly transition from appellate review by appeal boards to appellate review by the Commission. The Commission has determined that an orderly

transition will be assisted by the commissioners taking to themselves, with certain exceptions, 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) filed in the period beginning one day after publication of this document and ending on the effective date of a final rule. The Commission review during this interim period will follow existing procedures. Thus the present right of parties to a mandatory review on the merits of initial decisions will not be affected. All appeals and other appellate and related matters pending before an appeal board on the date of publication of this notice will be decided by the appeal board under current regulations.

This transition plan will enable appeal boards to conclude their work on pending appeals without interruption by new ones. In addition, by allowing appeal boards to complete all pending matters the work already expended on these matters will not be lost.

The Commission has allowed for an exception to the requirement that all new appellate matters be filed with it. If a filing is closely related to a matter currently pending before an appeal board, it should be decided by the appeal board even if it is filed after the date of publication of this final rule. For example, a motion for stay pending an appeal on a matter that is pending before an appeal board should be decided by the appeal board even if filed after the effective date of this final rule. Under this exception the Commission expects the appeal board to continue performing its currently pending appellate functions in the Seabrook operating licence proceeding.

This will conserve agency resources by assuring that an appeal board will be able to make use of its familiarity with a case to decide pending matters connected with the case. The appeal board is to decide in the first instance whether papers filed with it should be referred to the Commission under this transition plan.

The final rule being issued today amends certain of the Commission's regulations to make them consistent with this transition plan. Thus, the authorization for appeal boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission in 10 CFR 2.785 and 2.1255 is revoked with respect to new appellate matters. 10 CFR 2.788 is amended to make clear that stay requests in the interim period are not to be filed with an appeal board unless closely related to a matter currently pending before the appeal board. Similarly, 10 CFR 2.1015 is amended to make clear that appeals governed by that regulation are to be filed with the Commission and not with an appeal board.

The Commission's procedure in 10 CFR 2.786 for filing a petition for review of an appeal board decision or action with the Commission remains effective for cases pending before an appeal board on the date of publication of this notice. Such a petition for review will be superfluous and will not be available to a party whose appeal is heard by the Commission under the transition plan. However, the Commission's procedure at § 2.771 for petitioning for reconsideration of a Commission decision remains effective.

Because this amendment preserves the right of parties to a merits review of initial decisions of presiding officers and relates solely to matters of agency practice, notice of proposed rulemaking and public procedures thereon are unnecessary and the amendment may be made effective upon publication without deferring effectiveness for 30 days.

Environmental Impact: Categorical Exclusion

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

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0136.

Regulatory Analysis

The Commission needs a plan to achieve an efficient transition between agency appellate review by appeal boards and agency appellate review by the Commission. The transition plan put in place by this rule change will have no effect on parties other than to change the forum for appellate review of initial decisions in affected proceedings. The transition plan will, however, enable appeal boards to complete their work on existing cases without being interrupted by new appeals. By leaving all pending appellate matters for

resolution by appeal boards, this transition plan also prevents any potential loss in the efforts already expended by an appeal board. Thus the cost entailed in the promulgation and application of this final rule is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for this rule.

Backfit Analysis

This 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 CFR 50.109 is required for this final rule.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Part 2:

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239; sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix R also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section 2.785 is amended to add the following note:

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

* * * * *

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding for establishing procedures for direct Commission review of initial

decisions, i.e., until the effective date of a final rule, the authorization of Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission is restricted as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this regulation to the contrary.

(a) Appeal boards are authorized to decide 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 on which this final rule is published in the Federal Register)

(b) Appeal boards are not authorized to decide appeals and other appellate and related matters filed in the period beginning _____ (one day after publication of this final rule in the Federal Register) and ending on the effective date of a final rule in the rulemaking proceeding referred to above, unless a filing is closely related to a matter currently pending before an appeal board. Appeals and other appellate and related matters filed in this period will be decided by the Commission under current regulations. The appeal board should decide in the first instance whether papers filed with it should be referred to the Commission under the terms of this Note.

3. Section 2.788 is amended to add the following note:

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

* * * * *

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding establishing procedures for direct Commission review of initial decisions, requests for stays of decisions of presiding officers shall not be filed with an Atomic Safety and Licensing Appeal Board in the period beginning _____ (one day after publication of this final rule in the Federal Register) unless a stay request is related closely to a matter currently pending before an appeal board.

4. Section 2.1015 is amended to add the following note:

§ 2.1015 Appeals.

* * * * *

NOTE: Any appeal taken pursuant to the terms of this regulation after _____ (the date on which this final rule is published in the Federal Register) shall be filed with the Commission rather than with an Atomic Safety and Licensing Appeal Board notwithstanding any provisions of this regulation to the contrary.

5. Section 2.1255 is amended to add the following note:

§2.1255 Review by the Atomic Safety and Licensing Appeal Board

* * * * *

NOTE: Pending completion of the Commission's ongoing rulemaking proceeding for establishing procedures for direct Commission review of initial decisions, i.e., until the effective date of a final rule, the authorization of Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise be exercised and performed by the Commission is restricted as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this regulation to the contrary.

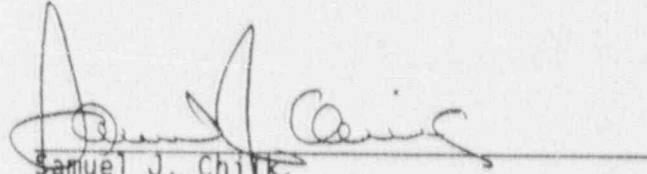
(a) Appeal boards are authorized to decide all appeals and other appellate and related matters (including appeals from initial decisions, interlocutory appeals and motions, certified questions, referrals and petitions for directed certification) pending before an appeal board on _____, (the date on which this final rule is published in the Federal Register)

(b) Appeal boards are not authorized to decide appeals and other appellate and related matters filed in the period beginning _____ (one day after publication of this final rule in the Federal Register) and ending on the effective date of a final rule in the rulemaking proceeding referred to above unless a filing is closely related to a matter currently pending before an appeal board. Appeals and other appellate and related matters filed in this period will be decided by the Commission under current regulations. Appeal boards should decide in the

first instance whether papers filed with it should be referred to the Commission under the terms of this Note.

Dated at Rockville, Maryland, this 18th day of Oct, 1990.

For the Nuclear Regulatory Commission.


Samuel J. Chirk,
Secretary of the Commission

AD77-2
PDR



RULEMAKING ISSUE
(Notation Vote)

August 17, 1990

SECY-90-292

For: The Commission
From: William C. Parler
General Counsel
Subject: OPTIONS AND PROCEDURES FOR DIRECT COMMISSION
REVIEW OF LICENSING BOARD DECISIONS AND
TRANSITION PLAN FOR PHASING OUT APPEAL PANEL

Summary: This paper responds to the Secretary's June 29, 1990 staff requirements memorandum requesting the Office of the General Counsel to provide (1) a transition plan for phasing out the Atomic Safety and Licensing Appeal Panel; (2) a discussion of the options and procedures for direct Commission review of licensing board decisions, including an evaluation of the merits of creating a Commission-level Opinion Writing Office, and (3) recommended changes to the procedural regulations in 10 C.F.R. Part 2 to reflect the abolition of the Appeal Panel and the establishment of a mechanism for direct Commission review of licensing board decisions. The discussion which follows addresses the first two requests. The attached notice of proposed rulemaking, which discusses the substance of the various options and proposals, addresses the third. We propose to draft the actual rule changes after consideration of public comment.

Contact:
Martin G. Halsch
x21740

NOTE: TO BE MADE PUBLICLY AVAILABLE
WHEN THE FINAL SRM IS MADE
AVAILABLE

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

In sum, there are two broad options for direct Commission review of licensing board decisions: discretionary review and mandatory review.¹ Each option can be implemented with a variety of procedures. Under either option under consideration here the Commission will need to examine each licensing board 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.

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 Act²

¹ A third option would be for the licensing board to certify the record to the Commission with or without a recommended decision so that the Commission itself would issue the initial decision. See Office of the Controller, "An Evaluation Of The Workload And Resource Requirements For The Atomic Safety And Licensing Appeal Panel" (June 1990) ("Controller's Report") at 16 and Appendix H at 4-5 (Options E and F). NRC regulations already provide this option for the Commission "when the public interest so requires". 10 C.F.R. § 2.760(b). A license could not be made immediately effective until the Commission rendered its decision which could take a considerable amount of time depending upon the extent of the record. Thus we see little benefit to this option and do not discuss it further.

² Section 191a of the AEA authorizes the Commission to grant the licensing board the power to make final decisions. At the time the licensing board was established in 1962 the Commission provided for petitions for discretionary Commission review, as well as sua sponte review, of decisions of presiding officers. In 1965 the Commission substituted an appeal-as-of-right by the filing of exceptions by parties for the discretionary petition

and the Administrative Procedure Act.³ The advantage of a discretionary review system is that it would empower the Commission rather than the parties to select the matters for Commission review and would expedite the adjudicatory process in those cases where little or no further merits consideration is warranted (i.e., where the Commission is satisfied with the licensing board's decision or where few issues need to be reviewed). It would enable the Commission to focus its attention only on those cases that meet its standard for granting review. On the other hand, a discretionary review system would not require a level of Commission involvement in adjudicatory proceedings that is much greater than the present practice. Thus a discretionary review system may send no strong "signal" that the Commission intends to become more active in adjudications. Indeed, the greater level of Commission involvement would become most apparent with the Commission's actual practice under the system.

for review procedure. 31 Fed. Reg. 14014 (1965). The substitution was made because the Commission believed that the filing of petitions for review delayed rather than expedited disposition of cases apparently because petitions for review were generally granted (thus requiring both a Commission decision on the petition and a Commission decision on the merits). In 1969 the Commission established the appeal board to exercise the appellate review function.

³ Section 557(b) of the APA provides that the decision of the presiding officer becomes the decision of the agency without further proceedings unless there is an appeal to the agency or the agency takes review sua sponte and that the agency may limit the issues it will consider on appeal by notice or by rule. One legal treatise reports that "most agencies review the decisions of administrative law judges under a ... discretionary review [procedure]." Gary J. Edles and Jerome Nelson, Federal Regulatory Process, 1984 Supplement, at 124. However unlike NRC most agencies do not give any effect to their adjudicatory decisions until the administrative review process has been exhausted and petitions for review are denied or decided on the merits.

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 issues⁴ and (2) the court does not require the petitioner to file a discretionary petition for review with the agency before coming to court.⁵

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, we should amend the rules to make explicit that the filing of a petition for review with the Commission is an available remedy which the Commission expects will be sought 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.⁶

⁴ Under 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.

⁵ We provide in an Appendix to this paper a legal analysis of the legal doctrines of "finality" and "exhaustion of administrative remedies" which underlie our discussion of the potential problem of premature judicial review.

⁶ If the Commission does not take review of the licensing board decision sua sponte and no petition for review is filed and a party then goes to court, it will be possible to argue that the party should not be heard because of its failure to exhaust its administrative remedies by filing a petition for review with the Commission. There can be no guarantee, however, that the court will not excuse the party's failure to exhaust.

If the Commission adopts a discretionary review system, it will need to establish standards for taking review. At the time the licensing board was established in 1962, the Commission provided for discretionary petitions for review which were evaluated according to the following standard:

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).⁷ 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

⁷ Elements of this standard were similar to those used by the Civil Aeronautics Board which granted petitions for review if "(i) a finding of material fact is erroneous; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules, or precedent; (iii) a substantial or important question of law, policy or discretion is involved; or (iv) a prejudicial procedural error has occurred." See Controller's Report, Appendix B at 24.

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. The advantage of the less restrictive earlier standard is that it gives the Commission greater discretion to modify a licensing board decision consistent with its supervisory authority over adjudications.

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). The advantage of providing a mandatory review system is that it compels Commission involvement and signals strongly that the Commission intends to become substantially involved in adjudications, since all matters properly appealed would have to be decided by the Commission itself. 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.

The disadvantage of a mandatory review system is that it would prolong the adjudicatory process because all issues appealed by a party would have to be addressed and decided by the Commission. 10 C.F.R. § 2.762 presently provides a procedure for mandatory review of licensing board decisions. This

one, or a similar one, could be adapted for Commission use.

Recommendation:

If the Commission is willing to amend its immediate effectiveness regulation along the lines discussed above, so as to prevent premature judicial review, we believe that a discretionary review system will be preferable to a mandatory review system. 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.

II. Using Existing Organization v. Opinion Writing Office

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.⁸ We consider below the respective benefits of these two alternative methods of providing the Commission assistance in rendering its adjudicatory decisions.⁹

⁸ For a listing of the functions now performed by the Appeal Board, see Controller's Report at 2-5. For a synopsis of the expected future appellate review workload, see Controller's Report at 6-10.

⁹ Before 1969 when the Appeal Panel was established the Commission employed OGC for this function. Thus we describe the benefits of utilizing OGC although it would be possible to use a different existing organization, such as the Chairman's Office, to perform this function.

A. Benefits of Using OGC

1. If the Commission selects a discretionary review system, OGC would, for the most part, be performing its customary duties, albeit on a somewhat larger scale, of reviewing the lower-level decision, suggesting options for Commission action and preparing a draft response to any petitions for review. Also when the options paper or draft response was presented to the Commission, it would already contain OGC's legal advice and would not need to be sent to OGC for legal review. On the other hand, OGC would be required to examine the record before the licensing board more extensively than at present since it would be operating without the benefit of a previous layer of appellate review which was extremely effective in discovering and correcting matters that could prove troublesome on judicial review.

2. Using OGC would retain the close coordination between the attorneys who review the record and decision below and prepare a draft opinion for the Commission and the attorneys who defend the final opinion before the court (often the same individuals). This system results in the attorneys who defend the Commission in court being immersed in the record well before petitions for judicial review are filed and briefs are due. This has proved to be very important in the past, especially in reacting to injunction requests and expected appeals in immediate effectiveness cases. If the Commission establishes a separate office, it might be able to counteract the diminishment of this close coordination by mandating that this office obtain informal and formal input from OGC. It will remain very important that OGC be able to review draft Commission decisions before they are issued.

3. Administratively, it would be simpler to add employees and resources to OGC as needed than to establish, locate and set up a new office. If a discretionary review system is adopted, it might be better to use OGC at least initially until the Commission has a

better idea of just how much work will be involved.

B. Benefits of Establishing an Opinion Writing Office

1. A separate Commission-level office with its own Director (and possibly Deputy Director) might better serve to attract and retain highly qualified personnel despite the decreased visibility of such personnel in the adjudicatory process. The Commission will need to decide whether this office should report to the Chairman or to the Commission. It might also signal a greater change from prior practice and a greater level of Commission involvement in adjudications.

2. Particularly if the Commission selects a mandatory review system, the resulting workload is likely to be at least equivalent to the workload now before the Appeal Panel. It may be possible in any event to use the employees of this office for other suitable non-adjudicatory tasks which would not conflict with its adjudicatory functions and thus assure a sufficient workload to maintain the office.

III. TRANSITION PLAN

A. Transition Planning Elements

In developing a plan for making the transition from appellate review by appeal boards to appellate review by the Commission, three classes of cases must be considered: (1) cases presently before appeal boards; (2) cases presently before the licensing board which may be appealed; and (3) cases to be heard by a licensing board in the future.

1. Cases Presently Before Appeal Boards

Parties who have already appealed licensing board decisions to an appeal board in NRC's present appeal-as-of-right system have a right to have their appeals heard on the

merits.¹⁰ While the Commission can at any time substitute itself for an appeal board, to terminate the Appeal Panel before these cases are concluded would result in a heavy loss of the time and expertise already invested in these cases by the appeal boards. Thus a more orderly course would be for the Commission to allow the Appeal Panel to continue to exist as an entity until the cases presently before it are concluded. The Appeal Panel would need to be continued as a separate entity for at least nine months and perhaps longer to complete the present workload.¹¹

2. Cases Presently Before A Licensing Board And Cases To Be Heard By A Licensing Board In The Future

Establishing a new system for agency appellate review, whether discretionary or mandatory, will require a notice-and-comment rulemaking proceeding.¹² Thus the new system

¹⁰ As of August 15, 1990, seven proceedings were before an appeal board: (1) Advanced Medical (enforcement); (2) Kerr-McGee (decommissioning); (3) Seabrook (operating license); (4) Turkey Point (license amendment); (5) Vermont Yankee (license amendment); (6) Wrangler Labs (enforcement); and (7) Turkey Point (a second and different license amendment case). The Seabrook proceeding represents about half of the Appeal Panel's workload and is expected to take at least six months to complete.

¹¹ In the eventuality that the present members of the Appeal Panel become unavailable before cases presently before appeal boards are concluded, the Commission could appoint appropriate present NRC employees (perhaps including Licensing Board Panel members) as temporary members of the Panel, or take the cases up itself.

¹² The Commission has generally amended Part 2 procedural regulations through notice-and-comment rulemakings. Moreover, in Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), the court held that the Federal Aviation Administration was obliged to engage in notice and comment procedures before promulgating a body of regulations governing the adjudication of administrative civil penalty actions because the rules in question "substantially affected civil penalty defendants' right to avail themselves of

can become effective when the notice of a final rule is published in the Federal Register. The first step in the development of a proposed rule will be the Commission's decision as to whether to adopt a discretionary or a mandatory review system and whether to use an existing organization or establish a new opinion writing office. Once those decisions are made, the next steps would be: (1) the notice of proposed rulemaking is published in the Federal Register for a forty-five day comment period (2 months); (2) OGC analyzes the comments and prepares a draft final rule (1-2 months depending on the number of comments); (3) the Commission considers and votes on the draft final rule (1 month). Total elapsed time is about four-five months with a tight schedule for both OGC and the Commission.

A difficult planning question concerns those cases before a licensing board which may be appealed between now and the time a rule change is completed. Retaining the current system for these cases will have the effect of extending the life of the Appeal Panel by perhaps another 3-5 months (for a combined period of about one year to one and one half years). The Commission could suspend its rules governing appeal to an appeal board and direct that all appeals filed after the publication of the proposed rule will be heard by the Commission on the merits until such time as the rule becomes final when appeals will be governed by the new system.¹³

an administrative adjudication," 900 F.2d at 375, and could not rely upon the Administrative Procedure Act's exemption from this requirement for changes in agency procedural rules. While we have reservations about the correctness of the decision and the decision might be distinguished from the matter at hand here, the decision does indicate that initiating a new system without prior comment entails a substantial risk of reversal and resulting delay in putting the new system in effect.

¹³ If the Commission were to suspend its rules and go immediately to a discretionary review system, this would have the effect of making the proposed rule for all intents and purposes final and would cast doubt on the Commission's willingness to genuinely respond to comments. Thus, we do not suggest this as

B. Options

Given the above planning considerations, we see the following options for a transition plan:

1. Proceed with notice-and-comment rulemaking without making any interim changes.

All cases properly appealed prior to publication of the final rule would proceed through the old system. This is the "cleanest" transition plan since the date the final rule goes into effect would determine which cases are heard under the old, and the new, systems. This plan would result in the Appeal Panel being retained for the longest period of time since it would not terminate until appellate review of all cases filed prior to the effective date of the final rule had been completed.

2. Proceed with notice-and-comment rulemaking and suspend the rules governing agency appellate review. The suspension notice should provide that in the interim period before the rule becomes final appeals be filed with the Commission instead of the Appeal Panel for a merits review.

This plan would cut off the future workload of the Appeal Panel at a date certain, the date of the publication of the proposed rule. The Appeal Panel itself would exist as an entity until it had concluded its work on cases before it on the date of publication of the proposed rule.

an option because such a suspension would be subject to challenge as constituting a de facto rule change without prior public comment.

3. Proceed with notice-and-comment rulemaking but set a date certain for the termination of the Appeal Panel.

Any cases, including Seabrook, still before the Appeal Panel on the date certain would have to be transferred to the Commission at that time for a mandatory merits review. This plan would have the advantage inherent in the certainty of knowing exactly when an event will occur. Should the Commission opt for a discretionary review system and the rule change not become final until after the date chosen, appeals filed in the interim will need to be decided by the Commission in a mandatory review.

Recommendation:

We believe that Option 2 would best serve the Commission interests. The details of Option 2 are set forth in the attached notice. Option 1 would unnecessarily extend the life of the Appeal Panel. Option 3 could potentially lose the time and expertise of the Appeal Panel if they were still working on cases when the date of termination arrived.

IV. SUMMARY

This paper requests the consideration and vote of the Commissioners on the following issues:

A. Whether the Commission should adopt a discretionary or a mandatory appellate review system

B. Whether the Commission should use an existing organization and, if so, which one, for assistance in performing its appellate adjudicatory functions or establish a separate Commission-level Opinion Writing Office

C. Whether the Commission should adopt a transition plan which will:

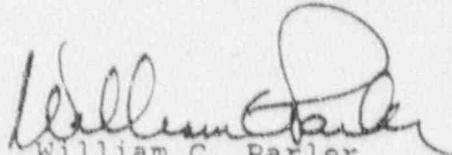
C1. Proceed with notice-and-comment rulemaking without making any interim changes;

C2. Proceed with notice-and-comment rulemaking and, in addition, direct OGC to draft a notice suspending the rules directing appeals to an appeal board and providing that in the interim period the Commission itself will hear appeals on the merits; or

C3. Proceed with notice-and-comment rulemaking and set a date certain for the termination of the Appeal Panel.

Coordination: This paper has been coordinated with the Chairman of the Appeal Panel.

Recommendation: Approve the attached notice of proposed rulemaking.


William C. Parler
General Counsel

Attachments:
As stated

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Tuesday, September 4, 1990.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Monday, August 27, 1990, 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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APPENDIX

To evaluate the probability of premature judicial review occurring and to understand how it may be avoided the legal concepts of "finality" and "exhaustion of administrative remedies" must be examined.

1. Finality. The court lacks jurisdiction to review an NRC order until it has become final. 28 U.S.C. § 2344. Generally, administrative orders are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. See, e.g., Sierra Club v. NRC, 862 F.2d 222, 225 (9th Cir. 1988).¹⁴ Under this standard, if a licensing board decision is allowed to become effective without the need for any Commission action, then that decision will be subject to judicial review.

2. Exhaustion of Administrative Remedies Once the licensing board decision has been allowed to become effective and final without any Commission review, a separate question is presented

¹⁴ In Sierra Club, the court held that an appeal board decision was final and therefore subject to judicial review because it established the parties' rights and was immediately enforceable, citing 10 C.F.R. § 2.786(b)(8), despite the fact that the period for sua sponte review by the Commission had not come to an end. 10 C.F.R. § 2.786(b)(8) provides: "Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the Atomic Safety and Licensing Appeal Board, unless otherwise ordered by the Commission."

whether a court will require a petitioner to have raised issues in a discretionary petition for review with the Commission prior to coming to court. This issue will only arise where a party allows the time for filing a petition for review with the Commission to lapse, the Commission does not take review qua sponte, and the party then seeks judicial review.

A court will usually require that agency administrative procedures be exhausted before a party may come to court. However, the court may find that an exception to the exhaustion doctrine applies and excuse the party's failure to file a petition for review with the Commission. Some case law suggests that the filing of a discretionary petition for review will not be viewed as a procedure essential to obtaining judicial review.¹⁵

¹⁵ See Levers v. Anderson, 326 U.S. 219 (1945) (Court held that petitioner's failure to file a motion for reconsideration with the official who had denied petitioner's permit did not constitute a failure to exhaust administrative remedies where review by the official was discretionary). One court characterized the Levers holding as the "futility exception" to the exhaustion requirement. James v. Rumsfeld, 580 F.2d 224, 228, n.4 (6th Cir. 1978) (Court enforced a statutory exhaustion requirement, rejecting Levers as inapposite because "Levers did not involve a statutorily mandated exhaustion rule and only held that one need not petition an administrative agency for a permissive reconsideration in order to obtain review of agency action in a Court of Appeals"). See also Sohm v. Fowler, 365 F.2d 915, 917, n.2 (D.C. Cir. 1966) (Court required exhaustion where review board had exercised its discretion to accept petitioner's appeal, distinguishing this case from Levers on this basis as well as on the facts that the board here was not the same body which rendered the initial administrative decision and that resort to the board was not shown to be futile).

However, where an agency requires the filing of a discretionary petition for review, it is likely that exhaustion will be required. In New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 99 (1st Cir. 1978), the court, although rejecting the argument that issues not presented to the Commission on a petition for review of an appeal board decision were not subject to judicial review, stated:

An appeal to superior agency authority is not a prerequisite to reviewability absent an agency rule requiring an appeal before the agency action becomes final. 5 U.S.C. § 704. The NRC has recently adopted a procedure allowing parties to seek review of Appeal Board decisions before the Commission, but, as the Commission stated at oral argument, this rule is not mandatory, and the Commission does not view it as a prerequisite to review by a court. See 10 C.F.R. § 2.786.

This suggests that the court may require exhaustion where the filing of a petition for review is mandatory under the agency's rules and where the agency action does not become final under the agency's rules until the agency has acted on the petition. ¹⁶

¹⁶ In Weinberger v. Salfi, 422 U.S. 749 (1975), the Supreme Court considered whether claimants should be excused from exhausting the procedures used by the Social Security Administration in awarding benefits. Those procedures required that a claimant seek a hearing before an administrative law judge and then, if disappointed, file a discretionary appeal with the Appeals Council. Although the Court excused exhaustion in this case because only a constitutional question was at issue, the Court observed that the "final decision" of the Secretary subject to judicial review was not defined by statute but rather that "its meaning is left to the Secretary to flesh out by regulation....[thus t]he statutory scheme is ... one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." 422 U.S. at 766 (footnote omitted).

The discretionary review system we have in mind would include these elements in order to prevent parties from going to court over initial decisions without complaining first to the Commission about them. We will need to make clear that while the granting of a petition for review is discretionary with the Commission, the filing of a petition for review is mandatory for a party who wants to exhaust administrative remedies.

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 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 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

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.

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 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 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

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 to obtain review of an initial decision 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

of the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121, or the NRC's size standards published December 9, 1985 (50 FR 50241). If a discretionary review system is adopted, the procedural requirements on licensees or intervenors may be reduced because they will not need to fully brief errors of fact or law that they may perceive in a presiding officer's decision prior to seeking judicial review unless the Commission first determines to take review of the decision. Licensees and intervenors will, however, need to file petitions for discretionary review with the Commission if they perceive errors in the presiding officer's decision and intend to seek judicial review. If a mandatory review system is adopted, the burden on licensees and intervenors will be substantially the same as it is at present. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the NRC hereby certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. § 553, the Nuclear Regulatory Commission is proposing to adopt amendments to 10 CFR Part 2 substantially as described above. After

consideration of public comments, a final rule and notice of final rulemaking will be prepared and published.

Dated at Rockville, Maryland, this ____ day of _____, 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.