

AA61-2

PDR

December 30, 1980

Note to William J. Dircks

This responds to your inquiry of December 29, 1980 regarding the proposed rule change to implement the Sholly case. You inquired as to why it is necessary to have a three-member ASLB hold a hearing as opposed to a single administrative law judge who would be required to render a decision within a specified period of time.

It is not necessary to have a three-member ASLB preside at the hearing. Under the Atomic Energy Act, the Commission has the discretion of designating itself, an ASLB or an administrative law judge to preside at hearings. Custom has dictated that an ASLB be designated to preside at licensing hearings for the practical reason that it permits the designation of technical experts as members of the ASLB to assist the lawyer chairman in dealing with the technical issues which can be expected to arise during the hearing.

On the other hand, custom has dictated that a single administrative law judge preside in enforcement proceedings. Such proceedings tend to revolve around a factual situation which is subject to the application of law, regulation, or precedent by an administrative law judge.

Another practical reason for the limited use of ALJ's in Commission proceedings is that there is only one ALJ presently available to the Commission. He is Ivan Smith, who is now chairman of the TMI restart ASLB. He, obviously, could not handle all of the hearings contemplated by the rule. For the Commission to obtain additional ALJ's would involve a complex selection process. Moreover, such ALJ's would have no familiarity with our procedures or practices. This alone would create delay.

In the paper at page 3 and the rule at page 7, we have attempted to indicate that the Commission has the discretion to take these various alternative courses of action in designating the presiding officer.

If the Commission were to specify a date for completion of the hearing, it could be accused of denying due process or violating other legal rights of the participants in a proceeding. The most the Commission can do to expedite these decisions is to exhort the presiding officers, whether a ASLB or an ALJ, to act expeditiously (see page 10 of the preamble of the rule). You will recall that this is what the Commission has done in the Appendix to 10 CFR Part 2 with respect to the period of time within which it expects presiding officers to issue initial decisions.

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William J. Dircks

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By the way, you may be interested in knowing that we received a notice today that Mr. Sholly will be joining the Washington office of the Union of Concerned Scientists on February 1, 1981.

Original Signed by Thomas F. Engelhardt

Thomas F. Engelhardt
Deputy Executive Legal Director