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DECISIONS

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HISTORY OF THE RULE

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RULE TITLE: OPTIONS AND PROCEDURES FOR DIRECT COMMISSION
REVIEW OF LICENSING BOARD DECISIONS

PROPOSED RULE	PROPOSED RULE	DATE PROPOSED RULE
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DOCKET NO. PR-002
(55FR42947)

In the Matter of
OPTIONS AND PROCEDURES FOR DIRECT COMMISSION
REVIEW OF LICENSING BOARD DECISIONS

DATE DOCKETED	DATE OF DOCUMENT	TITLE OR DESCRIPTION OF DOCUMENT
10/22/90	10/18/90	FEDERAL REGISTER NOTICE - FINAL RULE
12/10/90	12/05/90	COMMENT OF OHIO CITIZENS FOR RESPONSIBLE ENERGY (SUSAN L. HIATT) (1)
12/10/90	12/10/90	COMMENT OF CAROLINA POWER & LIGHT COMPANY, ET AL. (J. KNOTTS, JR., D. STENGER, M. ROSS) (2)
12/10/90	12/10/90	COMMENT OF ALABAMA POWER COMPANY (W. G. HAIRSTON, III) (4)
12/10/90	12/10/90	COMMENT OF NUMARC (JOE F. COLVIN) (5)
12/11/90	12/10/90	COMMENT OF PHILADELPHIA ELECTRIC COMPANY (G. A. HUNGER, JR.) (6)
12/16/90	12/10/90	COMMENT OF GEORGIA POWER COMPANY (W. G. HAIRSTON, III) (3)
12/31/90	12/26/90	COMMENT OF DOE (WILLIAM H. YOUNG) (7)
06/20/91	06/19/91	FEDERAL REGISTER NOTICE - FINAL RULE

DOCKET NUMBER
PROPOSED RULE **PR** 2
(55 FR 42947)

[7590-01]

DOCKETED
USNRC

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 0, 1 and 2

RIN 3150-AD73

Procedures for Direct Commission Review
of Decisions of Presiding Officers

'91 JUN 20 P4:06

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its rules of procedure to establish a new system for agency appellate review of decisions and actions of presiding officers in all formal and informal agency adjudications.¹ The Commission's prior decision to abolish the Atomic Safety and Licensing Appeal Panel which had provided mandatory administrative appellate review of initial decisions of presiding officers in agency adjudications necessitates the establishment of a new system. The new system provides for discretionary review by the Commissioners of the NRC of most partial and final initial decisions, referred rulings and certifications of questions.

EFFECTIVE DATE: (30 days from date of publication)

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

Pub. 6/27/91
56 FR 29403

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: This final rule (1) sets forth procedures for petitioning for Commission review of decisions and actions for which review is permitted; (2) establishes a standard which the Commission will employ in determining whether to take review; (3) codifies the existing case law standard for interlocutory review in revised § 2.786(g) and provides that this standard must be met for interlocutory appeals under §§ 2.718(i) and 2.730(f); (4) retains the Commission's current immediate effectiveness review procedure whereby designated licensing board decisions do not become effective until the Commission so determines; (5) makes clear that for all orders subject to judicial review a petition for Commission review is an available remedy for a disappointed party; and (6) incorporates the provisions of present § 2.762 into § 2.1015(c) (relating to licensing of a high level waste repository) which is otherwise unaltered by this rulemaking. In addition, this final rule deletes references to the Appeal Panel or to appeal boards from NRC regulations. Finally, the NRC's regulations describing internal agency organization are amended to reflect the creation of a new Office of Commission Appellate Adjudication whose function is to assist the Commission in exercising its adjudicatory responsibilities.

This rule includes an additional amendment to 10 CFR Part 2. This amendment adds a new § 2.8 entitled, "Information collection requirements: OMB approval." This section provides the OMB clearance approval authority for the existing information collection requirements in 10 CFR Part 2, Appendix B.

The new § 2.8 is included in 10 CFR Part 2 solely to correct a technical oversight in the regulations.

Background

On October 24, 1990 (55 FR 42947), the Commission published a notice of proposed rulemaking announcing its proposal to establish a new system for providing agency appellate review of initial decisions in all formal and informal agency adjudications to replace the system of mandatory review of initial decisions by appeal boards followed by discretionary review of appeal board decisions by the Commission. The Commission's need to formulate a new system was created by its earlier decision to abolish the Appeal Panel. The Commission proposed to adopt a system providing for direct discretionary review of licensing board decisions by the Commission and further proposed to adopt a broad review standard like that which applied when the Atomic Safety and Licensing Board was established in 1962, rather than the more narrow standard that the Commission has applied in determining whether to take review of appeal board decisions.

The Commission invited public comment on its choices and on necessary or desirable procedural changes incident to either system as well as on whether the Commission should make use of an existing organization or establish a separate office to assist it in performing its adjudicatory function. The comment period expired December 10, 1990. Seven comments were received: four from electric utilities or their counsel, one from an industry organization (Nuclear Management and Resources Council (NUMARC)), one from a public interest group (Ohio Citizens for Responsible Energy (OCRE)) and one from the Department of Energy. Copies of all comments received are available for

public inspection, and copying for a fee, at the NRC Public Document Room at 2120 L Street, NW. (lower level), Washington, DC.

Summary of Public Comments

A. General.

All industry commenters and the Department of Energy supported the Commission's proposals to adopt a discretionary review system and a broad standard of review. These commenters noted that this system would give the Commission the flexibility to involve itself only in cases requiring special Commission attention, such as cases involving novel, complex, or precedent-setting issues. This would enhance the Commission's ability to determine how best to allocate its resources to carry out its public health and safety functions. One industry commenter, while supportive of discretionary review in most cases, urged that review be mandatory in those cases where a licensing board and the NRC Staff hold conflicting views with respect to the issuance of certain types of authorizations because an internal conflict, in the view of the commenter, requires resolution by the Commission. This commenter also suggested that the Commission's immediate effectiveness rule be supplanted with a different procedure which would provide a definite time limit to the automatic stay now provided for licensing board decisions affected by this rule to help streamline the licensing process. OCRE objected to the Commission's decision to abolish the Appeal Panel and, absent reconsideration of that decision, favored mandatory review by the Commission. In OCRE's view, a mandatory review system would be the best means of securing direct Commission involvement in agency adjudications and would also be more fair to

potential appellants in that all parties dissatisfied with licensing board decisions would be assured an equal degree of agency appellate review.

B. Commission Responses to Specific Comments.

1. Abolition of the Appeal Panel.

OCRE objects to the Commission's decision to abolish the Appeal Panel and asserts that this decision should not have been made without advance notice and solicitation of public comments. In addition, OCRE notes that Congress, in transferring the functions of the Appeal Panel to the Commission at the time it enacted the Energy Reorganization Act of 1974, required the Commission to notify Congress in advance of any decision to abolish the Appeal Panel. OCRE believes that the Appeal Panel served an important "separation of powers" function because it did not have the potential conflict of interest inherent in the Commission's dual function of being both an adjudicatory body and the supervisor of the NRC Staff which is frequently a party in adjudications before the Commission. OCRE states that it prefers the system of review by appeal boards where opportunity for oral argument is available to the parties.

The Commission's decision to abolish the Appeal Panel was an internal management decision concerning which agency organization would conduct administrative appellate review. In adopting interim procedures for conducting appellate review itself, the Commission explicitly stated that it intended to follow existing procedures and thus the existing right of the parties to a merits review of an initial decision would not be affected. (October 24, 1990; 55 FR 42944). Given these facts, the Commission was under no legal duty to provide notice and opportunity for public comment with

respect to its decision to abolish the Appeal Panel. See 5 U.S.C. 553(b)(A). In any event, we have considered OCRE's view and do not find it persuasive.

The present rulemaking proceeding, which substitutes a discretionary system of review for a mandatory system and changes certain procedures by which review is conducted, does affect the procedural rights of prospective appellants and, for this reason, has been made the subject of a notice and comment rulemaking proceeding. In response to OCRE's comments concerning NRC's obligations to Congress, we note that Congress was notified of the Commission's plan to abolish the Appeal Panel by letters dated July 3, 1990, from the Chairman of the Commission to the President of the Senate and the Speaker of the House. In response to OCRE's concern that the Commission will be subject to a conflict of interest in conducting appellate review, we note that OCRE's objection is applicable to all agencies with both adjudicatory and staff supervisory functions and is not ground for retaining the Appeal Panel. Moreover the Commission's rules governing ex parte communication and separation of functions (10 CFR 2.780 and 2.781) have long and successfully protected the integrity of adjudicatory proceedings from potential conflicts of the sort complained of here. There is no reason to suppose that these regulations will not continue to serve their function of assuring the impartiality of the Commission and its adjudicatory employees in agency adjudications. Finally, the availability of oral argument in agency appellate review has always been, and will continue to be, a matter of agency discretion. See 10 CFR 2.763.

2. Mandatory vs. Discretionary Review.

As noted above, all commenters except OCRE supported adoption of a discretionary review system. Reasons given emphasized the administrative efficiency which will result from the Commission having the flexibility to involve itself only in appeals warranting Commission attention, such as cases involving particularly novel, complex, or precedent-setting issues or important legal, policy, or public health and safety questions. In the view of one industry commenter, a discretionary system, by giving the Commission the opportunity to focus its attention only on the truly significant cases, will provide more meaningful access to the Commission than would a mandatory system requiring that all cases, including the routine or insignificant, come before the Commission for review. OCRE, on the other hand, favors a mandatory review system. OCRE believes that a mandatory system will serve to increase the Commission's direct involvement in agency adjudications which was one of the reasons given for the decision to abolish the Appeal Panel. Further, in OCRE's view, mandatory review will be more fair to all parties in NRC adjudicatory proceedings because all parties will be assured of a thorough agency review of licensing board decisions without the need to incur the expense and delay of judicial review. OCRE mentions the filing fee, the costs of printing and binding the briefs and appendix, and the need for legal counsel as expenses necessitated by a decision to seek judicial review of an initial decision.

The Commission believes that a discretionary review system will be administratively more efficient than a mandatory system for the reasons suggested by the commenters and will also achieve appropriate involvement of the Commission in agency adjudications. While OCRE is technically correct

that a mandatory system would bring greater direct involvement of the Commission, the desirability of direct involvement must be balanced against a sensible use of the Commission's time and resources. Even in a discretionary system, the Commission will examine all licensing board decisions to determine whether to take review sua sponte. Where review is not taken, a discretionary system will have the benefit of expeditiously bringing the adjudication to an end and enabling a disappointed party to seek judicial review at an earlier point. The direct involvement of the Commission in those cases where review is taken will be more meaningful because the significance of the case will be highlighted by the very fact that the Commission has taken review.

The Commission does not agree with OCRE that it is somehow inequitable to provide review of licensing board decisions in some cases but to deny review in others and thus leave some parties with the sole recourse of seeking an initial merits review in the courts. Many disappointed litigants may lose again on appeal. Thus such a party would be saddled with the expense and delay of an appeal before the Commission as well as an appeal in court. Moreover, the expenses of an appeal to the Commission and an appeal to a court would be much the same unless, as contemplated by OCRE, the appellants appear pro se before the Commission but retain counsel in court. Even in such an unusual case, however, it may be possible for the appellants to argue pro se in court as well. In short, a potential appellant of an initial decision is at least as likely to save on expenses by being able to go to court if a petition for Commission review is rejected as by having to incur the expenses of an appeal before the Commission before judicial review becomes available.

3. Mandatory Review of Licensing Board - NRC Staff Conflicts.

One industry commenter, while agreeing that a discretionary review system is appropriate for most cases, suggested that the Commission provide for mandatory review in a proceeding where the licensing board disagrees with the staff's findings and recommendations as to issuance of a site permit, design approval, construction authorization, operating license, combined license, or license amendment. This is because such a situation would create an intra-agency conflict that the commenter believes would warrant mandatory Commission review.

The Commission agrees that the circumstance envisioned is one that might likely merit Commission review. However, to make review mandatory in such a situation might create the appearance that the staff is a party more equal than others in the adjudicatory proceeding before the licensing board and might tend to unduly focus the proceeding on the findings and recommendations of the staff as opposed to those of the applicant on whom the burden of proof has traditionally rested at least in initial licensing cases. Thus the Commission believes that an exception to the discretionary review system need not be carved out to deal with this potential circumstance.

4. Standard for Granting Review.

All commenters addressing the issue supported the Commission's proposed adoption of a standard of review similar to that employed by the Commission at the time the Atomic Safety and Licensing Board was established in 1962. That standard states:

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. (January 13, 1962; 27 FR 377)

An industry commenter urged adoption of an additional factor:

A conflict in licensing board decisions on a controlling question of law or matter of fact necessary for decision.

Commission review of conflicting interpretations of law by different licensing boards and reconciliation of those interpretations, it is argued, would contribute to a more consistent body of NRC precedent. Similarly, the commenter contends that review where there are conflicts in material factual findings (such as the adequacy of a particular design used at different reactors) would enable the Commission to reconcile differences between licensing boards and would also carry over the policy embodied in present 10 CFR 2.786(b)(4)(ii), wherein the Commission may take review of an appeal board decision if it appears that the appeal board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to resolution of that same issue by the licensing board.

The Commission adopts this suggestion in part. The potential conflict between licensing boards as to issues of material fact is not explicitly comprised within the review standard but it is clearly a reason for the Commission to take review. Thus the Commission has incorporated this part of the commenter's suggestion into § 2.786(b)(4) of the final rule. On the other hand, a potential conflicting interpretation of law between licensing boards is already a matter comprised within the second or third factor of the January

13, 1962 (27 FR 377) rule. Thus the Commission believes that adding another factor to address this circumstance would be redundant.

The same commenter also suggested that the language of the Commission's present standard for taking review of appeal board decisions be added, perhaps as a footnote, to the standard of review to emphasize that issues presented for review must be significant and thus discourage frivolous appeals. That regulation states:

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.

10 CFR 2.786(b)(4)(i) (1990). The Commission does not agree that this additional language is necessary to discourage frivolous appeals. The standard already provides that the Commission, in determining whether to take review, will give due weight to the existence of a substantial question with respect to, among other things, a substantial and important question of law, policy or discretion. This language should be sufficient to warn potential appellants that issues presented for review must be significant. Moreover, coupling the more restrictive language of the standard the Commission has used to determine whether to take review of appeal board decisions with the more flexible language of the January 13, 1962 (27 FR 377) standard could lead to confusion as to what standard is really being applied. Thus the Commission has not adopted this suggestion.

5. Immediate Effectiveness Rule Amendment.

The Commission's notice of proposed rulemaking noted one potential problem with adopting a discretionary review system: the possibility that a licensing board's decision might be appealed to a court without any petition for review having been submitted to the agency alerting the agency to potential problems with the decision and giving the agency an opportunity to correct these problems. However, the Commission expressed the view that one way of avoiding this problem would be to continue the Commission's immediate effectiveness regulation (10 CFR 2.764) which provides an automatic stay of effectiveness of designated licensing board decisions until the Commission has reviewed the decision to determine whether it should be allowed to become effective pending any appellate review of the merits of the decision.

Two industry commenters addressed this matter. One favored continuation of the present immediate effectiveness rule; the other urged that the immediate effectiveness rule be replaced with an alternative procedure whereby the Commission would have a brief time limit (10 days was suggested) within which to decide whether to review a licensing board decision authorizing issuance of a construction permit or operating license for a nuclear power reactor. During that period, a party would be able to request a stay of the decision pending any merits review by the Commission. The stay motion would be governed by the factors specified in 10 CFR 2.788(e). If both a stay and review were granted, the licensing action authorized by the decision would not become effective and the decision would not become final agency action. If review were granted but a stay denied, the licensing action authorized by the decision would be effective but there would be no final agency action as to the merits of the licensing board decision. A court could review the

Commission's stay decision, but not the merits of the licensing board decision. The advantage of this alternative procedure, in the commenter's view, is that it would help streamline the licensing process in that there would no longer be an automatic stay of indefinite length before the licensing board's decision is allowed to take effect.

The Commission does not believe that it would be feasible to set a regulatory time limit on its decision whether to take review of a licensing board decision of the brevity suggested by the commenter due to the wide variety of cases, including cases presenting multiple complex technical or legal issues where the record is voluminous, that come before the board. The time suggested is not adequate for petitions for review, and responses thereto, to be filed and considered. The Commission's present rule governing petitions for review of appeal board decisions (which will be retained and applied to licensing board decisions) provides a thirty-day period for a decision on whether to take review (10 CFR 2.786(b)(5)). The Commission is establishing a separate Office of Commission Appellate Adjudication with the function of assisting the Commission in the exercise of its appellate review functions. The Commission believes that it will be able to reach a decision on whether to take review in an expeditious fashion but that to impose a severe regulatory time limit for this decision could interfere with its duty to make sure that no public health or safety problems are unresolved before a decision is allowed to become final. Thus the Commission has not adopted this suggestion.

These amendments will take effect thirty days after publication in the Federal Register. The amendments apply to any licensing board decision or action issued on or after the effective date of these rules. Appeals

presently pending before an appeal board in the Seabrook operating license proceeding, Advanced Medical Systems (Suspension Order), and Wrangler Laboratories enforcement proceedings, and the Turkey Point (OLA-4) and Turkey Point (OLA-5) license amendment proceedings will be governed by the rules in effect prior to October 24, 1990. Licensing board decisions or actions issued before the date these amendments become effective are governed by the rules in effect prior to October 24, 1990, except that the Commission will take the place of appeal boards under those rules and except that the Commission will not entertain a petition for review of its own decision.

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 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

The Commission's prior decision to abolish the Appeal Panel which had provided administrative appellate review of initial decisions of presiding officers in agency adjudications necessitates the establishment of a new system wherein the Commission itself will review initial decisions. On

October 24, 1990 (55 FR 42944), the Commission put in place interim procedures for conducting this review. In this rulemaking, the Commission adopts a discretionary review system, including a standard whereby the Commission will exercise its discretion whether to take review of a licensing board decision. This system replaces the system of mandatory appellate review formerly provided by appeal boards. The cost of the new discretionary review system is likely to be less in that in all cases where review is not taken the Commission and the parties will not need to expend further time and resources before a final agency decision is reached. 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.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this 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). In a discretionary review system, 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.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule, and therefore, that a backfit analysis is not required for this final rule, because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects

10 CFR Part 0

Conflict of interest, Criminal penalty.

10 CFR Part 1

Organization and functions (Government Agencies).

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. 552 and 553, the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Parts 0, 1, and 2.

PART 0 - CONDUCT OF EMPLOYEES

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 25, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2035, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 11222, 30 FR 6469, 3 CFR 1964-1965 COMP., p. 306; 5 CFR 735.104.

Sections 0.735-21 and 0.735-29 also issued under 5 U.S.C. 552, 553. Section 0.735-26 also issued under secs. 501, 502, Pub. L. 95-521, 92 Stat. 1864, 1867, as amended by secs. 1, 2, Pub. L. 96-28, 93 Stat. 76, 77 (18 U.S.C. 207).

2. In 10 CFR Part 0, all references to the "Atomic Safety and Licensing Appeal Panel" are removed.

PART 1 - STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

AUTHORITY: Secs. 23, 161, 68 Stat. 925, 948, as amended (42 U.S.C. 2033, 2201); sec. 29, Pub. L. 85-256, 71 Stat. 579, Pub. L. 95-209, 91 Stat. 1483 (42 U.S.C. 2039); sec. 191, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); secs. 201, 203, 204, 205, 209, 88 Stat. 1242, 1244, 1245, 1246, 1248, as amended (42 U.S.C. 5841, 5843, 5844, 5845, 5849); 5 U.S.C. 552, 553; Reorganization Plan No. 1 of 1980, 45 FR 40561, June 16, 1980.

4. In § 1.11, paragraph (c) is revised to read as follows:
§ 1.11 The Commission.

* * * * *

(c) The following staff units and officials report directly to the Commission: Atomic Safety and Licensing Board Panel, Office of the General Counsel, Office of the Secretary, Office of Commission Appellate Adjudication, Office of the LSS Administrator, Office of Governmental and Public Affairs, and other committees and boards which are authorized or established specifically by the Act. The Advisory Committee on Reactor Safeguards also reports directly to the Commission.

* * * * *

§ 1.17 [Removed]

5. Part 1 is amended by removing § 1.17.

6. In § 1.23, paragraph (b) is revised to read as follows:

§ 1.23 Office of the General Counsel.

* * * * *

(b) Reviews and prepares appropriate draft Commission decisions on public petitions seeking direct Commission action and rulemaking proceedings involving hearings, monitors cases pending before presiding officers and reviews draft Commission decisions on Atomic Safety and Licensing Board decisions and rulings;

* * * * *

7. A new § 1.24 is added to read as follows:

§ 1.24 Office of Commission Appellate Adjudication.

The Office of Commission Appellate Adjudication --

(a) Monitors cases pending before presiding officers;

(b) Provides the Commission with an analysis of any adjudicatory matter requiring a Commission decision (e.g., petitions for review, certified questions, stay requests) including available options;

(c) Drafts any necessary decisions pursuant to the Commission's guidance after presentation of options; and

(d) Consults with the Office of the General Counsel in identifying the options to be presented to the Commission and in drafting the final decision to be presented to the Commission.

8. In 10 CFR Part 1 all references to "Atomic Safety and Licensing Appeal Panel" are removed.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

9. 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, 2233, 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 under 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 B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

10. In the definition of Commission adjudicatory employee in § 2.4, paragraph (2) is revised to read as follows:

§ 2.4 Definitions.

* * * * *

"Commission adjudicatory employee" means --

* * * * *

(2) The employees of the Office of Commission Appellate Adjudication;

* * * * *

11. A new § 2.8 is added to read as follows:

§ 2.8 Information collection requirements: OMB approval.

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq). OMB has approved the information collection requirements contained in this part under control number 3150-0136.

(b) The approved information collection requirements contained in this part appear in Appendix B.

12. In § 2.704, paragraph (d)(2) is revised to read as follows:

§ 2.704 Designation of presiding officer, disqualification, unavailability.

* * * * *

(d) * * *

(2) The Commission may direct that the record be certified to it for decision; or

* * * * *

13. Section 2.714a is revised to read as follows:

§ 2.714a Petitions for review of certain rulings on petitions for leave to intervene and/or requests for hearing.

(a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order. The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief. Any other party may file a brief in support of or in opposition to the appeal

within ten (10) days after service of the appeal. No other appeals from rulings on petitions and/or requests for hearing shall be allowed.

* * * * *

§ 2.721 [Amended]

14. In § 2.721, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

15. In § 2.760, paragraphs (a), (b)(1), and (c)(4) are revised to read as follows:

§2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty (40) days after its date unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review sua sponte or the decision is subject to the provisions of § 2.764.

(b) * * *

(1) Prepare its own decision which will become final unless the Commission grants a petition for reconsideration pursuant to § 2.771; or

* * * * *

(c) * * *

(4) The time within which a petition for review of the decision may be filed, the time within which answers in support of or in opposition to a petition for review filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

16. In § 2.761, paragraphs (a)(1) and (c)(1) are revised to read as follows:

§2.761 Expedited decisional procedure.

(a) * * *

(1) All parties stipulate that the initial decision may be omitted and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

* * * * *

(c) * * *

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a petition for review, to request oral argument, and to seek judicial review;

* * * * *

§ 2.762 [Removed]

17. Part 2 is amended by removing § 2.762.

18. Section 2.763 is revised to read as follows:

§2.763 Oral argument.

In its discretion the Commission may allow oral argument upon the request of a party made in a petition for review or brief on review, or upon its own initiative.

19. In § 2.764, paragraph (e)(3) is removed and paragraphs (a), (b), (e)(2), (f)(2)(iv), and (g) are revised to read as follows:

§2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

(a) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to review thereof and further decision by the Commission upon petition for review filed by any party pursuant to § 2.786 or upon its own motion.

(b) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing or granting of a petition for review, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

* * * * *

(e) * * *

(2) Commission. Within sixty days of the service of any Licensing Board decision that would otherwise authorize issuance of a construction permit, the Commission will seek to issue a decision on any stay motions that are timely filed. Such motions shall be filed as provided by 10 CFR 2.788. For the purpose of this policy, a "stay" motion is one that seeks to defer the

effectiveness of a Licensing Board decision beyond the period necessary for the Commission action described herein. If no stay papers are filed, the Commission will, within the same time period (or earlier if possible), analyze the record and construction permit decision below on its own motion and will seek to issue a decision on whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard. The initial decision will be considered stayed pending the Commission's decision. In deciding these stay questions, the Commission shall employ the procedures set out in 10 CFR 2.788.

(f) * * *

(2) * * *

(iv) In announcing a stay decision, the Commission may allow the proceeding to run its ordinary course or give instructions as to the future handling of the proceeding. Furthermore, the Commission may in a particular case determine that compliance with existing regulations and policies may no longer be sufficient to warrant approval of a license application and may alter those regulations and policies.

(g) The Commission's effectiveness determination is entirely without prejudice to proceedings under § 2.786 or § 2.788.

20. In § 2.770, paragraph (a) is revised to read as follows:

§ 2.770 Final decision.

(a) The Commission will ordinarily consider the whole record on review, but may limit the issues to be reviewed to those identified in an order taking review.

* * * * *

21. In § 2.771, paragraph (a) is revised to read as follows:

§ 2.771 Petition for reconsideration.

(a) A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision.

* * * * *

22. In § 2.780, paragraph (e)(2) is revised to read as follows:

§ 2.780 Ex parte communication.

* * * * *

(e) * * *

(2) The prohibitions of this section cease to apply to ex parte communications relevant to the merits of a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

* * * * *

23. In § 2.781, paragraphs (d)(2) and (f) are revised to read as follows:

§ 2.781 Separation of functions.

* * * * *

(d) * * *

(2) The prohibitions of this section will cease to apply to the disputed issues pertinent to a full or partial initial decision when, in accordance with § 2.786, the time has expired for Commission review of the decision.

* * * * *

(f) If an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a communication authorized by this section, the substance of the communication must be specified in the record of the proceeding and every party must be afforded an opportunity to controvert the fact or opinion. If the parties have not had an opportunity to controvert the fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing a petition for review of an initial decision, or a petition for reconsideration of a final decision that clearly and concisely sets forth the information or argument relied on to show the contrary. If appropriate, a party may be afforded the opportunity for cross-examination or to present rebuttal evidence.

§ 2.785 [Removed]

24. Part 2 is amended by removing § 2.785.

25. Section 2.786 is revised to read as follows:

§ 2.786 Review of decisions and actions of a presiding officer.

(a) Within forty (40) days after the date of a decision or action by a presiding officer, or within thirty (30) days after a petition for review of the decision or action has been filed under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review.

(b)(1) Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after

service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this Part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

(2) A petition for review under this paragraph must be no longer than ten (10) pages, and must contain the following:

(i) A concise summary of the decision or action of which review is sought;

(ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;

(iii) A concise statement why in the petitioner's view the decision or action is erroneous; and

(iv) A concise statement why Commission review should be exercised.

(3) Any other party to the proceeding may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. This answer must be no longer than ten (10) pages and should concisely address the matters in paragraph (b)(2) of this section to the extent appropriate. The petitioning party shall have no right to reply, except as permitted by the Commission.

(4) 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 the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised sua sponte by a presiding officer has been raised before the presiding officer for the purpose of this section.

(6) A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.

(c) If within thirty (30) days after the filing of a petition for review the Commission does not grant the petition, in whole or in part, the petition shall be deemed denied, unless the Commission in its discretion extends the time for its consideration of the petition and any answers thereto.

(d) If a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed and designating the parties to the review proceeding and direct that appropriate briefs be filed, oral argument be held, or both.

(e) Petitions for reconsideration of Commission decisions granting or denying review in whole or in part will not be entertained. A petition for reconsideration of a Commission decision after review may be filed within ten (10) days, but is not necessary for exhaustion of administrative remedies.

However, if a petition for reconsideration is filed, the Commission decision is not final until the petition is decided.

(f) Neither the filing nor the granting of a petition for review will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission.

(g) Certified questions and referred rulings. A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) must meet one of the alternative standards in this subsection to merit Commission review. A certified question or referred ruling will be reviewed if it either --

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

§ 2.787 [Removed]

26. Part 2 is amended by removing § 2.787.

27. Section 2.788 is revised to read as follows:

§ 2.788 Stays of decisions of presiding officers pending review.

(a) Within ten (10) days after service of a decision or action of a presiding officer any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a

decision on a petition for review. This application may be filed with the Commission or the presiding officer, but not both at the same time.

(b) An application for a stay must be no longer than ten (10) pages, exclusive of affidavits, and must contain the following:

(1) A concise summary of the decision or action which is requested to be stayed;

(2) A concise statement of the grounds for stay, with reference to the factors specified in paragraph (e) of this section; and

(3) To the extent that an application for a stay relies on facts subject to dispute, appropriate references to the record or affidavits by knowledgeable persons.

(c) Service of an application for a stay on the other parties shall be by the same method, e.g. telecopier message, mail, as the method for filing the application with the Commission or the presiding officer.

(d) Within ten (10) days after service of an application for a stay under this section, any party may file an answer supporting or opposing the granting of a stay. This answer must be no longer than ten (10) pages, exclusive of affidavits, and should concisely address the matters in paragraph (b) of this section to the extent appropriate. No further replies to answers will be entertained. Filing of and service of an answer on the other parties must be by the same method, e.g. telecopier message, mail, as the method for filing the application for the stay.

(e) In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

(f) In extraordinary cases, where prompt application is made under this section, the Commission or presiding officer may grant a temporary stay to preserve the status quo without waiting for filing of any answer. The application may be made orally provided the application is promptly confirmed by telecopier message. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

28. Section 2.1000 is revised to read as follows:

§ 2.1000 Scope of subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR part 2, subpart G, rules of general applicability, except for the following provisions: §§ 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.788, and 2.790.

29. In § 2.1015, paragraph (c) is revised to read as follows:

§ 2.1015 Appeals.

* * * * *

(c) Appeals from a Presiding Officer initial decision or partial initial decision must be filed and briefed before the Commission in accordance with the following requirements.

(1) Notice of appeal. Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal. The notice shall specify:

- (i) The party taking the appeal; and
- (ii) The decision being appealed.

(2) Filing appellant's brief. Each appellant shall file a brief supporting its position on appeal within thirty (30) days (40 days if Commission staff is the appellant) after the filing of notice required by paragraph (a) of this section.

(3) Filing responsive brief. Any party who is not an appellant may file a brief in support of or in opposition to the appeal within thirty (30) days after the period has expired for the filing and service of the brief of all appellants. Commission staff may file a responsive brief within forty (40) days after the period has expired for the filing and service of the briefs of all appellants. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed.

(4) Brief Content. A brief in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.

(i) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. An intervenor-appellant's brief must be

confined to issues which the intervenor-appellant placed in controversy or sought to place in controversy in the proceeding. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

(ii) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.

(5) Brief length. A party shall not file a brief in excess of seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request an increase of this page limit for good cause. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement requested.

(6) Certificate of service. All documents filed under this section must be accompanied by a certificate reflecting service upon all other parties to the proceeding.

(7) Failure to comply. A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

* * * * *

30. In § 2.1209, paragraph (d) is revised to read as follows:
§ 2.1209 Power of presiding officer.

* * * * *

(d) Certify questions to the Commission for determination, either in the presiding officer's discretion or on direction of the Commission;

* * * * *

31. Section 2.1241 is revised to read as follows:

§ 2.1241 Settlement of proceedings.

The fair and reasonable settlement of proceedings subject to this subpart is encouraged. A settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding.

32. In § 2.1251, paragraphs (a), (c)(3) and (f) are revised to read as follows:

§ 2.1251 Initial decision and its effect.

(a) Unless the Commission directs that the record be certified to it in accordance with paragraph (b) of this section, the presiding officer shall render an initial decision after completion of an informal hearing under this subpart. That initial decision constitutes the final action of the Commission thirty (30) days after the date of issuance, unless any party petitions for Commission review in accordance with § 2.786 or the Commission takes review of the decision sua sponte.

* * * * *

(c) * * *

(3) The time within which a petition for review may be filed, the time within which any answer to a petition for review may be filed, and the date when the decision becomes final in the absence of the Commission taking review of the decision.

* * * * *

(f) Following an initial decision resolving all issues in favor of the licensing action as specified in paragraph (e) of this section, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of a petition for review or pendency of any review taken by the Commission pursuant to § 2.786, shall take the appropriate licensing action upon making the appropriate licensing findings promptly, except as may be provided pursuant to paragraph (e)(1) or (2) of this section.

33. Section 2.1253 is revised to read as follows:

§ 2.1253 Petitions for review of initial decisions.

Parties and § 2.1211(b) participants may petition for review of an initial decision under this subpart in accordance with the procedures set out in §§ 2.786 and 2.763 or the Commission may review the decision on its own motion. Commission review will be conducted in accordance with those procedures the Commission deems appropriate. The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review.

§ 2.1255 [Removed]

34. Part 2 is amended by removing § 2.1255.

§ 2.1257 [Removed]

35. Part 2 is amended by removing § 2.1257.

36. In Part 2, Appendix A, Section IX is removed and Section I(b) is revised to read as follows:

APPENDIX A - STATEMENT OF GENERAL POLICY AND PROCEDURE: CONDUCT
OF PROCEEDINGS FOR THE ISSUANCE OF CONSTRUCTION PERMITS AND
OPERATING LICENSES FOR PRODUCTION AND UTILIZATION FACILITIES FOR
WHICH A HEARING IS REQUIRED UNDER SECTION 189a OF THE ATOMIC
ENERGY ACT OF 1954, AS AMENDED

* * * * *

I. Preliminary Matters

* * * * *

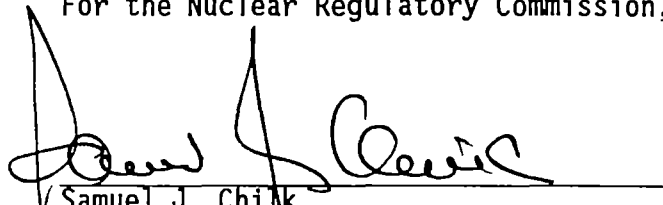
(b) In fixing the time and place of any conference, including prehearing conferences, or of any adjourned session of the evidentiary hearing, due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as of the Board members, the nature of such conference or adjourned session, and the public interest. Adjourned sessions of hearings may be held in the Washington, DC area if all parties so stipulate. If the parties disagree, and any party considers that there are valid reasons for holding such session in the Washington, D.C. area, the matter should be referred to the Commission for resolution.

* * * * *

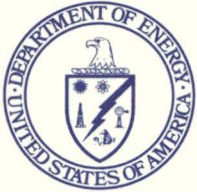
37. In 10 CFR Part 2, all further references to the "Atomic Safety and Licensing Appeal Panel," "Atomic Safety and Licensing Appeal Board" and "Appeal Board" are removed.

Dated at Rockville, MD this 19th day of June, 1991.

For the Nuclear Regulatory Commission,



Samuel J. Chirk,
Secretary of the Commission.



DOCKET NUMBER
PROPOSED RULE **PR** 2
(55 FR 42947)

7

Department of Energy
Washington, DC 20585

December 26, 1990

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USNRC

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Secretary
U.S. Nuclear Regulatory Commission
Attention: Chief, Docketing and
Service Branch
Washington, D.C. 20555

Dear Sir:

This letter is to provide the Department of Energy's (DOE) comments on the Federal Register Notice (55 FR 42947) published on October 24, 1990. The notice requested public comment on proposed amendments to 10 CFR Part 2 resulting from the Nuclear Regulatory Commission (NRC) decision to abolish the Atomic Safety and Licensing Appeal Panel as an intermediate layer of appellate review of Licensing Board decisions.

DOE has reviewed this notice and supports the NRC proposal to adopt a discretionary review system of Licensing Board decisions. We also support using the less prescriptive review standard described in the notice, which is similar to the standard which applied when the Atomic Safety and Licensing Board was established. We believe that this NRC initiative to streamline the review process will allow for more timely resolution of issues raised by parties to the licensing process.

We appreciate the opportunity to comment on this Federal Register Notice.

Sincerely,

William H. Young

William H. Young
Assistant Secretary
for Nuclear Energy

JAN 28 1991

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December 10, 1990

Mr. Samuel J. Chilk
Secretary of the Commission
U. S. Nuclear Regulatory Commission
ATTN: Docketing and Service Branch
Washington, DC 20555

Subject: Comments Concerning the Nuclear Regulatory Commission's
Proposed Rule 10 CFR 2, "Options and Procedures for Direct Commission
Review of Licensing Board Decisions," (55 FR 42947).

Dear Mr. Chilk:

This letter is being submitted in response to the Nuclear Regulatory Commission's (NRC's) request for comments concerning the Proposed Rule 10 CFR 2, "Options and Procedures for Direct Commission Review of Licensing Board Decisions," published in the Federal Register (55 FR 42927, dated October 24, 1990).

The Philadelphia Electric Company (PECo) appreciates the opportunity to comment on this proposed rule, and endorses the comments submitted by the Nuclear Management and Resources Council (NUMARC). This proposed rule stipulates that the Commissioners of the NRC will assume the responsibility for review of initial decisions in all formal and informal adjudicatory proceedings. These changes to the regulations were necessitated by the NRC's decision to abolish the Atomic Safety and Licensing Appeal Panel (ASLAP). As a part of this rulemaking, the NRC is considering two alternatives for a new Commission appellate review system; mandatory or discretionary reviews. Of the two alternatives, we consider that the discretionary review option favored by the NRC is the most appropriate.

The Commission should also continue in effect its regulations in 10CFR2.764 regarding the immediate effectiveness of Licensing Board decisions authorizing the issuance of construction permits and operating licenses. All other Licensing Board decisions should take immediate effect unless, applying the criteria of 10CFR2.788(e), the Commission or the Licensing Board determines that an application for a stay should be granted. The Commission also mentioned in its notice that it will have to establish an organization to assist the Commission in performing its review function. Whether the Commission uses an existing organization or establishes a new one seems to be a matter of internal organization. However, the Commission must assure that the separation of functions concepts reflected in 10CFR2.781 are strictly applied to the individuals who assist the Commission in its appellate review function.

JAN 28 1991

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U. S. Nuclear Regulatory Commission
Mr. Samuel J. Chilk

December 10, 1990
Page 2 of 2

If you have any questions or require additional information, please contact us.

Very truly yours,

A handwritten signature in dark ink, appearing to read "G. A. Hunger, Jr.", written in a cursive style.

G. A. Hunger, Jr.
Manager, Licensing
Nuclear Engineering and Services

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

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December 10, 1990

Joe F. Colvin
Executive Vice President &
Chief Operating Officer

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. - 20555

ATTENTION: Docketing and Service Branch

RE: Proposed Rule - 10 C.F.R. Part 2
Options and Procedures for Direct Commission Review of
Licensing Board Decisions
55 Fed. Reg. 42947 (October 24, 1990)
Request for Comments

Dear Mr. Chilk:

These comments are submitted by the Nuclear Management and Resources Council, Inc. ("NUMARC") in response to the request of the U.S. Nuclear Regulatory Commission ("NRC" or "the Commission") for comments on the Proposed Rule entitled, "Options and Procedures for Direct Commission Review of Licensing Board Decisions" (55 Fed. Reg. 42947, October 24, 1990). NUMARC's comments are also responsive to NRC's companion Final Rule entitled, "Interim Procedures for Agency Appellate Review" (55 Fed. Reg. 42944, October 24, 1990).

NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect-engineering firms and all of the major nuclear steam supply system vendors.

NUMARC supports the Commission's initiative regarding the intermediate review of Licensing Board decisions. As noted in the Proposed Rule, circumstances have substantially changed since the establishment of the Atomic Safety and Licensing Appeal Panel ("ASLAP" or "Appeal Panel") in 1969. The Commission's decision to abolish the ASLAP is both timely and appropriate.

JAN 28 1991

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Mr. Samuel J. Chilk
December 10, 1990
Page 2

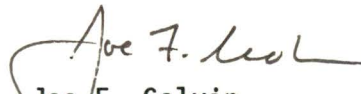
Although a mandatory appellate review would ensure a high degree of Commission involvement, we would urge the Commission to consider the development of a discretionary review system. A discretionary system would permit the Commission to review those cases requiring special Commission attention by adjudicating certain appeals itself. Such a system would also allow the Commission sufficient time to deal with the many other important issues affecting the industry today.

The applicable standards for review should be those that would allow the Commission maximum flexibility. When the Atomic Safety and Licensing Board ("ASLB") was established in 1962 to preside over contested adjudications, discretionary petitions for review were evaluated "giving due weight to the existence of a substantial question" involving any consideration which the Commission deemed 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 more restrictive, requiring a higher standard for review. Therefore, it would appear reasonable for the Commission to adopt a review standard similar to that which applied when the ASLB was established in 1962 and a review procedure similar to the current certiorari Commission review system, requiring that a concise petition for review to be filed within a fixed period.

The Commission's transition plan for current cases is reasonable and appropriate. All appeals pending before an appeal board prior to publication of the rulemakings will be decided by the appeal board under current regulations. Correspondingly, all appeals filed after publication of the rulemakings will be filed with the Commission.

We appreciate the opportunity to comment on the Proposed Rule and welcome the opportunity to discuss these comments further with appropriate NRC personnel.

Sincerely,


Joe F. Colvin

JFC/LMB♦ec

Alabama Power Company
40 Inverness Center Parkway
Post Office Box 1295
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W. G. Hairston, III
Senior Vice President
Nuclear Operations

DOCKET NUMBER
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(55FR42947)

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Alabama Power

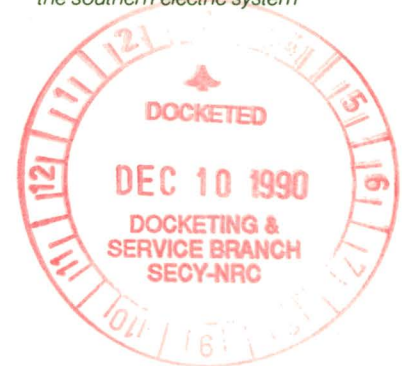
the southern electric system

December 10, 1990

Docket Nos. 50-348
50-364

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTN: Docketing and Service Branch



Comments on Proposed Rule
"Options and Procedures for Direct Commission Review of
Licensing Board Decisions"
(55 Federal Register 42947 of October 24, 1990)

Dear Mr. Chilk:

Alabama Power Company has reviewed the proposed rule, 10 CFR Part 2, "Options and Procedures for Direct Commission Review of Licensing Board Decisions," published in the Federal Register on October 24, 1990. In accordance with the request for comments, Alabama Power Company is in total agreement with the NUMARC comments which are to be provided to the NRC.

Should you have any questions, please advise.

Respectfully submitted,

W. G. Hairston, III

WGH, III/JMG

cc: Mr. S. D. Ebnetter
Mr. S. T. Hoffman
Mr. G. F. Maxwell

JAN 28 1991

Acknowledged by card

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(55FR 42947)

3

the southern electric system

W. G. Hairston, III
Senior Vice President
Nuclear Operations

December 10, 1990

Docket Nos. 50-321 50-424
 50-366 50-425



Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

ATTN: Docketing and Service Branch


Comments on Proposed Rule
"Options and Procedures for Direct Commission Review of
Licensing Board Decisions"
(55 Federal Register 42947 of October 24, 1990)

Dear Mr. Chilk:

Georgia Power Company has reviewed the proposed rule, 10 CFR Part 2, "Options and Procedures for Direct Commission Review of Licensing Board Decisions," published in the Federal Register on October 24, 1990. In accordance with the request for comments, Georgia Power Company is in total agreement with the NUMARC comments which are to be provided to the NRC.

Should you have any questions, please advise.

Respectfully submitted,


for W. G. Hairston, III

WGH, III/JMG

JAN 28 1991

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Mr. Samuel J. Chilk
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cc: Georgia Power Company

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Mr. W. B. Shipman, Acting General Manager - Plant Vogtle
Mr. H. L. Sumner, Jr., General Manager - Plant Hatch
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90 DEC 10 P352

December 10, 1990

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Service Branch

**Subj: Notice of Proposed Rulemaking:
Options and Procedures for Direct Commission
Review of Licensing Board Decisions
55 Fed. Reg. 42,947 (October 24, 1990)**

Dear Mr. Chilk:

In accordance with the above-referenced Notice of Proposed Rulemaking, we hereby submit the following comments on behalf of Carolina Power & Light Company, Duke Power Company, Niagara Mohawk Power Corporation, Rochester Gas & Electric, TU Electric, Washington Public Power Supply System, and Yankee Atomic Electric Company.

The proposed revision to the NRC's Rules of Practice in 10 C.F.R. Part 2 would provide for direct Commission review of initial decisions in adjudicatory proceedings. This proposal comes about as a result of the Commission's decision to phase out its Atomic Safety and Licensing Appeal Board Panel -- the intermediate appellate tribunal in agency adjudications. The proposal offers two alternatives for Commission review of initial decisions: discretionary review and mandatory review. In the end, the Commission recommends adoption of a discretionary review system similar to one that existed when the Atomic Safety and Licensing Board ("ASLB") was first established in 1962. The proposal also provides for a choice of standards for granting review in the event a discretionary review system is adopted by the Commission. We offer the following comments on the proposed revisions to the Rules of Practice.

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I. Summary

In general, we agree with the Commission's position that a discretionary review system would be preferable to a system of mandatory review in all cases. However, we believe that there are some cases where mandatory review is warranted. In particular, we urge the Commission to provide for mandatory review in a proceeding where the Licensing Board disagrees with the NRC Staff's findings and recommendations as to issuance of a site permit, design approval, construction authorization, operating license, combined license, or license amendment. We also believe some changes to the current "immediate effectiveness" rule are warranted in light of the proposed changes to the Commission's role in the review of ASLB decisions. As for the standard for granting discretionary review, we believe that the standard should be similar to the standard which was in place in 1962, with some additional considerations that would provide for review in the event of conflicting Licensing Board decisions as to matters of fact or law.

II. Discussion

Prior to the Commission's decision to abolish the Appeal Board Panel, individual Appeal Boards were appointed to serve as the intermediate level of review of initial decisions of the ASLB. The Appeal Board was originally established in 1969 on the theory that an intermediate level of review was necessary in order to focus the Commission's time on policy matters rather than on routine appeals in the numerous then-pending power reactor licensing proceedings. Now, however, the Commission indicates that the impending completion of the last pending major operating license proceeding (Seabrook) presents the Commission with the opportunity to restructure the NRC's appellate process.

In phasing out the Appeal Board, recognition of its valuable work over the years is appropriate. We agree with the Commission's statement that

the Appeal Panel has developed 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 [Appeal Panel] must be commended for their sustained, outstanding performance.

55 Fed. Reg. at 42,947. In this regard, we trust that the Commission will strive to maintain the same high standards in its opinions as an appellate tribunal as those set by the Appeal Board. This consideration takes on increased importance as the

Commission (perhaps supported by a separate opinion writing office) becomes the sole appellate tribunal within the NRC structure. Commission opinions will at times need to develop fully the basis for affirming or reversing a hearing board, because it will be those opinions, sometimes on complex issues, that will be scrutinized by federal courts on appeal.

To provide for Commission review of ASLB decisions, the proposed rule presents two options -- mandatory review or discretionary review. The notice of proposed rulemaking seeks comments on the advantages and disadvantages of the two types of review systems. The NRC also seeks comments on the standard to be used by the Commission in taking discretionary review in the event that a discretionary system is chosen.

A. Discretionary Review System

We generally agree with the Commission that a system of discretionary review is preferable to a system of mandatory review for all cases.

We believe that the interests of public health and safety and administrative efficiency will be better served by giving the Commission the discretion in most cases to decide when and whether to address appeals. By having the flexibility to decline to hear appeals that are frivolous or that are solely aimed at delaying necessary and supportable NRC licensing action, the Commission should be in a position to make the important decisions on how best to allocate its resources to carry out its statutory mandate to protect the public health and safety. Discretionary review would also allow the Commission to avoid full briefing on cases which may present no particularly novel, complex, or precedent-setting issues.

It is unlikely that if a general discretionary type of review mechanism is substituted for mandatory review in all cases that the Commission will deny review to important legal, policy, and public health and safety questions that merit its attention.^{1/}

^{1/} Under current Commission policy, the NRC Staff does not issue full-power licenses without Commission approval with respect to contested or uncontested issues. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685, 688, 689 (1986), aff'd sub nom. on other grounds, Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987). This would be equally true under the proposed procedure which we discuss below. Therefore, there is little likelihood that a significant error in an important ASLB decision would go unreviewed by the Commission.

In fact, the Commission will be given a greater opportunity to consider the truly significant and worthy cases, and a discretionary review system will thereby provide more meaningful access to the Commission.

In contrast to discretionary review, a mandatory review system for all cases would require the Commission to review on the merits whatever "errors of fact or law" a party may choose to appeal on any case. This mandatory review would essentially be the same as was previously available before the Appeal Board under 10 C.F.R. § 2.762(d)(1).

A system of mandatory review for all cases may have the effect of requiring the Commission to address cases of no real legal, regulatory, or safety import. Thus, the Commission would become significantly involved with all initial decisions in licensing proceedings. In many routine cases this degree of involvement would simply be unproductive, wasteful of time and resources, and unnecessary, and could introduce considerable delay and inefficiency into the licensing process.^{2/} In addition, in some cases, mandatory review would enable parties pursuing frivolous and dilatory appeals to have their cases heard by the Commission, thereby unnecessarily delaying valid NRC action and diluting Commission resources.

This is not to say, however, that there are never any cases for which mandatory review is appropriate. We believe that in a proceeding where the Licensing Board rejects the NRC Staff's findings and recommendations as to the issuance of a site approval, design certification, construction authorization, operating license, combined license, or license amendment, an intra-agency conflict would be created that would warrant mandatory Commission review. For example, if a Licensing Board were to deny a license application where the Staff's safety and environmental findings are in favor of granting the application, or vice versa, this situation would represent a conflict within the agency that is important enough to require reconciliation by the Commission.

We therefore recommend that the Commission's rules expressly provide for mandatory review in such cases by adopting a provision similar to the following provision:

^{2/} As noted above in note 1, we propose below a procedure for limiting the time for Commission consideration of petitions for review to ensure that there will be no delay in the appeals process and suggest a standard for granting review that would ensure that the Commission will not be required to entertain trivial appeals.

The Commission shall review any decision in which the Atomic Safety and Licensing Board disagrees with the findings and recommendations of the Staff as to (1) the design approval for a facility; (2) the recommendations of the Staff as to granting or denying of an application for any permit or license approving a site or design or authorizing the construction or operation of a facility; or (3) the granting or denying of an amendment to any permit or license.

B. Immediate Effectiveness Rule

The NRC perceives one potential problem with a discretionary review system. Adjudicatory decisions could arguably be appealed to a federal court prior to any petition for review to the Commission (or in advance of the Commission deciding whether to take review of the decision). The Commission believes that this could be prevented, however, if the NRC continues its immediate effectiveness regulation (10 C.F.R. § 2.764) so that licensing board decisions directing issuance of a construction authorization or operating license will not become effective immediately. 55 Fed. Reg. at 42,948. In addition, the Commission believes that its Rules of Practice could be amended to specify that the filing of a petition for review with the Commission is an available remedy before a Licensing Board's decision becomes final agency action. This would force the appellant to exhaust its administrative remedies before seeking judicial review. Id. We generally support such an amendment to provide for a more orderly review procedure.

We believe, however, that this purpose could be accomplished by replacing the "immediate effectiveness" rule with a more straightforward procedure. As part of the discretionary review procedure, the Commission could provide for a 10-day period (or other brief time limit) within which the Commission must decide whether to review an ASLB decision authorizing issuance of a construction permit or operating license for a power reactor. During that 10-day period, a party would be able to request the Commission to grant a stay of the ASLB decision pending Commission review. After the expiration of the 10-day period, the ASLB decision would become final agency action unless the Commission accepts review and grants a stay of effectiveness.^{3/} The Commission would decide the stay question pursuant to the factors present in 10 C.F.R. § 2.788(e):

^{3/} The Commission could, of course, deny a stay but grant review.

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the [moving] party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

This procedure would be preferable to the "immediate effectiveness" rule since there would no longer be a prolonged automatic stay of decisions authorizing issuance of licenses. The "immediate effectiveness" rule is burdensome in that an automatic stay of an initial decision authorizing issuance of a license remains in effect indefinitely until the Commission completes its review of the decision. We believe that our proposal would help streamline the licensing process in that it would permit the ASLB decision to become final agency action within a reasonable time unless the Commission grants review of the decision and grants a stay upon a strong showing by the party seeking the stay.^{4/}

C. Standard for Granting Review

With respect to the standard for granting discretionary review that would be used by the Commission in determining whether to review an ASLB decision, the Commission proposes adoption of what it characterizes as a "less restrictive" standard for granting review than that currently present in 10 C.F.R. § 2.786(b)(4). This standard would be similar to an earlier Commission standard for granting review which provided as follows:

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:

-
- ^{4/} Under our proposal, a party could still appeal the Commission's denial of a stay to federal court while Commission review of the merits of the case proceeded. The federal court would consider only the stay request and would not review the merits of the case until the Commission had acted.

- (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.

This proposed standard would appear to be less restrictive and more flexible than the current standard for Commission review of Appeal Board decisions (10 C.F.R. § 2.786). It would obviously vest a great deal of discretion in the Commission to determine whether to accept review. However, in order to focus the Commission's discretion and to provide for review in another important situation, we suggest that an additional factor be added to the above standard.

Specifically, we believe that the Commission should allow expressly for review in cases where the following consideration is present:

A conflict in Licensing Board decisions on a controlling question of law or matter of fact necessary for decision.

With respect to conflicts on matters of law, the concept here is similar to Supreme Court review in cases where there are conflicting interpretations of law by different circuit courts of appeal. Commission review of conflicting ASLB decisions and reconciliation of those decisions would contribute to a more consistent body of NRC precedent. Similarly, allowing expressly for review where there are conflicts in factual findings (such as the adequacy of a particular design used at different reactors) would enable the Commission to reconcile differences between Licensing Boards. Review in this situation would also carry over the policy embodied in the present standard for granting Commission review of matters of fact in Appeal Board decisions in 10 C.F.R. § 2.786(b)(4)(ii).^{5/}

^{5/} This standard for granting review of disputed matters of fact provides:
(Footnote 5 continued on next page.)

In addition, to discourage frivolous appeals, we suggest that the Commission add cautionary language to the provisions on granting discretionary review. For example, the Commission might incorporate, as a footnote to the six specific considerations that make up the standard for granting review discussed above, language similar to the present standard for Commission acceptance of petitions for review (from the Appeal Board), which is found in 10 C.F.R. § 2.786(b)(4)(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.

We believe that the NRC needs flexibility in determining whether it should review certain adjudicatory decisions. The standard for granting review should be carefully crafted to give the Commission the flexibility to deny review in appropriate cases, i.e., those cases where the decision below is sound and defensible as a matter of law and does not raise significant policy issues. The proposed footnote will provide further emphasis on the significance of the issues presented for review. In sum, therefore, we support adoption of the proposed standard for granting review with the suggested modifications.

III. Conclusion

We believe that for most cases the adoption of a discretionary review system would be preferable to a mandatory review system. However, mandatory review should be provided in licensing proceedings where the Licensing Board does not accept the conclusions and recommendations of the NRC Staff, a situation

(Footnote 5 continued from previous page.)

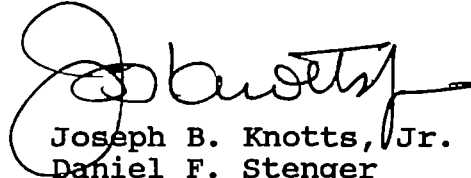
A petition for review of matters of fact will not be granted unless it appears that the [Appeal Board] has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to resolution of that same issue by the [Licensing Board].

Mr. Samuel J. Chilk
December 10, 1990
Page 9

that represents a conflict within the agency that requires resolution by the Commission. The standard for granting review to be adopted in a discretionary review system should be somewhat limited to the significant issues as set out in an earlier Commission standard (quoted on pages 6-7 supra) with the addition of a consideration for granting review where there is a conflict in Licensing Board decisions on controlling questions of law or matters of fact necessary for decision. We also support the addition of a footnote, as specified above, that adds cautionary language to the standard for granting review to discourage frivolous appeals.

We appreciate this opportunity to express our views on this important subject.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Knotts, Jr.", with a stylized flourish extending to the right.

Joseph B. Knotts, Jr.
Daniel F. Stenger
Mitchell S. Ross

December 5, 1990

COMMENTS OF OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC. ("OCRE")
ON PROPOSED RULE, "OPTIONS AND PROCEDURES FOR DIRECT COMMISSION
REVIEW OF LICENSING BOARD DECISIONS," 55 FED. REG. 42947
(OCTOBER 24, 1990)

90 DEC 10 P115
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By this proposed rule the NRC seeks to evaluate options for direct Commission review of decisions of the Atomic Safety and Licensing Boards, since the Commission has decided to abolish the Atomic Safety and Licensing Appeal Board. OCRE believes that the NRC's rulemaking is inherently flawed in that the NRC did not seek public comment on its decision to abolish the Appeal Board.

OCRE was an intervenor in the Perry Nuclear Power Plant operating license proceeding before the NRC. We continue to participate in operating license amendment proceedings for Perry. As such, we have come to appreciate the value of the Appeal Board to the quality of the adjudicatory process. Even though its rulings were at times adverse to OCRE, we feel that the Appeal Board serves a valuable function in the NRC's adjudicatory system. The Appeal Board has raised the process to a scholarly, intellectual level, ensuring that all parties are granted their rights and that all parties fulfil their obligations under the law. OCRE thus strongly opposes the NRC's plans to abolish the Appeal Board.

Ironically, the Commission likewise has recognized the Appeal Board's contribution: "In the years since 1969 the Appeal Panel has developed 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," 55 FR 42947. What a great way to commend the Appeal Panel members: by terminating their employment with the agency. If it isn't broken, why fix it?

The reasons advanced by the NRC for abolishing the Appeal Panel are not persuasive. Simply because some criticisms have been advanced through the years (e.g., by the Kemeny Commission, the Rogovin Special Inquiry Group and former Commissioner Victor Gilinsky) does not give the NRC sufficient reason to unilaterally abolish the Panel. Others, such as former Commissioner James Asselstine, have supported the Panel. Such a momentous decision should have been reached only after a full and vigorous debate wherein the input of the participants to NRC proceedings, Congress, and the general public was specifically solicited.

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Apparently the NRC does not intend to seek Congressional approval before abolishing the Appeal Board. While the Appeal Board is not statutorily established, as is the Atomic Safety and Licensing Board (by Section 191 of the Atomic Energy Act), Congress did transfer its functions from the old Atomic Energy Commission to the NRC in the Energy Reorganization Act of 1974 (Section 201(g)(1)). In fact, in enacting that Act, Congress explicitly found the functions of the Appeal Board to be necessary, and stated that, if the NRC should decide to abolish the Appeal Board, "the Commission would be required, under the conference substitute, to notify the Congress in advance." Report of the Conference Committee, House Report No. 93-1445, 93rd Congress, 2nd Session. The Senate Report noted that the Appeal Panel was essential to the NRC's effective operation. Senate Committee on Government Operations, Report No. 93-980, 93rd Congress, 2nd Session.

The Commission's direct involvement in licensing proceedings has not improved the process, but rather has degraded it. For example, in the Perry operating license proceeding, after the occurrence of the January 31, 1986 earthquake, with an epicenter just 10 miles from the Perry plant, the Appeal Board was willing to hold a hearing. But the Commission *sua sponte* interjected itself into the matter and overruled the Appeal Board, summarily denying OCRE's motion to reopen the record due to the earthquake. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-07, 23 NRC 233 (1986). On a matter of great importance to public safety, the Appeal Board was willing to listen. The Appeal Board cared about due process of law. Perhaps that is why this Commission wants to abolish it.

Due process would be enhanced by making the adjudicatory process independent from the Commission. The Appeal Board serves an important "separation of powers" function. As an independent arbiter, it has no conflict of interest, as does the Commission, which both directs the NRC Staff, a party to the proceeding, and serves as an adjudicatory body. In fact, the public interest would be better served by making the Appeal Board the final adjudicatory authority within the NRC, such that its decisions become final agency action, with no review by the Commission. This will ensure that the outcome of proceedings is determined on the basis of fact and law, rather than expedience and politics.

As a practical matter, the NRC Commissioners cannot themselves perform the functions of the Appeal Board and at the same time perform their administrative duties. Appellate review will be largely conducted by law clerks to the Commissioners. They will serve as a "hidden" Appeal Panel. The NRC acknowledges this: "To assist the Commission in performing its appellate adjudicatory functions, which primarily involves 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 as separate opinion writing office." 55 FR 42948. OCRE prefers the system as it now functions, where the parties have the opportunity to personally appear and argue before the Appeal Board. If it isn't broken, don't fix it.

If the NRC persists in its decision to abolish the Appeal Board, it must decide on some manner of handling appeals from Licensing Board decisions. Logically, to be consistent with the reasons given for abolishing the Appeal Board, the Commission should review every final Licensing Board decision, thereby increasing its "direct involvement in agency adjudications." Mandatory review would also avoid the inconsistency of some Licensing Board decisions receiving Commission review, while others are appealed directly to the Court of Appeals. Mandatory review will provide all parties with equal protection of the law in that all appellants are assured of a thorough agency review of Licensing Board decisions. Indeed, participants in the NRC's adjudicatory proceedings are entitled to thorough agency appellate review to remedy inequities without having to incur the expense and delay of judicial review. (The expenses of judicial review include the filing fee, the costs of printing and binding the briefs and appendix (record), and the need for legal counsel, whereas participants in NRC proceedings need not be represented by counsel.) OCRE would thus favor mandatory Commission review of Licensing Board decisions.

Respectfully submitted,



Susan L. Hiatt
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PROPOSED RULE **PR** 2
(55 FR 42947)

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[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

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Options and Procedures for Direct Commission
Review of Licensing Board Decisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) 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

pub. 10/24/90

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: Office of the Secretary, Docketing and Service Branch, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

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 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 Panel was continued for the same reason. In the years since 1969 the Appeal Panel has developed 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

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.

performance. 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 and to address some of the criticisms that have been directed to the Commission's isolation from that process over the years by, for example, the Kemeny 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. 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 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, as any body of case law is modified 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. When using either option

under consideration the Commission will need to examine each decision to determine if review at the Commission's own initiative (sua sponte) is warranted. The Commission 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

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

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, NRC's rules of practice could be amended to make explicit that the filing of a petition for review with the Commission is a remedy available 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:

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 CFR 2.762(d) (1962). The Commission's present regulation governing acceptance of petitions for review of appeal board decisions, 10 CFR 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 CFR 2.762(d)(1). A possible advantage of providing a mandatory review system is that it requires a high degree of Commission involvement because all matters properly appealed would have to be decided by the Commission itself. However, in many routine cases this degree of involvement would 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 operate procedurally like the current certiorari Commission review system (10 CFR 2.786). There will be a short petition for review which will need to be filed within a fixed period (perhaps 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 become final. Comments are invited on the review standard and review procedures described in this proposed approach.

To assist the Commission in performing its appellate adjudicatory functions, which primarily involves 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 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 adopted, 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 as follows.

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 effective date of the final rule 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.

The NRC is publishing in this issue of the Federal Register, in a companion document, a final rule amending certain of its regulations to make them consistent with the transition plan described above.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation 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 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 review of initial decisions 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.

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.

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 CFR 50.109(c) is required for this proposed 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. 553, the Nuclear Regulatory Commission is proposing to adopt amendments to 10 CFR Part 2. After consideration of public comments, a final rule and notice of final rulemaking will be prepared and published.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

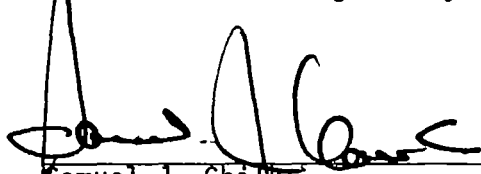
1. The authority citation for Part 2 continues to read as follows:

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 B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

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

For the Nuclear Regulatory Commission.



Samuel J. Chilk,
Secretary of the Commission.