ADAMS Template: SECY-067

DOCUMENT DATE: 06/29/1983

TITLE: PR-002 - 48FR29876 - DELETION OF EXCEPTION FILING REQUIREMENT FOR APPEAL FROM INITIAL DECISION - CONSOLIDATION OF RESPONSIVE BRIEFS

CASE REFERENCE: PR-002

48FR29876

KEY WORD: RULEMAKING COMMENTS

Document Sensitivity: Non-sensitive - SUNSI Review Complete

PAGE 1 OF 2 STATUS OF RULEMAKING RECORD 1 OF 1

PROPOSED RULE: PR-002

RULE NAME: DELETION OF EXCEPTION FILING REQUIREMENT FOR APPEA L FROM INITIAL DECISION - CONSOLIDATION OF RESPONS IVE BRIEFS

PROPOSED RULE FED REG CITE: 48FR29876

PROPOSED RULE PUBLICATION DATE: 06/29/83 NUMBER OF COMMENTS: 10

ORIGINAL DATE FOR COMMENTS: 07/29/83 EXTENSION DATE: / /

FINAL RULE FED. REG. CITE: 48FR52282 FINAL RULE PUBLICATION DATE: 11/17/83

NOTES ON: VOLUME 1(6/23/83 - 8/4/83). FILES LOCATED ON P1.
TATUS :
OF RULE :

PRESS PAGE DOWN OR ENTER TO SEE RULE HISTORY OR STAFF CONTACT

PRESS ESC TO SEE ADDITIONAL RULES OR (S) TO STOP DISPLAY

PAGE 2 OF 2 HISTORY OF THE RULE

PART AFFECTED: PR-002

RULE TITLE: DELETION OF EXCEPTION FILING REQUIREMENT FOR APPEA L FROM INITIAL DECISION - CONSOLIDATION OF RESPONS IVE BRIEFS

PROPOSED RULE SECY PAPER: 83-150	PROPOSED RULE SRM DATE: / /	DATE PROPOSED RULE SIGNED BY SECRETARY: 06/23/83
FINAL RULE SECY PAPER:	FINAL RULE SRM DATE: / /	DATE FINAL RULE SIGNED BY SECRETARY: 11/02/83

STAFF CONTACTS ON THE RULE

CONTACT1: TRIP ROTHSCHILD	MAIL STOP: 15G18	PHONE: 504-1600
CONTACT2:	MAIL STOP:	PHONE:

PRESS PAGEUP TO SEE STATUS OF RULEMAKING
PRESS ESC TO SEE ADDITIONAL RULES OR (S) TO STOP DISPLAY

DOCKET NO. PR-002
(48FR29876)

In the Matter of

DELETION OF EXCEPTION FILING REQUIREMENT FOR APPEA
L FROM INITIAL DECISION - CONSOLIDATION OF RESPONS
IVE BRIEFS

DATE DOCKETED	DATE OF DOCUMENT	TITLE OR DESCRIPTION OF DOCUMENT
06/24/83	06/23/83	FEDERAL REGISTER NOTICE - PROPOSED RULE
07/07/83	07/07/83	COMMENT OF ATOMIC SAFETY & LICENSING APPEAL PANEL (ALAN ROSENTHAL) (1)
07/27/83	07/20/83	COMMENT OF JOHN D. PARKYN (2)
07/28/83	07/25/83	COMMENT OF COMMONWEALTH EDISON CO. (PHILIP P. STEPTOE) (3)
07/29/83	07/29/83	COMMENT OF NUMBER OF UTILITIES (LEBOEUF, LAMB LEIBY & MACRAE) (4)
07/29/83	07/29/83	COMMENT OF HOUSTON LIGHTING & IOWA ELECTRIC LIGHT (MICHAEL A. BAUSER) (5)
08/01/83	07/29/83	COMMENT OF DUKE POWER CO. & TEXAS UTILITIES (DEBEVOISE & LIBERMAN) (6)
08/01/83	07/28/83	COMMENT OF ROBERT E. HELFRICH (7)
08/01/83	07/28/83	COMMENT OF O.W. DIXON, JR. (8)
08/02/83	07/29/83	COMMENT OF ATOMIC INDUSTRIAL FORUM (BARTON Z. COWAN, ESQ.) (9)
08/04/83	08/02/83	COMMENT OF JOHN F. DOHERTY (10)

10/04/93	11/02/83	FEDERAL REGISTER NOTICE FOR FINAL RULE DATED 11/17/83, PUBLISHED AT 48FR52282
/ /	/ /	

substantial number of small entities. This action is designed to promote orderly marketing of the California-Arizona lemon crop for the benefit of producers, and will not substantially affect costs for the directly regulated handlers.

This final rule is issued under Marketing Order No. 910, as amended (7 CFR Part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The action is based upon the recommendations and information submitted by the Lemon Administrative Committee and upon other available information. It is hereby found that this action will tend to effectuate the declared policy of the Act.

This action is consistent with the marketing policy currently in effect. The committee met by telephone on November 9&10, 1983, to consider the current and prospective conditions of supply and demand and recommended an increase in the quantity of lemons deemed advisable to be handled during the specified week. The committee reports the demand for lemons is improved.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this amendment is based and the effective date necessary to effectuate the declared policy of the Act. Interested persons were given an opportunity to present information and views on the amendment during the telephone meeting, and it relieves restrictions on the handling of lemons. It is necessary to effectuate the declared purposes of the Act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

1. Section 910.736 Lemon Regulation 436 (48 FR 50877) is revised to read as follows:

§ 910.736 Lemon Regulation 436.

The quantity of lemons grown in California and Arizona which may be handled during the period November 6, 1983, through November 12, 1983, is established at 240,000 cartons.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674)

Dated: November 14, 1983.

Russell L. Hawes,

Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 83–30962 Filed 11–16–83; 8:45 am]

BILLING CODE 3410–02–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Deletion of Exception Filing Requirement for Appeal From Initial Decision; Consolidation of Responsive Briefs

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations relating to appeals from an initial adjudicatory decision. Parties will be required to file a notice of appeal rather than exceptions to the initial decision. In addition, parties will be required to file a single responsive brief, regardless of the number of appellant briefs filed.

This amendment will reduce procedural requirements for appealing an initial decision and permit parties to the proceeding and the agency to focus better their litigative efforts.

EFFECTIVE DATE: December 19, 1983.

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone (202) 634–1465.

SUPPLEMENTARY INFORMATION: On June 29, 1983, the Nuclear Regulatory Commission published in the **Federal Register** (48 FR 29876) a notice of proposed rulemaking containing proposed amendments to 10 CFR Part 2. The Commission proposed to eliminate the provision in 10 CFR 2.762 that requires a party appealing an initial decision to file detailed exceptions to the decision with the Atomic Safety and Licensing Appeal Board ("Appeal Board"). Under the current rule each exception must state, without supporting argumentation, the single error of fact or law asserted. Under the proposal, the Commission would require the parties instead to file a notice of appeal which would simply identify the appellant and the decision being appealed.

The Commission noted in the Statement of Considerations that currently, parties who wish to appeal an initial decision must include in their

August 2, 1983

318 Summit Ave. #3
Brighton, Mass. 02135

Secretary
U. S. Nuclear Regulatory Commission
Washington D. C. 20555

ATTN: DOCKETING & SERVICE BRANCH

To whom it may concern:

The Federal Register of June 29, 1983 (48 Fed. Reg. 29,876, "Proposed Rules") notes changes proposed for 10 C.F.R. 2, the N.R.C. Rules of Practice. John F. Doherty, of 318 Summit Ave., Brighton, Massachusetts, respectfully offers the below comment to the Commission.

The Federal Register item states, "Commissioner Ahearne would be interested in comments on whether the rules should be changed to provide that only parties who have filed proposed findings with the Licensing Board on an issue can appeal that issue."

My experience with the Allens Creek case tells me there is a serious handicap in this proposal, destroying its value. Allens Creek involved a total of more than 100 safety and environmental issues. Working as an unfunded Intervenor I filed proposed findings of fact on 14 of these. Were I placed in the identical situation with the proposal an actual rule, I would have been motivated to say something about many other issues to preserve the right of appeal after seeing the Licensing Board's decision. This would result in wasted time for the Licensing Board and worse genuine findings of fact because in the latter instance, time would have been subtracted from the genuine effort. After all, there is no criterion for a finding of fact sufficient to appeal an issue, nor do I think the Commission would want parties appealing decisions that findings of fact were not sufficient to raise appeals!

I suppose some advantage to knowing what the appeals are likely to be from looking at the findings of fact. But there would be tactics to minimize this, such as findings of fact on each issue, just as exceptions are filed under 10 CFR 2.762 to preserve the briefing right.

Thank you for the opportunity to comment.

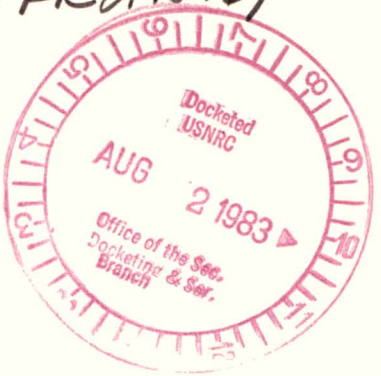
Respectfully,

John F. Doherty

John F. Doherty

8/2/83

Atomic Industrial Forum, Inc.
7101 Wisconsin Avenue
Washington, D.C. 20014
Telephone: (301) 654-9260
TWX 7108249602 ATOMIC FOR DC



July 29, 1983

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

Re: Proposed Procedural Rule (10 CFR Part 2), 48 F.R. 29876-79, June 29, 1983

Dear Mr. Chilk:

The Atomic Industrial Forum appreciates the opportunity to comment on the Commission's Federal Register notice of June 29, 1983, concerning proposed changes to the procedural rules in 10 CFR Part 2. Our comments have been prepared in consultation with a number of members of the AIF Lawyers Committee.

The proposed rule would (1) amend 10 CFR 2.762 to replace the exception filing process with a notice of appeal and (2) require the filing of a single responsive brief. In addition, the preamble accompanying the proposal requests comments on whether to amend the current rules relating to the filing of proposed findings (10 CFR 2.754). We oppose the proposed amendment to 10 CFR 2.762, have no objection to the filing of a single responsive brief, and support a revision to 10 CFR 2.754 requiring the filing of proposed findings as a prerequisite to an appeal.

Exceptions vs. Notice of Appeal

The Commission notice states that the filing of exceptions has resulted in delay in the appeal process and lengthy written filings which convey little more than a party's intention to appeal. It is claimed that elimination of exceptions will serve to better focus the litigants' positions. (48 F.R. 29876). Our experience, however, indicates that exceptions do serve a useful purpose, requiring an early, albeit imperfect, focus on the issues, and that this result, on balance, outweighs the possible negative of bulky filings. Furthermore, we believe delay caused by the filing of exceptions is minimal.

A rule revision which eliminates exceptions and requires the appellant's brief to identify each issue appealed and appropriate citations to the record (see proposed 10 CFR 2.762(d)(1)) merely delays the parties' focusing activities a few weeks.

Early and meaningful participation in the appellate process is desirable, and the Commission's regulations should be structured to achieve this end.

The Filing of Findings

In the Fermi case cited in the explanatory material accompanying the proposal, the Appeal Board held that "the filing of proposed findings of fact is optional, unless the presiding officer directs otherwise." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC _____; 2 Nuclear Regulation Reporter (CCH) para. 30,755.01, p. 80687 (January 4, 1983). We recommend that the Commission revise 10 CFR 2.754 to provide that, unless the Licensing Board expressly exempts the parties from the requirement, only parties who have filed proposed findings of fact may appeal. Such a requirement is consistent with case law which places great stress on the usefulness of proposed findings,*/ and enhances the focusing efforts of the parties as well as those of the Commission's adjudicatory boards.

Single Responsive Brief

Consolidation of reply briefs is an unobjectionable change to the regulations in terms of reduction of the paper burden. The Commission may also wish to expand limitations in the proposed rule on the date for filing (30 days, 40 days for the staff) and the number of pages (70) in reply briefs, or at least suggest in the final rule that modification of such limitations be granted more freely than in the past.

Sincerely,

Barton Z. Cowan

Barton Z. Cowan, Esquire
Chairman, AIF Lawyers
Committee

---

*/Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-33 (1973). See also, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978)

(8)

SOUTH CAROLINA ELECTRIC & GAS COMPANY
POST OFFICE 764
COLUMBIA, SOUTH CAROLINA 29218

O. W. DIXON, JR.
VICE PRESIDENT
NUCLEAR OPERATIONS

July 28, 1983

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

Attention: Docketing and Service Branch

Subject: Virgil C. Summer Nuclear Operating License No. NPF-12 Comments on Deletion of Exception Filing Requirement for Appeal from Initial Decision

Dear Mr. Chilk:

South Carolina Electric & Gas Company (SCE&G) takes a position opposing the rules change proposed by the NRC on June 29, 1983 which would delete the provision for filing of exceptions and would provide for unified responsive briefs regardless of the number of appellant briefs. The reasons for this position are stated below.

The amendment proposed first would modify section 2.762 of the Commission Rules of Practice to allow a party to make an appeal by merely filing a notice of appeal rather than specific well-defined exceptions as is currently required. There is a need for a sharp focusing of the issues for appeal early in the appeal process. Contrary to the propositions set forth in the statement of considerations accompanying the proposed amendment, the preparation and review of exceptions are not needless expenditures of litigant and agency resources. The conceptualization of exceptions are a prerequisite to the orderly and efficient drafting of briefs to be submitted to the Atomic Safety and Licensing Appeal Boards by any party. It is in one fashion or another a step which is taken anyhow.

Even if it is determined that the current practice in exception filing is undesirable, an available cure is for the adjudicatory tribunals to utilize their powers to refuse to accept inadequate exceptions or even to initiate sanctions

against an offending party. Similarly, the Appeal Board has the power to deny any requests for extensions by parties who are merely requesting additional time to file exhaustive lists of exceptions. Thus, the expressed concern that the current exceptions requirement leads to delay is not valid unless the Appeals Board fails to exercise its powers to control the proceedings. If the problem is an Appeal Board failure, the cure should be directed there.

In sum, we believe the requirement for filing exceptions serves a useful purpose. The creation of excessive amounts of paperwork for the Appeal Board to review and the abuse of the process to gain time extensions are matters within the control of the Appeal Board. A better approach to resolving problems will be first to require enforcement of section 2.762(a) as it is presently constituted. Only if that effort fails should amendments be considered.

The second proposal is to allow the filing of a single responsive brief regardless of the number of exceptions and to require that brief thirty days after the last appellant's brief is filed. Additionally, the single responsive brief would be limited to no more than seventy pages.

A seventy page limit can work to the extreme disadvantage of a party attempting to respond to multiple appellants. If each appellant raises only a few issues, the total number of issues could still be significant and the space required to treat each issue adequately could well mandate a brief in excess of seventy pages. Of course, while relief from the seventy page limit can be sought, there is no assurance it will be granted. If, on the other hand, requests for relief from the seventy page limit are granted liberally, then one must question the usefulness of the limit itself.

Again, it is our belief that remedies already exist. One solution, where multiple appellants raise similar or the same issues, is to require consolidated briefs on such issues, allowing separate briefs on other issues. This would allow respondents to file a single brief on the consolidated issues and separate briefs on nonconsolidated issues.

The other problem with the proposed rule on a single responsive brief relates to an obvious inability of respondent to know whether any particular appellant brief will be the "last brief" unless that brief is filed on the last day available. In other words, one appellant may file a brief

within the first few days of the period provided and other appellants may file no briefs. A respondent in that situation will not know until the time for filing appellant briefs has passed whether or not that first filed brief is the only brief. Thus, a substantial portion of his thirty days for filing a responsive brief may have passed before there is a realization that the time for filing the responsive brief has already begun.

A cure for this problem, if the rule is to be adopted, would be to have the time for filing a respondent's brief to begin after the end of the time available under the rules for filing of all appellant's briefs.

The notice of rulemaking also contained a request for comments on whether the NRC Rules of Practice should be amended to provide that only parties who have filed proposed findings with the Licensing Board on an issue can appeal that issue. SCE&G would strongly support a proposed amendment to that effect.

Becoming a "party" to a proceeding before the NRC portends certain rights but also imposes obligations. A simple sense of fairness dictates that one who deems an issue significant enough to warrant appeal should, in order to preserve the right to appeal, inform all parties, including the Board, what its position on the issue is before a decision is rendered. To do less is to allow the proceedings to become a game wherein a party springs its position upon the others at the latest and most disruptive moment.

The filing of proposed facts should be an absolute precondition to appealing a Licensing Board decision on any issue.

If you have any questions, please advise.

Very truly yours,

O. W. Dixon, Jr.

/mu

cc: V. C. Summer
T. C. Nichols, Jr.
E. H. Crews, Jr.
E. C. Roberts
H. N. Cyrus
Group/General Managers
O. S. Bradham
R. B. Clary
C. A. Price
A. R. Koon
C. L. Ligon (NSRC)
NPCF
File (Lic./Engr.)

Telephone (617) 872-8100
TWX 710-380-7619

YANKEE ATOMIC ELECTRIC COMPANY

1671 Worcester Road, Framingham, Massachusetts 01701

July 28, 1983
FYC 83-11
GLA 83-72

Secretary of the Commission
United States Nuclear Regulatory Commission
Washington, D. C. 20555

Attention: Docketing and Service Branch

Subject: Deletion of Exception Filing Requirement for Appeal from Initial Decision; Consolidation of Responsive Briefs; Proposed Rule (48FR29876, 29 June 1983)

Dear Sir:

Yankee Atomic Electric Company appreciates the opportunity to comment on the subject document. Yankee Atomic owns and operates a nuclear power plant in Rowe, Massachusetts. The Nuclear Services Division also provides engineering and licensing services for other nuclear power plants in the Northeast including Vermont Yankee, Maine Yankee, and Seabrook 1 and 2.

I. Summary

Yankee Atomic agrees in part and disagrees in part with the Commission's proposal, as explained in our comments below. In sum, regarding the proposed deletion of the exception filing requirement (Section II, below), we support with tentative concern the judgment of the Commission that this change may improve the efficiency of the appeals process in many instances. We reserve judgment, however, on whether this change will "permit the parties and agency to better focus their litigative efforts". Regarding the proposed consolidation of responsive briefs (Section III, below), we suggest that the Commission consider changing slightly its timing requirements for filing the consolidated briefs, in order to preserve an adequate opportunity for respondents to file. We propose that the period for filing responsive briefs begin running at the end of the period for filing appellant briefs, rather than from the date of the last-filed appellant's brief.

II. Proposed Deletion of Exception Filing Requirement for Appeal from Initial Decision [10CFR Part 2, Para. 2.762(a)]

We perceive a benefit to the current requirement to file exceptions, without argument, for each single error of fact or law on appeal. This benefit is that it compels aggrieved parties on appeal, whether they be NRC staff, licensees, or intervenors, to state concisely at a very early

stage of the appeal, the issues that responding parties must prepare to confront. Thus, filing exceptions rather than a simple notice of appeal can serve the important purpose of framing precisely the issues for appeal. We believe that filing exceptions requires appellants to responsibly focus the scope of litigation. Although mere notice filing may be more expedient, the procedural aspects of the appeal must not interfere with the substantive issues that can more directly affect the important interests at stake for all parties.

We believe that the proposed change to notice filing is not necessarily a remedy against appellants filing exceptions in exhaustive lists, seeking to avoid the seemingly harsh result that points not excepted may not be briefed or argued and are therefore waived. Appellants should know their grievances, and the existing rules of practice for filing exceptions pursuant to Section 2.762 does not prohibit meaningful pursuit of their desired relief.

As an alternative to deletion of the exceptions filing requirement, we suggest that the current "good cause" standard in Section 2.711, for deciding whether to grant extensions in time limits for appellants seeking to file exhaustive lists of all possible exceptions, be elevated to a somewhat higher standard such as a showing of "substantial hardship" by the moving party. We wish to make it clear to the Commission that our suggestion of this alternative should not be construed as a wholesale rejection of the proposal to delete exception filing requirements.

III. Consolidation of Responsive Briefs [10CFR Part 2, Para. 2.762(c)]

As a practical matter, we believe that the proposed change to require a single, consolidated responsive brief could deprive respondents of a meaningful opportunity to participate in the appeal process. For example, assume that several intervenor parties, who appeal an initial decision, each file a single appellant brief of the maximum length of 70 pages. Respondents may be substantially disadvantaged by the length requirement limiting their single consolidated brief to 70 pages. We believe that such instances, which are not unusual, must be presumed to establish a "good cause" for extending respondent's time to file, pursuant to existing Section 2.711.

Again assume, for the sake of argument, that several appellants file notices of appeal. Under the proposed rule of practice, responding parties will not know their filing deadlines for responsive briefs until the last appellant's brief is filed. If appellants who filed notice of their intent to appeal an initial decision fail to do so, and withdraw, responding parties waiting for the last brief to be filed will be placed in a situation of detrimental reliance on the withdrawing appellants. The time for filing responsive briefs under the proposed rules, assuming this scenario, will have partially expired when respondents first know

their due date for filing. Thus, we propose a change to the time requirements for filing responsive briefs that will clearly define the filing deadlines for all respondents. Our suggested change is shown on the attachment.

Very Truly yours,

Robert E. Helfrich

Robert E. Helfrich
Generic Licensing Activities

REH/bal

Attachment

cc: Office of General Counsel

ATTACHMENT TO FYC 83-11

Commentor's Suggested Change to
Paragraph 2.762(c)

"(c) Filing Responsive Brief. Any party who is not an appellant may file a brief in support of or in opposition to the appeal ... Where more than one appellant's brief is filed, the time for filing a responsive brief shall be determined from the date [of the last filed appellant's brief] <u>of expiration of the period for filing all appellants' briefs</u>. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed."

[ ] - delete
___ - insert

(6)

LAW OFFICES OF
DEBEVOISE & LIBERMAN

1200 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

TELEPHONE (202) 857-9800

July 29, 1983

The Honorable Samuel Chilk
Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Subj: Proposed Rule Amending 10 C.F.R. Part 2 (48 Fed. Reg. 29876)

Dear Mr. Chilk:

On June 29, 1983, the Commission published a proposed rule which would amend 10 C.F.R. Part 2 by deleting the provision for the filing of exceptions and substituting provisions for filing notices of appeal from initial decisions. The amendments would also provide for unified responsive briefs irrespective of the number of appellant briefs. The following comments are submitted on behalf of Duke Power Company and Texas Utilities Generating Company.

For the reasons set forth below, we believe that the proposed rules are inadequate and that they should not be promulgated.

I. The Exception Filing Requirement

The proposed amendments to Part 2 would first modify Section 2.762 so that a party may take an appeal to the Commission by filing a notice of appeal instead of specific documented exceptions as is presently the case. We believe that the current practice of filing exceptions is helpful because it requires the appealing party to identify precisely those portions of the initial decision it wishes to challenge, and the specific error alleged, and as such puts all parties on notice as to the questions which will be litigated on appeal. We note in this regard that Section 2.762 was amended in 1973 to provide for the separate filing of exceptions and briefs and to establish additional standards concerning the form and content of such documents. The underlying reason for this amendment was the need to improve the appellate process within NRC

in light of the increasing complexity of power reactor licensing proceedings.[1] Certainly those proceedings have become no less complex than was the case in 1973 and, if anything, just the opposite is true. Therefore, the need continues to exist for issues to be sharply focused from the outset of the appellate process. Abandoning the exceptions process is simply inconsistent with this need.

In addition, the stated justification for proposed amendments to Section 2.762 does not, we believe, provide a sufficient empirical basis for issuing the proposed amendments. The rule is apparently based on the underlying premise that "[e]xceptions convey little more than a party's intention to appeal."[2] This is simply not true where the existing rules are complied with voluntarily or when they are enforced. The precise ruling challenged and the specific error alleged must be stated, and such information is most useful. The proposed rule would have precisely the effect of imparting no information other than the generalized intention to appeal.

The statement of considerations accompanying the proposed amendment also states that the preparation and review of exceptions are needless expenditures of litigant and agency resources.[3] To the contrary, we believe that if done correctly, the preparation of exceptions should be the first and a key step in drafting a brief to be submitted to the Atomic Safety and Licensing Appeal Board. For this reason, their preparation is hardly a waste of the litigant's time. Similarly, if exceptions are not prepared in accordance with the NRC Rules of Practice and as such do not identify with requisite specificity the issues to be appealed, the solution to the problem is not to eliminate the practice because the review of such pleadings has not been of value to NRC tribunals. Rather, the solution is for those tribunals to refuse to accept inadequate exceptions and if appropriate, to initiate sanctions against the offending party.

The proposed rule is also purportedly justified on the ground that exceptions delay the appeal process because parties will request additional time to file an exhaustive list of exceptions.[4] Again, the way to solve

---

1 38 Fed. Reg. 5624 (1973).

2 48 Fed. Reg. at 29876.

3 Id.

4 Id.

this problem is for the Appeal Board to deny such extensions of time absent the strongest possible showing of need. Presumably, a party in a licensing proceeding is sufficiently familiar with the record to be able to identify quickly those findings or rulings he desires to appeal. He should have thought through the proper findings and disposition of issues when he prepared proposed findings. There is more to be gained by requiring even exhaustive exceptions which require a focused approach and early disclosure than by abandoning the current approach in favor of an uninformative general notice of appeal. The time limits already established by the Commission in its Rules of Practice may require more rigid enforcement if exceptions are being used to obtain unwarranted extensions of time.

At bottom we believe that the exceptions requirement continues to be a useful tool in focusing issues on appeal. We also believe that the justification offered in support of abandoning that requirement reflects more on the ability of the Commission and its adjudicatory tribunals to manage licensing proceedings effectively than it does on the rules themselves. It appears to us that after a period in which litigants have been allowed to abuse the exceptions requirement, the Commission has simply concluded that such requirement does not serve any useful role in licensing proceedings. We submit that a far more useful approach would be to enforce Section 2.762(a) as it is presently constituted.

II. Responsive Briefs

The proposed rules would also amend Part 2 to provide that any party other than an appellant may file a single responsive brief (not to exceed seventy pages) regardless of the number of appellants who have filed briefs to which other parties may or must respond. It would further modify the NRC Rules of Practice to state that such responsive brief is due thirty days after the last of the appellants' briefs are filed.

We believe that this proposed rule will severely impair the ability of parties other than appellants to respond to the arguments raised in multiple appellants' briefs. First, it is entirely possible that when there are a number of appellants raising a number of different issues, it will be totally unrealistic to limit the responses to appellants' briefs to seventy pages. For example, assume that in an operating licensing hearing there are three (or five or ten) intervenors each of which is raising separate and unrelated issues. Each intervenor

could submit a single brief addressing each of those subjects for a total of 210 (or 350 or 700) pages of record citations legal citations and arguments (i.e., seventy pages on the issues raised by each of the intervenors). However, the applicant, which carried the burden of proof on those issues, would be limited to a single seventy-page response. While it could request a waiver from the seventy-page limit, there is no assurance that a waiver would be granted.

Conversely, where an applicant is an appellant, or where the applicant and the Staff are both appellants, the largest ratio of pages of appellant to responsive briefs an intervenor would face is two to one.

This is not to say that we are unreceptive to genuine concerns raised by the Appeal Board as to the volume of paper it must review. One approach, not presented by the proposed rule, would be to eliminate or reduce the role of the Staff. Apart from that, however, we submit that through existing mechanisms the Appeal Board can reduce the volume of paper before it in a more even-handed manner than that proposed. Specifically, in situations where there are a number of appellants raising duplicate issues, the Appeal Board could issue an order imposing an obligation on those parties to submit a consolidated brief on duplicate issues and separate briefs on other issues. By virtue of existing Rules of Practice, only a single brief could then be submitted on those consolidated issues in response.[5] In this manner, obligations would be imposed on all parties equally to confine their arguments thereby reducing the volume of paper before the Appeal Board.

Second, we believe that the proposed rule will be difficult to apply when there are a number of appellants involved. As presently drafted, proposed Section 2.762(c) would require the filing of a single responsive brief thirty days after the last filed appellant's brief (as opposed to the date when such could be timely filed). However, it is possible to envision a situation where two appellants addressing similar or related issues would have the right to file briefs, and the first was in fact filed well before the thirty-day deadline established in proposed Section 2.762(b). If for some reason the other exepcted brief was not filed or not timely filed, then the opposing party would find itself in the unenviable position of having to respond in a very short period of

---

[5] See 10 C.F.R. § 2.785.

time to the single brief actually filed or prepare two or more versions of briefs depending on treatment of the untimely filing.

For example, if Appellant X filed its brief on day ten of the thirty-day period established in proposed Section 2.762(b), and Appellant Y could have filed its brief on day thirty but did not, then the subsequent thirty-day period during which a single responsive brief could be filed would run from day ten when Appellant X filed. As a result, the response date would in fact be twenty days earlier than planned.

This situation is aggravated even further by the fact that a party responding to the appellants cannot plan to complete work on its brief within the period dating from when it receives the first of what could be a series of briefs, because it is limited to a single response and must anticipate or defer work on other expected arguments. Clearly, that response cannot be completed until all of the briefs have been received. This would be especially true if the requirement to file exceptions is repealed, because then an appellee will not even have notice as to the issues which could be raised on appeal. At bottom, the proposed rule assumes that all appellants will file a brief on a clearly established schedule and that the last of those briefs will be clearly identifiable. In fact, that just is not the case.

Accordingly, should the Commission decide to promulgate amended Section 2.762(b) to provide for a single responsive brief, we urge that the promulgated rule be modified to establish that when more than one party has filed a Notice of Appeal or Exceptions, the time for filing a responsive brief shall automatically be determined from the latest date by which appellants could have filed their briefs, regardless of whether in fact the last of those briefs was filed earlier than this date. Specific language is set forth below.

> **(c) 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 days (30) days after the filing and service of the appellant's brief. Commission staff may file a responsive brief within forty (40) days after the filing and service of appellant's brief. Where more than one appellant's brief is filed, the

> time for filing a responsive brief shall be determined from the date of the last filed appellant's brief. Where more than one party has filed a notice of appeal, the time for filing a responsive brief shall be determined from the latest date by which all appellants could have filed their briefs. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed. However, this requirement may be waived if the issues raised on appeal are complex or the ends of justice otherwise so require.

III. Filing of Proposed Findings as a Precondition to Appeal

The Notice of Rulemaking solicits comments on whether the NRC Rules of Practice should be amended to provide that only parties who have filed proposed findings with the Licensing Board on an issue can appeal that issue.[6] We believe that instituting such a requirement would be useful.

As the Appeal Board recognized in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2),[7] requiring the filing of proposed findings is a useful mechanism by which a licensing board can resolve complex issues before it. Moreover, because all participants in a proceeding should be familiar with the issues they seek to litigate, filing such findings is not unduly burdensome.

Given these observations, we believe that it logically follows that the filing of proposed facts should be a precondition to appealing a licensing board decision on that issue. All parties have an obligation to make their views know before a lower tribunal before seeking to raise issues on appeal. As the Supreme Court has stated,

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and

---

6 Id.

7 ALAB-709, 17 NRC __ (January 4, 1983).

> then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."[8]

Accordingly, we would agree with a modification of NRC Rules of Practice in this regard.

Respectfully submitted,

DEBEVOISE & LIBERMAN

By: _____

---

8 Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-554 (1978).

LAW OFFICES

LOWENSTEIN, NEWMAN, REIS & AXELRAD, P.C.

1025 CONNECTICUT AVENUE, N.W.

WASHINGTON, D.C. 20036

202·862-8400

JACK R. NEWMAN
HAROLD F. REIS
MAURICE AXELRAD
KATHLEEN H. SHEA
J. A. BOUKNIGHT, JR.
MICHAEL A. BAUSER
DOUGLAS G. GREEN
DAVID G. POWELL

E. GREGORY BARNES
JANET E. B. ECKER
STEVEN P. FRANTZ
JILL E. GRANT
FREDERIC S. GRAY
ALVIN H. GUTTERMAN
HOLLY N. LINDEMAN
DAVID B. RASKIN
DONALD J. SILVERMAN

ROBERT LOWENSTEIN
OF COUNSEL

July 29, 1983

(5)

Secretary
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rule, Deletion of Exception Filing Requirement for Appeal from Initial Decision; Consolidation of Responsive Briefs (48 Fed. Reg. 29,876)

Dear Mr. Secretary:

This refers to the above-entitled notice of proposed rulemaking under which the procedures for appeal from initial decisions of Atomic Safety and Licensing Boards would be modified in two respects. First, under proposed new 10 CFR § 2.762(a), the need to file exceptions to such initial decisions would be eliminated as a prerequisite to further appeal within the Commission. An appeal would be effected simply by filing a notice of appeal within 10 days after service of the initial decision. Such notice would need merely to specify the party taking the appeal, and the decision being appealed. Second, under proposed new 10 CFR § 2.762(c), responding parties would be limited to the filing of a single brief in response to multiple appellant briefs, and restricted from filing a separate brief in response to each appellant brief. In addition, the notice expresses an interest in views as to whether the Commission's rules should be changed to provide that only parties who have filed proposed findings with the Licensing Board on an issue will be permitted to appeal that issue.

These comments are submitted on behalf of Houston Lighting & Power Company and Iowa Electric Light & Power Company. In summary, we:

(1) oppose the elimination of the requirement for exceptions;

(2) do not object to limiting the number of responsive briefs on appeal to one, but suggest that if such a limitation is imposed a policy be adopted favoring reasonable extensions of time to respond and also relaxation of the limitations on the length of responsive briefs in appropriate cases; and

(3) we believe that the rules should be changed to provide that only parties who have filed proposed findings on an issue can appeal that issue.

First, so far as elimination of the requirement for filing exceptions is concerned, we strongly disagree with the suggestion contained in the notice that the result will be to "permit the parties and the agency to better focus their litigative efforts." 48 Fed. Reg. 29,876. Under the present rule, the party appealing is required to state in each exception "the single error of fact or law which is being asserted in that exception." 10 CFR § 2.762(a)(1). Under 10 CFR § 2.762(b), the briefs must be filed "in support of, or in opposition to, the exceptions." Consequently, briefs tend to be organized so as to address or focus separately upon each exception, or group of related exceptions.

The new proposal does not contain provisions which would so clearly direct the appellant's attention to the need to describe with precision and address separately each matter being appealed. Proposed new 10 CFR § 2.762 (d)(1) merely requires that a brief specify "for each issue appealed, the precise portion of the record relied upon in support of the assertion of error." The new rules would not even contain language similar to that now included

in typical appellate court rules.*/ Consequently, the need to clearly define issues or contentions would receive far less emphasis under the proposal than under the present rules. The need for such emphasis is particularly important in a litigative system in which many of those participating are not experienced lawyers.

Moreover -- even if it is granted that reviewing a record to identify all exceptions is burdensome -- in fact, essentially the same task will eventually have to be undertaken anyway in order to write a full and adequate brief. The present system serves a useful function, however, by alerting the responding parties promptly to the issue or issues which will be raised on appeal. Even if it is assumed that some of the exceptions will ultimately be waived by failure to address them, the responding parties should be able to at least identify the serious exceptions promptly. Considering the volume of many NRC records, the time for responding to briefs may, as a general rule, become inadequate if such advance notice and opportunity to prepare is eliminated.

Second, we do not object to the proposal that each party file only a single responding brief, regardless of the number of appellant briefs filed. Indeed, responding parties in appellate litigation frequently request authority to file a single brief where the rules of the appellate body do not expressly so authorize. However, we believe that, in complex cases involving appeals by several parties on widely differing subjects, the time and length limitations contained in the present rules -- which would remain unmodified -- might present a problem. Consequently, we suggest that the statement of considerations accompanying the final rule indicate that exceptions to those limitations are be granted generously in such circumstances.

---

*/ Rule 28 of the Federal Rules of Appellate Procedure requires that each brief contain: "A statement of the issues presented for review." Supreme Court Rule 21 requires that a petition for certiorari contain, among other things:

> (a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious.

The question of whether the rules should be changed to provide that only parties who file proposed findings with the Licensing Board on an issue may appeal that matter arises from the ruling to the contrary in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC ___ (Jan. 4, 1983). In that proceeding, the Appeal Board interpreted the Commission's rules as eliminating the right to appeal only in circumstances in which a Licensing Board directs the parties to file proposed findings. The Appeal Board found nothing in the regulations empowering the denial of an appeal in the absence of such a direction. It went on to emphasize that Licensing Boards may direct a filing of proposed findings and that such action "is plainly the better practice." Slip op., p. 11.

It is difficult to overemphasize the importance of filing proposed findings of fact and conclusions of law in most proceedings before Atomic Safety and Licensing Boards in order to make clear what each party's position is and to prevent the proceeding from becoming "a game or a forum to engage in unjustified obstructionism."*/No one can take serious issue with the Appeal Board's observation in Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 333 (1973),

> that the filing of proposed findings and conclusions by parties is likely to be of substantial benefit to a licensing board in resolving various questions which are at issue in a proceeding -- particularly one such as this which involves complex factual questions and a lengthy record which includes a variety of expressed opinions on the various facets of reactor operation. If nothing else, such proposed findings will assist a board in determining what issues in fact exist between the parties, and what issues are either not actually in dispute or not relevant to the eventual decision which must be rendered.

---

*/ Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978).

Unless a party has so identified the issues and suggested resolutions to the Licensing Board, it does not seem appropriate to permit that party to appeal the Board's decision. Consequently, we strongly support modification of the rules to require findings of fact and conclusions of law unless the Licensing Board expressly dispenses with the requirement. Such a rule would be fair to the parties in terms of keeping them informed of opponents' positions at a crucial time and would, as has been emphasized in Midland and elsewhere, make the task of the Licensing and Appeal Boards more manageable. An exception to the rule would provide for circumstances where either the exigencies of time or the obvious clarity of the issue presented make it unnecessary, or unduly burdensome or time consuming, to require proposed findings of fact.

Respectfully submitted,

Michael A. Bauser

MAB:mjh

(4)

LEBOEUF, LAMB, LEIBY & MACRAE
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
202-457-7500
TELEX: 440274 TELECOPIER: 202-457-7543
202-457-7511

520 MADISON AVENUE
NEW YORK, NY 10022

500 KEARNS BUILDING
136 SOUTH MAIN
SALT LAKE CITY, UT 84101

411 PEQUOT AVENUE
SOUTHPORT, CT 06490

LEBOEUF, LAMB, LEIBY & MACRAE (UK)
47 BERKELEY SQUARE
LONDON W1X 5DB, ENGLAND

168 MILK STREET
BOSTON, MA 02109

336 FAYETTEVILLE STREET MALL
P.O. BOX 750
RALEIGH, NC 27602

150 STATE STREET
ALBANY, NY 12207

July 29, 1983

Samuel J. Chilk, Esq.
Secretary
Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Proposed Amendment of 10 C.F.F. § 2.762
and Related Provisions

Dear Mr. Chilk:

On June 29, 1983, the Commission published for comment a notice of proposed rulemaking to alter its regulations governing appeals of initial decisions in licensing cases. 48 Fed. Reg. 29876 (1983). As attorneys representing a number of utilities involved in the Commission's licensing and regulatory process, we wish to offer our comments on the proposed amendments.

It is our position that (1) elimination of the present requirement for the separate filing of exceptions to initial decisions is appropriate, (2) it is unwise and unnecessary to substitute a requirement for a separately-filed notice of appeal, (3) it is appropriate to provide for the filing of a single brief opposing exceptions by each party, (4) former Commissioner Ahearn is correct in suggesting that a party should be permitted to file exceptions only with respect to issues as to which proposed findings were filed by that party, and (5) if the Commission refrains from requiring a separate notice of appeal, most of the editorial changes proposed will be unnecessary.

The Commission's proposal to eliminate the current requirement for the filing of exceptions to initial decisions separately from and prior to a brief supporting such exceptions is fully supported by the reasons set forth in the Supplementary Information in the Commission's notice. The Commission should adopt the long-standing practice of the Federal Energy Regulatory Commission (Rule 711), pursuant to which an appeal from an initial decision is taken by filing a brief on exceptions, rather than by separately filing exceptions and a supporting brief. See 47 Fed. Reg. 19014, 19033 (1982), to be codified as 18 C.F.R. § 385.711.

Having tentatively determined to eliminate the requirement for the separate filing of exceptions, the Commission proposes instead to require the separate filing of a notice of appeal. In our view, the proposed requirement for a notice of appeal simply substitutes one meaningless piece of paper for another. (It may be argued that it is important to require early filing of a notice of appeal so that the Commission will "know" whether an initial decision is subject to further contest. In fact, until a full brief is filed, there is no way to tell whether, and to what extent, a party is prepared to pursue its appellate remedies. Just as the Government routinely files protective notices of appeal even though no final decision has been made to pursue a case, so it may be anticipated that counsel for parties in licensing cases will always file a notice of appeal to preserve their clients' rights.)

The same considerations that support the elimination of any requirement for separately-filed exceptions equally counsel against requiring a notice of appeal to be filed. The Commission should amend its regulations simply to provide for the filing of briefs on exceptions and briefs opposing exceptions.

It is appropriate to require each party opposing exceptions to file a single brief in opposition to all exceptions. Any problem concerning the date for such filing can readily be resolved by calculating the time for filing from the last date for filing briefs on exceptions, as opposed to the date(s) on which the briefs on exceptions are actually filed. See id. In this connection, the Commission should eliminate the present provisions permitting its staff an extra 10 days for filing, which delay and complicate the appellate briefing schedule. All briefs on exceptions

should be due 30 days after service of an initial decision, and each party (including the staff) should be permitted to file a single brief opposing exceptions within 30 days after the last date for filing a brief on exceptions.

If these suggestions are adopted, the Commission may wish to expand the page limitation for briefs opposing exceptions. In the alternative, the Commission could simply announce that requests for expansion of the page limitation will be freely granted where it is necessary for a party to respond to multiple briefs on exceptions.

Former Commissioner Ahearn requested comments on whether the Commission's regulations should be changed to provide that only parties who have filed proposed findings on an issue with a licensing board can appeal that issue, referring to The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 N.R.C. _____ (January 4, 1983). In the Fermi 2 case, the Appeal Board recognized that, as a matter of policy, a party that failed to file proposed findings should not be permitted to appeal an adverse initial decision. The Appeal Board declined to dismiss the appeal in the Fermi 2 case because the licensing board had failed to direct the parties to file proposed findings. The Appeal Board stated that it would be best if licensing boards routinely directed the filing of proposed findings.

Rather than relying upon each licensing board separately to direct the filing of proposed findings in each proceeding, it would be simpler for the Commission to impose that requirement in its regulations. This would have the advantage of putting all parties on notice at the beginning of any proceeding that they are expected to file proposed findings, rather than awaiting a direction by the licensing board, which would normally come at the end of the evidentiary hearing. Accordingly, we believe that the Commission should provide that no party may file a brief on exceptions concerning an issue with respect to which that party failed to file proposed findings.

Finally, the Commission's notice proposes a number of editorial and conforming changes to related provisions of 10 C.F.R. Part 2 and Appendix A. If the Commission accepts our recommendation and does not institute any requirement for the filing of a notice of appeal, there will be no need to

amend §§ 2.719, .721, .743, .760, .761, .764, .770, or .771. Section 2.763 should be amended to substitute "brief on exceptions" for "exceptions or brief." Section 2.762 and Appendix A will, of course, have to be substantively revised in any event.

Sincerely,

LeBoeuf, Lamb, Leiby & MacRae

ISHAM, LINCOLN & BEALE
COUNSELORS AT LAW

THREE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60602
TELEPHONE 312 558-7500
TELEX: 2-5288

EDWARD S. ISHAM, 1872-1902
ROBERT T. LINCOLN, 1872-1889
WILLIAM G. BEALE, 1885-1923

WASHINGTON OFFICE
1120 CONNECTICUT AVENUE, N.W.
SUITE 840
WASHINGTON, D.C. 20036
202 833-9730

July 25, 1983

Secretary, U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Attention: Docketing and Service Branch

Dear Sirs:

This law firm has been requested by Commonwealth Edison Company to submit comments on the NRC's proposed rule which deletes the exception filing requirement for appeals from initial decisions and provides for the consolidation of responsive briefs. 48 Fed. Reg. 29876 (June 29, 1983).

We strongly recommend that the requirement that appellants file exceptions be deferred until the date their brief is due, rather than deleted altogether from the regulations. Otherwise, there would be an obvious omission in the Rules of Practice in that appellants would be required to "specify ... for each issue appealed the precise portion of the record relied upon in support of the assertion of error," 10 CFR § 2.762(d), but they would not be required to specify the precise error of fact or law which they are appealing. Requiring exceptions to be filed with appellants' briefs would correct this deficiency. While one might assume

U.S. NUCLEAR REGULATORY COMMISSION
DOCKETING & SERVICE SECTION
OFFICE OF THE SECRETARY
COPIES RECEIVED

Postmark Date 7/25/83
Copies Received 1
Additional Copies Required
Special Instructions

that it would be easy to understand what issue is being appealed just by reading appellants' briefs, experience teaches that this is not always the case. In NRC practice, evidentiary records are huge and initial decisions are often very long. Intervenors (who frequently are the appellants) often appear pro se and have no legal training and no experience in writing briefs. Unless such pro se appellants are reminded by the Rules of Practice to specify what portion of the initial decision or other Licensing Board action they are appealing, it may be difficult for the respondents and the Appeal Board to understand and address adequately appellants' concerns.

We have no objection to consolidating responsive briefs, as long as an increase in the page limit for good cause can be requested as present regulations allow. 10 CFR § 2.762(e). Seventy pages ought to be enough in most cases for respondents to say what has to be said.

We support Commissioner Ahearne's suggestion that the rules be changed to provide that only parties who have filed proposed findings with the Licensing Board on an issue can appeal that issue. It obviously promotes efficiency and fairness to require parties to present their concerns in the first instance to Licensing Boards rather than allowing them to raise such concerns for the first time on appeal. Moreover, while the Appeal Board's decision in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2) ALAB-709, 17 NRC _____

(January 4, 1983) indicates that Licensing Boards can accomplish the same result by ordering parties to file findings of fact, we do not believe this is a matter which should be left to the adjudicatory boards' discretion. As the Supreme Court observed with respect to this exact issue in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54:

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that it had "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

As the history of the Vermont Yankee litigation and many other examples show, NRC adjudicatory boards are notoriously reluctant to decide issues on the basis of procedural defaults by parties. A Commission regulation providing that only parties who have filed proposed findings on an issue may appeal that issue is likely to be more effective than relying on the Licensing Board to order parties to file findings of fact and on the Appeal Board to enforce a default in the event the Licensing Board's

order to file findings of fact is ignored.

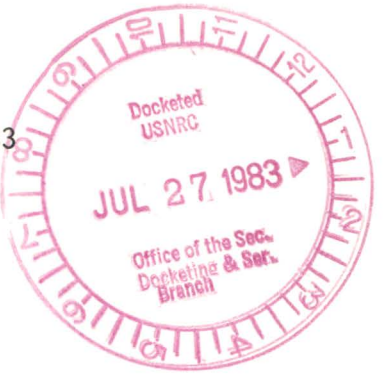
Respectfully submitted,

PPS:es

Philip P. Steptoe

DOCKET NUMBER
PROPOSED RULE PR-2
(48 FR 29876)

(2)



July 20, 1983

U. S. Nuclear Regulatory Commission
ATTN: Docketing & Service Branch
Washington, D. C. 20555

Gentlemen:

I am writing you this letter to put in comments on proposed rule change to 10 CFR Part II, "Deletion of Exception Filing Requirement for Appeal from an Initial Decision: Consolidation of Responsive Briefs". My comment on this proposed rule is that the rule should be changed to provide that only parties who have filed proposed findings for the licensing board can appeal that issue. It has been a mechanism of those in the anti-nuclear community for years to simply deluge an issue with paper. This, of course, adds nothing to the process and simply tends to submerge significant issues. It is my opinion that the proposed rule should reflect the limitation that only those parties really involved in this process should be permitted this particular privilege because after all only those people and parties involved in the licensing process are really cognizant of all that has gone into that particular point. The idea of adding a lot of additional outside information can only subvert the process of seeking a solution to any problems which exist.

If you have any questions regarding my opinion please feel free to contact me.

Sincerely,

John D. Parkyn

JDP:eme

John D. Parkyn
Route 1
Pleasant Valley
Stoddard, WI 54658

Acknowledged by card. 7/28/83 PD

OFFICE OF THE
SECRETARY

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

July 7, 1983

DOCKET NUMBER
PROPOSED RULE PR-2 (1)
(48FR29876)

MEMORANDUM FOR: Scott Stucky

FROM: John Hoyle

SUBJECT: COMMENTS BY ASLAP ON PROPOSED CHANGES TO 10 CFR PART 2

Attached is a June 30, 1983 memorandum from Alan Rosenthal, Chairman, ASLAP, providing comments on a proposed rule change. At the suggestion of the Office of the Chairman, please treat it as a comment on the proposed rule change to ensure that his comments are considered by staff in preparing recommendations on a final rulemaking.

cc: B. Reamer

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

June 30, 1983

MEMORANDUM FOR: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine

FROM: Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Panel

SUBJECT: PROPOSED CHANGES TO 10 CFR PART 2

In putting out for public comment the proposed amendment to Section 2.762(c) of the Rules of Practice that would require parties to file "a single responsive brief regardless of the number of appellants' briefs filed," the Commission indicated that it was particularly interested in the receipt of views on the following two questions:

> Do the commenters believe that this limitation will preserve an adequate opportunity to respond in cases in which many issues are raised on appeal? If so, do the commenters have suggestions on how the Appeal Board's desire to limit responsive briefs to the necessary minimum can be achieved while preserving an adequate opportunity to file responsive briefs?

Underlying those questions is the seeming concern that, if confronted with several appellants' briefs raising collectively a large number of discrete issues, the appellees might find themselves unable to respond adequately in a single brief not exceeding the 70 page limit prescribed in Section 2.762(e) of the Rules of Practice. Although I think it unlikely that this will often prove to be the case, in any event Section 2.762(e) expressly provides that a party may request an increase of the page limitation "for good cause." To this point, the appeal boards have manifested a willingness to grant such requests in circumstances where it has been apparent that the full range of issues presented by the appeal or appeals could not be satisfactorily addressed by an appellee in a 70 page brief. There is no reason to assume either that this policy will be altered if appellees are restricted to a

single brief or that appeal board members are incapable of making a rational judgment on the necessity for a page limit enlargement in a particular case. In this connection, an appeal board obviously is advantaged if there is a full (albeit without excess verbiage) briefing by all parties of the issues that must be decided by the board.

I trust that the Commission will take the foregoing into account in deciding upon the adoption of this proposed rule change following the conclusion of the comment period. I feel very strongly that the change should be made in the interest of a more orderly appellate procedure and, as noted, believe that no ground exists for the fear that the result might be the deprivation of an adequate opportunity to respond to an appellant's arguments. Indeed, in actuality, the change will simply codify what appeal boards have done in several past proceedings by order -- without (to my knowledge) any complaint from the affected appellees.

cc: S.J. Chilk, SECY
T. Rothschild, OGC
G.H. Cunningham, ELD

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR PART 2

Deletion of Exception Filing Requirement for Appeal from Initial Decision; Consolidation of Responsive Briefs

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The proposed rule would change the procedure for an appeal to the Commission from an initial adjudicatory decision. It would eliminate the filing of exceptions to the decision and would require instead the filing of a notice of appeal. In addition, parties would be required to file a single responsive brief, regardless of the number of appellant briefs filed. Under current practice, parties frequently file a separate pleading in response to each appellant's brief.

DATES: Submit comments by JUL 29 1983.

Comments received after JUL 29 1983 will be considered if it is practical to do so but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Send comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, 20555. ATTN: Docketing and Service Branch.

Hand deliver comments to: Room 1121, 1717 H Street, NW., Washington, DC, between 8:15 a.m. and 5:15 p.m.

Examine comments received at: The NRC Public Document Room, 1717 H Street, NW., Washington, DC.

Pub. 6/29/83
48FR 29876

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Acting Assistant General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Telephone (202) 634-1465.

SUPPLEMENTARY INFORMATION: Current Commission regulations require a party who takes an appeal to the Commission from an initial decision to file exceptions to the decision [10 CFR § 2.762]. Each exception must state, without argument, the single error of fact or law asserted. Points not excepted to may not be briefed or argued. Exceptions not briefed are waived.

A result of the current rule is that parties who wish to appeal an initial decision include in their exceptions every possible claim of error. The preparation of exceptions and their consideration by an Atomic Safety and Licensing Board are needless expenditures of litigant and agency resources. Exceptions convey little more than a party's intention to appeal. In addition, they delay the appeal process. Parties frequently request additional time to file an exhaustive list of exceptions so that no possible exception is waived by omission. Upon reflection, many of these exceptions are later abandoned and not briefed. The investment of time and effort in their preparation and review is wasted. Elimination of the requirement will permit the parties and the agency to better focus their litigative efforts.

The proposed rule replaces the filing of exceptions with the filing of a notice of appeal. The notice simply identifies the appellant and the decision being appealed.

The Commission also proposes to make a minor change with respect to the number of responsive briefs that a party may file on appeal. Each responding party will file a single brief in response to the appellants briefs, regardless of the number of appellant briefs filed. Issues raised by all appellants' briefs will be addressed in this single responsive brief. The time for filing the responsive brief will run from the date of the last filed appellant's brief. This change will reduce the volume of paper the Appeal Board must review. The Commission is particularly interested in comments on this point. Do the commenters believe that this limitation will preserve an adequate opportunity to respond in cases in which many issues are raised on appeal? If so, do the commenters have suggestions on how the Appeal Board's desire to limit responsive briefs to the necessary minimum can be achieved while preserving an adequate opportunity to file responsive briefs?

In addition to comments on the changes to the appeal process proposed by the Commission, Commissioner Ahearne would be interested in comments on whether the rules should be changed to provide that only parties who have filed proposed findings with the Licensing Board on an issue can appeal that issue. Cf. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC ___ (January 4, 1983).

Editorial, correcting, and conforming changes to other sections of Part 2 and Appendix A to Part 2 are also made in this proposed rule.

Paperwork Reduction Act Statement

The collection of information this proposed rule contains is exempt from the Paperwork Reduction Act of 1980 (44 U.S.C. § 518(c)(1)).

Regulatory Flexibility Statement

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Small entities which appeal initial Commission decisions may experience some cost saving as a result of the 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, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 2.

PART 2 - RULES OF PRACTICE
FOR DOMESTIC LICENSING PROCEEDINGS

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.

(Sec. 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. 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 also issued under 5 U.S.C. 557. 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). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

1. In § 2.719, paragraphs (c) and (d) are revised to read as follows:

§ 2.719 Separation of functions.

* * * * *

(c) In any adjudication for the determination of any application for initial licensing, other than a contested proceeding, the presiding officer may consult (1) the staff and (2) members of the panel appointed by the Commission from which members of atomic safety and licensing boards are drawn: Provided, however, That in adjudications in which an appeal from the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the presiding officer shall not consult any member of the Atomic Safety and Licensing Appeal Panel on any fact in issue.

(d) Except as provided in paragraph (c) of this section and § 2.780(e), in any case of adjudication, no officer or employee of the Commission who has engaged in the performance of any investigative or prosecuting function in the case or a factually related case may participate or advise in the initial or final decision, except as a witness or counsel in the proceeding. Where an initial or final decision is stated to rest in whole or in part on fact or opinion obtained as a result of a consultation or communication authorized by paragraph (c) of this section or § 2.780(e), the substance of the communication shall be specified in the record in 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 such fact or opinion prior to the filing of the decision, a party may controvert the fact or opinion by filing an appeal from the initial decision, or a petition for reconsideration of a final decision, clearly and concisely setting forth the information or argument relied on to show the contrary.

2. In § 2.721, paragraph (c) is revised to read as follows:

§ 2.721 Atomic safety and licensing boards.

* * * * *

(c) In a proceeding in which an appeal from the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the Commission will not designate any members of the Appeal Panel as members or alternates of the atomic safety and licensing board established to preside in such proceeding.

* * * * *

3. In § 2.743, paragraph (i)(2) is revised to read as follows:

§ 2.743 Evidence.

* * * * *

(i) Official Notice.

(1) * * *

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision clearly and concisely setting forth the information relied upon to show the contrary.

4. 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-five (45) days after its date when it authorizes the issuance or amendment of a license or limited work authorization for a facility, or thirty (30) days after its date in any other case, unless an appeal is taken in accordance with § 2.762 or the Commission directs that the record be certified to it for final decision.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may --

(1) Prepare its own initial decision, which will become final unless a notice of appeal is filed; or

* * * * *

(c) * * *

(4) The time within which a notice of appeal from the decision and a supporting brief may be filed, the time within which briefs in support of or in opposition to an appeal 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.

5. 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 notice of appeal, 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 notice of appeal, to request oral argument, and to seek judicial review;

* * * * *

6. Section 2.762 is revised to read as follows:

§ 2.762 Appeals to the Commission from initial decisions.

(a) 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 --

(1) the party taking the appeal; and

(2) the decision being appealed.

(b) 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.

(c) 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 filing and service of the appellant's brief. Commission staff may file a responsive brief within forty (40) days after the filing and service of appellant's brief. Where more than one appellant's brief is filed, the time for filing a responsive brief shall be determined from the date of the last filed appellant's brief. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed.

(d) Brief Content. A brief in excess of ten (10) pages shall 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.

(1) An appellant's brief must specify, inter alia, for each issue appealed, the precise portion of the record relied upon in support of the assertion of error.

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

(e) 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.

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

(g) 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.

7. 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 notice of appeal or brief, or upon its own initiative.

8. In § 2.764, paragraphs (a) and (b) 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 the review thereof and further decision by the Commission upon notice of appeal filed by any party pursuant to § 2.762 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 of a notice of appeal, 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.

* * * * *

9. In § 2.770, paragraphs (a) and (b)(3) are 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 and consider only findings and conclusions that were briefed after the filing of a notice of appeal.

(b) * * *

(3) The ruling on each material issue; and

* * * * *

10. 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. No petition may be filed with respect to an initial decision which has become final through failure to file a notice of appeal.

* * * * *

11. In Appendix A, paragraphs (b)(3) of Section VI and paragraphs (d) and (e) of Section IX are 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.*

* * * * *

VI. Posthearing Proceedings, Including the Initial Decision

* * * * *

(b) * * *

(3) The appropriate ruling, order, or denial or relief, with the effective date and time within which a notice of appeal from the initial decision may be filed;

* * * * *

IX. Licensing Proceedings Subject to Appellate Jurisdiction of Atomic Safety and Licensing Appeal Board

* * * * *

(d)(1) Appeals to the Appeal Board from initial decisions, or designated portions thereof, are initiated by the filing of a notice of appeal within 10 days of the issuance and service of the initial decision.

(2) A brief in support of the appeal must be filed by the appellant within 30 days thereafter (40 days in the case of the staff).

(3) A responsive brief may be filed by any other party within 30 days (40 days in the case of the staff) of the filing and service of the

---

*In the event of any conflict between the provisions of this appendix and any section of this part, the section governs.

appellant's brief. The prescribed time limits are subject to being lengthened or shortened in a particular case, either on motion of a party or by the Appeal Board on its own initiative (10 CFR 2.711). The time limits are also subject to the provisions of 10 CFR 2.710 relating to service by mail.

(4) There must be strict compliance with the time limits prescribed for the filing of the notice of appeal and briefs by the rules of practice or by an order of the Appeal Board which extends or shortens those limits in the particular case. Absent a showing of extraordinary and unanticipated circumstances, motions for extensions of time must be received by the Appeal Board at least 1 day prior to the date upon which the document in question is then due for filing. In no circumstances will a document be accepted by the Appeal Board on an untimely basis unless it is accompanied by a motion for leave to file it out of time, which similarly must be founded upon extraordinary and unanticipated circumstances.

(5) Every brief in excess of 10 pages shall 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.

(6) No brief is to exceed 70 pages in length unless leave to file a brief of a specified greater length has been previously sought and granted (10 CFR 2.762(e)). In this connection, inasmuch as the Appeal Board has available to it the entire record of the proceeding, extended quotations in a brief from the record are neither required nor

desirable. A summary is preferable, accompanied by explicit references to the record sources.

(7) Notices of appeal and briefs which in form or content are not in substantial compliance with the requirements imposed by the rules of practice are subject to being stricken.

(e) The holding of oral argument, whether or not specifically requested by a party, is within the Appeal Board's discretion (10 CFR 2.763). Where a notice of appeal has been filed, the Appeal Board routinely will consider whether the case should be calendared for oral argument. This consideration normally will take place following the receipt of all briefs. Oral argument will be directed if at least one member of the Appeal Board votes in favor of it. If oral argument is to be held, an order will be issued by the Appeal Board which will set the specific date and location, as well as the time allotted to each of the parties. In some instances, the order may also restrict the scope of the oral argument to one or more specified issues. It is anticipated that oral arguments will be conducted in either Washington, D.C., or Bethesda, Md.

* * * * *

Dated at Washington, DC, this 23d day of May, 1983.

For the Nuclear Regulatory Commission.

SAMUEL J. CHILK,
Secretary of the Commission.