

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Baran

SUBJECT: SECY-17-0030: OPTIONS AVAILABLE TO PROCESS
REQUESTS FOR STAND-ALONE EXEMPTIONS TO
REGULATORY REQUIREMENTS SOUGHT BY
DECOMMISSIONING POWER REACTORS

Approved X Disapproved X Abstain Not Participating

COMMENTS: Below Attached X None

Original vote date: July 19, 2017

Entered in "STARS"

Yes X

No


SIGNATURE

7/24/17
DATE

**Commissioner Baran's Comments on SECY-17-0030,
"Options Available to Process Requests for Stand-Alone Exemptions in Regulatory
Requirements Sought by Decommissioning Power Reactors"**

[REDACTED]
[REDACTED]
[REDACTED] rules of particular applicability (ROPAs) [REDACTED]
[REDACTED]

[REDACTED] ROPA [REDACTED] would provide for public notice and comment, which would allow interested stakeholders to share their views on decommissioning exemption requests that are of high public interest. [REDACTED] rather than issuing a regulatory exemption, the staff would take public comment on issuing a narrow, site-specific rule that would provide relief from a particular regulatory requirement.

Because NRC has no direct experience with ROPAs and this tool has not been used very often by other federal agencies, I reached out to a few of the nation's leading experts on administrative law to assess the viability of this approach. The law professors I spoke with each offered cautions about processing exemptions as ROPAs.

On its face, the Administrative Procedure Act's (APA) definition of "rule" includes "an agency statement of general or particular applicability and future effect." But one prominent view in the legal community is that the inclusion of the words "or particular" in this definition was a drafting error.¹ For example, in a 2004 legal article, Professor Ronald Levin argues that "[a] proper definition of 'rule' would turn on generality, not prospectivity."² He contends that the addition of "particular" in the definition was "a blunder" and "serious miscalculation" that "has proved, with hindsight, to be profoundly dysfunctional."³ Professor Levin also argues that "particular" is superfluous because other provisions of the definition already designate ratemaking activities as rules, which was the apparent goal of the drafters in including the "particular" language.⁴

This is not an isolated view. As early as 1947, shortly after passage of the APA, administrative law experts were questioning the inclusion of the "particular" language on the ground that it "is a complete change in the concept of 'rule,'" which had been understood to be inherently general in nature.⁵ More recently, both the Administrative Conference of the United States and the American Bar Association (ABA) have called for the removal of the word "particular" from the APA's definition of "rule."⁶ On February 8, 2016, the ABA House of Delegates approved a recommendation to eliminate the words "or particular" from the definition, noting that "this change would reconcile the APA with commonly understood use of the term

¹ See Ronald M. Levin, The Case for (Finally) Fixing the APA's Definition of "Rule" 56 Admin. L. Rev. 1077 (2004).

² *Id.* at 1079.

³ *Id.* at 1082-1083.

⁴ *Id.* at 1082.

⁵ *Id.* at 1081.

⁶ *Id.* at 1079-1080.

'rule.'"⁷ That approach would also make the APA consistent with the Model State Administrative Procedure Act, which has a definition of "rule" that refers only to agency statements of general applicability.

Because of the questionable pedigree of the "particular" language, the novelty of federal agencies issuing rules of particular applicability, and the resulting dearth of case law on ROPAs, I am not convinced that the agency would be on firm legal footing if we adopted the ROPA approach. [REDACTED]

[REDACTED] a simpler option that would rest on a firm legal foundation and provide many of the same benefits as the ROPA approach: soliciting stakeholder comments on decommissioning exemption requests as part of the existing exemption process. This approach could be limited to decommissioning exemption requests that the staff expects will be of high public interest. Although enhancing the exemption process in this way would require a modest amount of additional agency resources, inviting stakeholder comments on significant exemption requests would involve the public in the process and provide valuable insights to the staff. Therefore, during the pendency of the power reactor decommissioning rulemaking, the staff should solicit public comments on power reactor decommissioning exemption requests that are expected to be of high public interest, including those related to emergency planning, security, and decommissioning trust funds. The staff should consider and respond to the public comments during its evaluation of those exemption requests.

⁷ Final Resolution and Report on Resolution 106B for the American Bar Association's Midyear Meeting 2016, available at: https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/106b.html.